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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

207, 208, 209, 210 U. S.

BOOK 52,

LAWYERS' EDITION.

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COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,
HON. DAVID JOSIAH BREWER.
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM,
HON. JOSEPH MCKENNA,
HON. OLIVER WENDELL HOLMES,
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REPORTER,

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MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

126054

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

December 24, 1906.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 51 L. ed., Appendix I. p. 1193.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902–1903.	COMMISSIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE RUFUS W. PECKHAM, New York.	President CLEVELAND.	SECOND. VERMONT, CONN., NEW YORK.	1895. (Dec. 9.)	1896. (Jan. 6.)
ASSOCIATE JUSTICE WILLIAM H. MOODY, Massachusetts.	President ROOSEVELT.	THIRD. NEW JERSEY, PA., DEL.	1906. (Dec. 12.)	1906. (Dec. 17.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
ASSOCIATE JUSTICE EDWARD D. WHITE, Louisiana.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1894. (Feb. 19.)	1894. (Mar. 12.)
ASSOCIATE JUSTICE JOHN M. HARLAN, Kentucky.	President HAYES.	SIXTH. KY., TENN., OHIO, MICH.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE DAVID J. BREWER, Kansas.	President HARRISON.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., NEW MEX.,* OKLA.*	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOSEPH McKENNA, California.	President McKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1907.

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[1]*LEONIDAS M. LAWSON, William J. Harvey, Edward Balbach, Jr., et al., Petitioners,

v.

UNITED STATES MINING COMPANY.

(See S. C. Reporter's ed. 1–19.)

Federal court — equitable jurisdiction — effect of state law.

1. The holder, through a patent from the United States, of the legal title to a lode mining claim, in possession, may maintain a suit in equity, in a Federal circuit court sitting in Utah, without a prior adjudication in an action at law of its legal title, to quiet title and to restrain defendants from further mining or removing ore from beneath the surface of such claim, in view of the provisions of Utah Rev. Stat. § 3511, that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Appeal — review of facts.

2. The Federal Supreme Court must accept the conclusions of the court below on a question of fact, unless clearly and manifestly wrong.

Mines — apexing veins.

3. The senior location takes the entire width of the vein on its dip, where the apex of such vein is partly within two or more adjacent lode mining claims.

Mines — conclusiveness of patent — senior location.

4. Priority of entry and patent does not conclusively establish seniority of location, so as to give the holder of a lode mining claim under such patent the right to the entire width of the vein on its dip, where part of the apex of such vein is within such claim and part within an adjoining claim.

Evidence — presumption.

5. In the absence of the record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were therein considered and determined.

Mines — validity of location — government recognition.

6. Acceptance by the government of lode mining location notices given before the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), recognizing the rights of locators who have proceeded in conformity to local customs or rules, and the issue of patents thereon, is a recognition by the Land Department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to the notices.

[No. 2.]

Argued October 11, 12, 1906. Decided October 21, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the Circuit Court for the District of Utah, dismissing a bill to

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NOTE.—On the effect of state statutes upon Federal equity jurisdiction—see notes to Leighton v. Young, 18 L.R.A. 266; Whitehouse v. Jones, 12 L.R.A.(N.S.) 76; and Barling v. Bank of British North America, 1 C. C. A. 514.

On the right to follow a vein or lode on its dip beyond the surface lines of the location—see notes to Parrot Silver & Copper Co. v. Heinze, 53 L.R.A. 491, and Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 311.

On the location of a mining claim—see note to Dwinnell v. Dyer, 7 L.R.A.(N.S.) 763. See also notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859, and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

quiet title and to restrain the removal of ore from beneath the surface of a lode mining claim, remanded the cause with instructions to enter a decree in conformity with the prayer of the bill. Affirmed.

See same case below, 67 C. C. A. 587, 134 Fed. 769.

Statement by Mr. Justice **Brewer**:

[2] *This suit was commenced in the circuit court of the United States for the district of Utah by the United States Mining Company, claiming to be the owner of certain mining property, and praying that its title thereto be quieted and the defendant restrained from taking any ore therefrom. Jurisdiction was founded on diverse citizenship. In an amended complaint, filed June 2, 1902, it was alleged that the plaintiff is the owner and in possession of four mining claims known as the Jordan Extension, the Northern Light, the Grizzly, and the Fairview lode mining claims, the boundaries of each being given; that these mining claims are adjacent to each other and to certain other mining claims, all owned and worked by the plaintiff as one property for mining purposes; that beneath the surface of the claims above mentioned is a vein or lode of great value; that the defendants wrongfully claim to own said vein or lode and the ores and minerals therein contained; that they have, by means of secret underground works, obtained access thereto and have mined, extracted, and removed large quantities of valuable ores therefrom; that they threaten to continue such wrongful and unlawful invasion of the premises, and to continue to mine, extract, and remove ores and minerals; that the defendants are in possession of a mining claim adjacent to the four mining claims of plaintiff, known as the Kempton mining claim, United States lot 255, which was located in the year 1871, and, on information and belief, that the defendants pretend that the mineral deposits and ores under and beneath the surface of the four mining claims above mentioned are in and part of a mineral vein and lode belonging to and having its apex in said Kempton mining claim and on the dip of said alleged vein, which pretense the plaintiff charges to be contrary to the truth. The plaintiff further alleges that it is the owner and in possession of two certain mining claims, one named the Jordan Silver Mining Company's mine, but usually known as the "Old Jordan," located December 17, 1863; the other the Mountain Gem Lode and Mining claim located August 20, 1864, the boundaries of each of [3]which are given; *that in these two claims there is a lode, bearing silver and other metals, whose apex is within the surface boundaries; that the dip of said lodes is toward the Kempton claim occupied by the defendants, and that if there be any mineral vein or lode in the Kempton claim it is not one that has its apex within the limits of that claim, but is a part of the lodes apexing within the "Old Jordan" and Mountain Gem claims. The relief prayed for was a decree quieting plaintiff's title and restraining the defendants from mining and removing any ores or minerals. To this amended complaint the defendants filed a demurrer, stating, as one of the grounds thereof, that the plaintiff had an adequate remedy at law. This demurrer was overruled, and thereupon the defendants filed an answer and subsequently an amended answer, setting forth their title to the Kempton mining claim, and also to a claim known as the Ashland mining claim, and alleging that there are lodes whose apices are within these claims; that on their dip they enter beneath the surface of the plaintiff's claims, and that it is upon them that defendants have been mining; that the Kempton claim was patented to their grantors and predecessors in interest on February 23, 1875. They further deny that the "Old Jordan" claim was located on December 17, 1863, or patented July 14, 1877; deny that the Mountain Gem claim was located on August 20, 1864, or that a patent had been issued on said alleged location. They further aver that if there be any lode or vein in either the "Old Jordan" or the Mountain Gem claims, that such lode or vein is entirely distinct from those which have their apices in the Kempton and Ashland claims. On the hearing the court denied the application of the defendants to set the case for trial as a law case before a jury. At the same time it entered a decree dismissing the plaintiff's bill. From this decree the plaintiff appealed to the circuit court of appeals (67 C. C. A. 587, 134 Fed. 769), which reversed the decree of dismissal, and remanded the case with instructions to enter a decree for the plaintiff in conformity with the prayer of the bill. Thereupon, *on application of the defendants,[4] the case was brought to this court on certiorari.

Mr. **Charles J. Hughes, Jr.**, argued the cause, and, with Messrs. Ogden Hiles and Charles C. Dey, filed a brief for petitioners:

In every case where there are conflicting and overlapping mining lode claims, and the owner of one of them applies for a patent to his claim, and the owners of the other conflicting and overlapping claims fail, after due notice, to adverse, as the phrase is, and the applicant obtains a patent for his claim, from that fact there emerges an indisputable presumption that such claim is superior in right, is prior in valid location to the nonadversing conflicting claim, and that such claim has no right, either intralimital or extralateral, against such patented claim.

Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; Lavagnino v. Uhlig, 198 U. S. 443, 455, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; Wight v. Dubois, 21 Fed. 696; Golden Reward Min. Co. v. Buxton Min. Co. 79 Fed. 874; Lee v. Stahl, 9 Colo. 211, 11 Pac. 77; Seymour v. Fisher, 16 Colo. 193, 27 Pac. 240; Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. 32 Colo. 181, 64 L.R.A. 925, 75 Pac. 1070; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 355, 49 L. ed. 501, 511, 25 Sup. Ct. Rep. 266.

The doctrine of relation is not applicable.

Eureka Consol. Min. Co. v. Richmond Consol. Min. Co. 4 Sawy. 302, 9 Morrison, Min. Rep. 592, Fed. Cas. No. 4,548; Morrison, Mining Rights, 12th ed. 128; Evans v. Durango Land & Coal Co. 25 C. C. A. 532, 49 U. S. App. 320, 80 Fed. 433; Gibson v. Chouteau, 13 Wall. 100, 20 L. ed. 536; Newhall v. Sanger, 92 U. S. 766, 23 L. ed. 770; Redfield v. Parks, 132 U. S. 249, 33 L. ed. 331, 10 Sup. Ct. Rep. 83; Hussman v. Durham, 165 U. S. 148, 41 L. ed. 665, 17 Sup. Ct. Rep. 253; Small v. Westchester F. Ins. Co. 51 Fed. 795; Hawkins v. Harlan, 68 Cal. 238, 9 Pac. 108; Grant v. Iowa R. Land Co. 54 Iowa, 677, 7 N. W. 113; Ellis v. Pomeroy Improv. Co. 1 Wash. 576, 21 Pac. 27.

A location certificate is in itself only prima facie evidence of its own existence and filing.

Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 200, 119 Fed. 169; Sullivan v. Hense, 2 Colo. 429; Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. 9 Colo. 344, 12 Pac. 212; Becker v. Pugh. 9 Colo. 592, 13 Pac. 906; Meydenbauer v. Stevens, 78 Fed. 787; 2 Jones, Ev. § 521; Campbell v. Rankin. 99 U. S. 261, 25 L. ed. 435; Jantzon v. Arizona Copper Co. 3 Ariz. 6, 20 Pac. 93; Pollard v. Shively, 5 Colo. 309; 1 Lindley, Mines, 2d ed. §§ 391, 392; Roberts v. Wilson, 1 Utah, 292; Harvey v. Ryan, 42 Cal. 626; Moxon v. Wilkinson, 2 Mont. 421; Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co. 12 Nev. 312; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Flick v. Gold Hill & L. M. Min. Co. 8 Mont. 298, 20 Pac. 807.

The senior Kempton and Ashland patents conclusively prove and determine the priority of discovery and location of these claims over all overlapping and conflicting claims, and specifically the Jordan and Mountain Gem claims.

2 Lindley, Mines, 2d ed. § 783; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 48 C. C. A. 665, 109 Fed. 538, 52 C. C. A. 222, 114 Fed. 420, 421; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337–355, 49 L. ed. 501–511, 25 Sup. Ct. Rep. 266; Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. 32 Colo. 182, 64 L.R.A. 925, 75 Pac. 1070.

That the issuance of a patent to a mining lode claim conclusively establishes the priority of the location of that claim over an overlapping or conflicting claim is a corollary of the proposition affirmed by this court, that, when a patent is issued to a lode claim, there arises an indisputable presumption that no conflict claims exist.

Lavagnino v. Uhlig, 198 U. S. 443, 445, 49 L. ed. 1119, 1121, 25 Sup. Ct. Rep. 716.

The notice required of application for patent is certainly sufficient process to be the foundation for a conclusive adjudication.

Wight v. Dubois, 21 Fed. 696.

Therefore, when the patent is issued, every party who may once have had an adverse or conflicting claim is concluded thereby.

Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. supra.

Whether the patent is issued under § 2325 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1429), without adverse claim filed, or under § 2326, after adverse claim has been filed, and the matter adjudicated in court, the effect after adjudication is the same.

Jefferson Min. Co. Anchoria-Leland Min. & Mill. Co. supra.

The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing and the surface ground is incident thereto. In conveying a segment of the earth located under the provisions of the act, it is the intention of Congress to convey a mine contained within that segment, as the substance of the grant.

Wolfley v. Lebanon Min. Co. 4 Colo. 116, 13 Morrison, Min. Rep. 282; Morrison, Mining Rights, 12th ed. 144.

A patent is conclusive evidence as to the limits of a location, and it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

2 Lindley, Mines, 2d ed. p. 1389, § 778; Waterloo Min. Co. v. Doe, 56 Fed. 685.

The conclusiveness of the Kempton and

Ashland patents of February 23d, and September 27th, 1875, against these conflict claims, which are now asserted by the owner of the Jordan and Mountain Gem claims, is further confirmed by the exceptions in the Jordan and Gem patents before set forth. These exceptions are of the part of the lode within the conflict area, and of the extralateral rights incident thereto. They are good exceptions, because thereby it is certainly made known what is conveyed by the patents, and what not. Each of them fulfils all the conditions and rules by which a good exception is verified and proved, because: (a) It is in apt words. (b) The thing excepted is a part of the thing previously granted. (c) It is of a part only of the things previously granted; and not of any other thing. (d) It is of a thing which is separable from the thing granted; and not an inseparable interest or incident. (e) It is such a thing as that the party who accepts may retain it. (f) It is of a particular thing out of a general one; not a particular thing out of a particular one. (g) The thing excepted is certainly described and set down.

4 Cruise's Dig. 271.

Party relying on deed containing exception must plead himself without the exception.

Maxwell Land Grant Co. v. Dawson, 151 U. S. 586–604, 38 L. ed. 279–285, 14 Sup. Ct. Rep. 458.

The exceptions in the Jordan and Gem patents must effectually exclude the pretensions of the respondent, there being no exception in the Kempton and Ashland patents, in favor of either the Jordan or Gem alleged senior locations. Such seniority of location, if it ever existed at all, must be deemed to have been waived or relinquished.

Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478–486, 30 L. ed. 1140–1142, 7 Sup. Ct. Rep. 1356; 2 Lindley, Mines, 2d ed. § 782.

A specific finding of fact is not required to be made in a decree dismissing a bill. While in many cases specific findings of fact are desirable as the bases of provisions in the decree, where the judgment is for the complainant, the general practice is to enter a decree of dismissal in the form adopted in this case, where, upon the merits, the finding is for the defendant.

2 Beach, Modern Law of Eq. Pr. § 806; Whiting v. Bank of United States, 13 Pet. 6–14, 10 L. ed. 33–37; Craig v. Missouri, 4 Pet. 410–426, 7 L. ed. 903–908; Baker v. Cummings, 181 U. S. 117–125, 45 L. ed. 776–780, 21 Sup. Ct. Rep. 578; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111.

The circuit court of appeals was bound to accept the determination of the circuit court, under the circumstances in this case.

Snider v. Dobson, 21 C. C. A. 76, 40 U. S. App. 111, 74 Fed. 758; Stuart v. Hayden, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 408; Warren v. Burt, 7 C. C. A. 105, 12 U. S. App. 591, 58 Fed. 106; Paxson v. Brown, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 883; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 102; Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 283; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; Alviso v. United States, 8 Wall. 337, 19 L. ed. 305; Harrell v. Beall, 17 Wall. 590, 21 L. ed. 692; Levis v. Kengla, 169 U. S. 234, 42 L. ed. 728, 18 Sup. Ct. Rep. 309; Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306; Parker v. Phetteplace, 1 Wall. 684, 17 L. ed. 675; Tobey v. Leonard, 2 Wall. 430, 17 L. ed. 842; Albright v. Emery, 109 U. S. 651, 27 L. ed. 1064, 3 Sup. Ct. Rep. 426; Hewitt v. Campbell, 109 U. S. 103, 27 L. ed. 871, 3 Sup. Ct. Rep. 68; United States Trust Co. v. Mercantile Trust Co. 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 152; Metropolitan Nat. Bank v. Rogers, 3 C. C. A. 666, 3 U. S. App. 406, 53 Fed. 778; Moline Plow Co. v. Carson, 18 C. C. A. 606, 36 U. S. App. 449, 72 Fed. 388; Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 551, 57 Pac. 51; Hazeltine v. Brockway, 26 Colo. 297, 57 Pac. 1077; Springer v. Chicago Real Estate Loan & T. Co. 202 Ill. 27, 66 N. E. 850; Hardy v. Dyas, 203 Ill. 215, 67 N. E. 852; Boddie v. Brewer & H. Brewing Co. 204 Ill. 353, 68 N. E. 394; Bouton v. Cameron, 205 Ill. 69, 68 N. E. 800; Shea v. Teufert, 207 Ill. 225, 69 N. E. 872; Lurie v. Sabath, 208 Ill. 407, 70 N. E. 323; Polarek v. Gordon, 102 Ill. App. 358; Kochman v. O'Neill, 102 Ill. App. 475.

The limestone belt does not constitute a mineral-bearing lode. It is not a lode in fact, within the provisions of the United States statute, or within any reasonable construction which can be placed thereon. The ore bodies in conflict are not portions of the alleged broad lode, but are ore bodies which are parts of the Ashland fissure and Kempton bedded vein, having their apexes within the Ashland and Kempton claims.

Hyman v. Wheeler, 29 Fed. 347; Mt. Diablo Mill & Min. Co. v. Callison, 5 Sawy. 439, Fed. Cas. No. 9,886; Doe v. Waterloo Min. Co. 54 Fed. 935; Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481; Cheesman v. Shreeve, 40 Fed. 787; Golden v. Murphy, 27 Nev. 379, 75 Pac. 625, 76 Pac. 29; North Noonday Min. Co. v. Orient Min. Co. 6 Sawy. 299; 1

Fed. 522; Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784; Long v. Isaksen, 23 Land Dec. 357; Wheeler v. Smith, 23 Land Dec. 399; Grand Central Min. Co. v. Mammoth Min. Co. 29 Utah, 490, 83 Pac. 676; 11 American Encyclopedia, 560; Economical Geology, Bingham Mining District, 1905, No. 38, Professional Paper, pp. 242, 243; Le Conte, Elements of Geology, p. 257; Kemp, Ore Deposits of United States & Canada, pp. 44, 45; Emmons & Hayes, United States Geological Survey (1904), p. 238; Boutwell, Economic Geology of Bingham Mining District (1905), p. 251.

In order for a party in possession to maintain a bill of peace, for the purpose of quieting his title to land against a single adverse claimant ineffectually seeking to establish a legal title by repeated actions of ejectment, it is necessary for the bill to aver that complainant's title has been established at law; and where it appears from the bill that an action at law involving the same questions has been commenced, but has not been tried, it is a fatal defect.

Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632–641, 47 L. ed. 626–632, 23 Sup. Ct. Rep. 434; 1 Dan. Ch. Pl. & Pr. Perkins, 3d Am. ed. 573; Pom. Eq. Jur. §§ 177, 248, 253; Adams, Eq. 331; Bainbridge, Mines, 505; Irwin v. Davidson, 38 N. C. (3 Ired. Eq.) 311.

In mining cases, where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, and the legal title is in dispute, the modern practice is to require an action at law to be brought to try the legal title, and then to allow an ancillary action on the equity side of the court, in aid of the action at law, and for an injunction to preserve the property, pending the legal proceedings for the determination of the title.

Earhardt v. Boaro, 113 U. S. 537, 538; 28 L. ed. 1116, 1117, 5 Sup. Ct. Rep. 565; Stevens v. Williams, 5 Morrison, Min. Rep. 453; Morrison, Mining Rights, 12th ed. 334, 335.

In the case stated in the pleadings there is nothing like a ground of equitable jurisdiction in respect to the title to the estate. All the matters set up affecting that title are of legal cognizance, in which the parties have a constitutional right to a trial by jury.

Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70.

Of course, all that has been said is with reference to cases in which a judgment at law respecting the title has not been obtained. Where the title has been settled, the court will not hesitate, on a proper showing, to protect the legal estate.

Stevens v. Williams, supra.

Actions to quiet title, or to determine adverse claims under § 3511, Utah Revised Statutes of 1898, may be of a legal or equitable character, depending upon the pleadings; but where there are both equitable issues and issues of fact in the case, the court should first determine the equitable issue, and then submit the issues of fact to a jury upon proper instruction; and a failure to do so constitutes reversible error.

Park v. Wilkinson, 21 Utah, 285, 81 Am. St. Rep. 693, 60 Pac. 945.

The only ground of equity jurisdiction asserted by this bill is the right to an injunction; and that is no part of the original or concurrent equity jurisdiction of the court, but a part of its auxiliary jurisdiction merely.

1 Pom. Eq. Jur. § 177, p. 211.

Whenever, in a suit to quiet title to land, the legal title is disputed, and becomes an issue, the court will require that question to be tried by a jury, by appropriate pleadings and proceedings in that suit, as in a trial at law.

Curtis v. Sutter, 15 Cal. 260; Donahue v. Meister, 88 Cal. 124, 22 Am. St. Rep. 283, 25 Pac. 1096; Newman v. Duane, 89 Cal. 598, 27 Pac. 66.

This is nominally a suit in equity, but actually an action at common law, within the meaning of the 7th Amendment to the Constitution.

Parsons v. Bedford, 3 Pet. 433, 446, 447, 7 L. ed. 732, 736, 737; Fenn v. Holme, 21 How. 481, 16 L. ed. 198; Root v. Lake Shore & M. S. R. Co. 105 U. S. 207, 26 L. ed. 981.

All other questions apart, the court below ought to have dismissed this bill *sua sponte*, according to the rule established by this court in numerous decisions.

Hipp v. Babin, 19 How. 271, 278, 15 L. ed. 633, 635; Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 545, 550, 17 L. ed. 333, 336; Lewis v. Cocks, 23 Wall. 466, 470, 23 L. ed. 70, 71; Killian v. Ebbinghaus, 110 U. S. 568, 573, 28 L. ed. 246, 248, 4 Sup. Ct. Rep. 232; Grand Chute v. Winegar, 15 Wall. 375, 21 L. ed. 175; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 662, 35 L. ed. 303, 305, 11 Sup. Ct. Rep. 682.

A plaintiff who comes into court asserting that he is the owner of property to which others present claims, and asks to have his title quieted, must, as the very foundation of a decree in his behalf, prove that he does own it, and may succeed only upon the establishment of that title; and cannot do so upon the weakness of the defendant's title or the failure of the defendant to allege and affirmatively establish that he has a better right to the premises, title to which is sought to be quieted, than the plaintiff.

White, Mines & Mining Remedies, § 639; Dick v. Foraker, 155 U. S. 414, 39 L. ed. 205, 15 Sup. Ct. Rep. 124; 17 Enc. Pl. & Pr. pp. 300, 301, 350, 761; Glos v. Goodrich, 175 Ill. 20, 51 N. E. 643; Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; Watts v. Lindsey, 7 Wheat. 158, 5 L. ed. 423.

The presumption, from the mere ownership of the surface, that the ore beneath it is the property of the owner thereof, either upon the common-law presumption, or the presumption that it has its apex within the claim, is but prima facie in its nature, and disappears whenever the evidence discloses that the apex of the ore beneath the surface is outside of the surface.

Roxanna Gold Min. & Tunneling Co. v. Cone, 100 Fed. 168; Jones v. Prospect Mountain Tunnel Co. 21 Nev. 339, 31 Pac. 642; Montana Co. v. Clark, 42 Fed. 626; Iron Silver Min. Co. v. Cheesman, 116 U. S. 533, 29 L. ed. 713, 6 Sup. Ct. Rep. 481; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 3 Sup. Ct. Rep. 601; Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543; Heinemann v. Heard, 62 N. Y. 453; Heilman v. Lazarus, 90 N. Y. 673; Clark v. Hills, 67 Tex. 149, 2 S. W. 356.

The crossing of lodes is a well-recognized feature of mining districts, and for years, in Colorado especially, it was held that, notwithstanding the intimate relations existing between them as a result of their crossing, they were so legally separated that a location upon one did not include the other to the extent its apex was within the first-located claim's boundaries. This was the so-called cross-lode doctrine.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885.

Upon appeal, grounds may be urged, even for reversing a judgment, which were not called to the attention of the trial court, and this will especially be done where the objections will prevent the accomplishment of injustice, and tend to secure a righteous result.

Watts v. Waddle, 6 Pet. 389, 402, 8 L. ed. 437, 442; Woodward v. Bullock, 27 N. J. Eq. 507.

In equity cases the whole case is before the appellate court, to do justice upon that case upon the law and the facts which it discloses; and where the record does not contain enough to enable the court to intelligently ascertain and determine these rights, then to make such orders for further proceedings as will enable this to be accomplished.

Humphreys v. Switzer, 11 La. Ann. 320.

Courts have, in actions of ejectment, restored possession, not merely of empty stopes, but of the body of ore in lodes. The suit in ejectment will not merely determine who has a right to the possession of the empty chamber, but will determine who has a right to the title and possession of the lode itself beneath certain surface boundaries within certain defined extensions of planes through the end lines of claims, where the ownership depends upon the apex.

Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Reynolds v. Iron Silver Min. Co. 116 U. S. 687, 29 L. ed. 774, 6 Sup. Ct. Rep. 601; Hyman v. Wheeler, 29 Fed. 347.

Mr. **William H. Dickson** argued the cause, and, with Messrs. George Sutherland, A. C. Ellis, A. C. Ellis, Jr., E. M. Allison, and Waldemar Van Cott, filed a brief for respondent:

One who is shown to be the owner, and in possession of a mining claim is presumptively the owner, in the possession, and entitled to the possession, of all ores, etc., found within the exterior boundaries of such claim, extended downward vertically.

1 Lindley, Mines, 2d ed. § 551; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 53 L.R.A. 491, 87 Am. St. Rep. 386, 64 Pac. 326; Doe v. Waterloo Min. Co. 54 Fed. 935; Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; King v. Amy & S. Consol. Min. Co. 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; St. Louis Min. & Mill. Co. v. Montana Min. Co. 64 L.R.A. 207, 51 C. C. A. 530, 113 Fed. 902.

The burden of proof is upon him who seeks to go beyond his vertical boundaries and enter upon ore bodies beneath the surface of his neighbor's territory, to satisfy the court that he not only has an apex of a vein within his territory, which, in its course downward, extends to and includes the ores so found under his neighbor's claims, but also to establish, by a preponderance of the evidence, that his claim is so laid upon such apex or outcrop as to entitle him to extralateral rights, such as would carry him to the point in dispute.

Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 550; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 663; Del Monte Min. & Mill. Co. v.

Last Chance Min. & Mill. Co. 171 U. S. 66, 43 L. ed. 72, 18 Sup. Ct. Rep. 895; Leadville Min. Co. v. Fitzgerald, Fed. Cas. No. 8,158; Cheesman v. Shreve, 37 Fed. 36; 2 Lindley, Mines, § 866, p. 1595.

Where the owner of land is in the possession thereof, and one out of possession asserts an adverse claim or interest therein, the owner, under the laws of the state of Utah, is not required to wait until his title has been settled by an action at law.

The Federal courts will give effect to the enlarged equitable relief provided for by this act in all cases where the land is vacant, where neither the owner nor the person asserting the adverse claim is in possession, and in all cases where the owner is in the possession of the lands.

Central P. R. Co. v. Dyer, 1 Sawy. 648, Fed. Cas. No. 2,552; Holland v. Challen, 110 U. S. 16, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; Reynolds v. First Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; Prentice v. Duluth Storage & Forwarding Co. 7 C. C. A. 293, 19 U. S. App. 100, 58 Fed. 437; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483; Dahl v. Raunheim, 132 U. S. 260, 33 L. ed. 324, 10 Sup. Ct. Rep. 74; Cowley v. Northern P. R. Co. 159 U. S. 569, 582, 583, 40 L. ed. 263, 266, 267, 16 Sup. Ct. Rep. 127; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Wehrman v. Conklin, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; Allen v. Hanks, 136 U. S. 300, 34 L. ed. 414, 10 Sup. Ct. Rep. 961; Darragh v. H. Wetter Mfg. Co. 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 7.

The owner of a legal title, being in possession of a part of a tract of land, is, in contemplation of law, in possession of everything within its exterior boundaries, except as to such part only as he may have been actually ousted from; that the legal title and possession of a part draws to it the possession of the whole, except to the extent that there may have been an actual adverse possession by some other party. The possession of an intruder, or one without title, or of one even who enters under color of title, is not extended beyond his actual enclosure, or that of which he has taken actual physical possession, as against the true owner who is in possession of a part. The possession of a mere trespasser, or even of one entering under color of title, on a lode or vein, who has engaged in the extraction of ore therefrom, cannot be extended beyond the point of his pick, the face of his drift, or other actual opening made by him, as against the true owner who is also in possession.

Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 Pac. 231; Clarke v. Courtney, 5 Pet. 319, 354, 355, 8 L. ed. 140, 152, 153; Hunnicutt v. Peyton, 102 U. S. 333, 369, 26 L. ed. 113, 121.

If, in this case, we have such possession as would enable us to maintain an action of trespass against petitioners, then we have the requisite possession to maintain our suit in equity to quiet title. We have such possession as would entitle us to maintain trespass.

Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 462, 25 L. ed. 253; Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 415, 102 Fed. 430; Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. 139 Fed. 838.

But such action would be entirely inadequate to redress the wrongs complained of.

Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 3, 11 Pac. 515.

A bill to quiet title is the proper remedy.

Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 58 C. C. A. 311, 121 Fed. 973; Boyce v. Grundy, 3 Pet. 209, 7 L. ed. 655; Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; Allen v. Hanks, 136 U. S. 300, 310, 311, 34 L. ed. 414, 418, 10 Sup. Ct. Rep. 961; Cable v. United States L. Ins. Co. 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74; Smith v. American Nat. Bank, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 837; Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. supra.

The real end lines of a claim are those which cross the vein on its strike or course, no matter how they may be designated by the locator.

2 Lindley, Mines, §§ 586, 587; Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, 25 L. ed. 253; Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

A vein cannot be pursued on its course beyond the lines which it actually crosses. The patentee takes only so much of the vein as his lines actually cover. Where such vein crosses two opposite side lines, these lines, in law, are the true end lines of the location.

The right to follow the dip of the vein is bounded by the end lines properly so called, which lines are those which are crosswise of the general course of the vein on the surface.

2 Lindley, Mines, § 586; Catron v. Old,

23 Colo. 433, 58 Am. St. Rep. 256, 48 Pac. 687.

So far as the intralimital rights of the Northern Light to all that portion of the Ashland vein as it goes to the deep, the strike of which at its apex is found within its boundaries, and also the intralimital rights of the Grizzly to all that portion of the Ashland as it goes to the deep, the strike of which at its apex is found within the boundaries thereof, the case is precisely the same as that of Last Chance Min. Co. v. Tyler Min. Co. supra.

This belt of limestone with its sharply defined boundaries, crushed, broken, altered, and mineralized to the extent shown by the evidence, must, in contemplation of law, be regarded as a single lode or vein.

Eureka Consol. Min. Co. v. Richmond Consol. Min. Co. 4 Sawy. 302, Fed. Cas. No. 4.548; Iron Silver Min. Co. v. Cheesman, 116 U. S. 534, 29 L. ed. 713, 6 Sup. Ct. Rep. 481; Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413.

Assuming that, on the same vein, there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein.

Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 484, 485, 30 L. ed. 1142, 7 Sup. Ct. Rep. 1356.

The fact that a vein or lode is of such width on the surface as to extend beyond the side lines of the claim located thereon does not affect the extralateral rights of such claims against a junior location.

Bunker Hill & S. Min. & Concentrating Co. v. Empire State Idaho Min. & Developing Co. 106 Fed. 471, 52 C. C. A. 219, 114 Fed. 417; St. Louis Min. & Mill Co. v. Montana Min. Co. 56 L.R.A. 725, 44 C. C. A. 120, 104 Fed. 664; Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 299, 131 Fed. 579; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. 66 C. C. A. 99, 131 Fed. 604.

The title conveyed by patent relates to the date of the location on which it issued.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636-647, 26 L. ed. 875-879; Cahoon Gold Min. Co. v. Ajax Gold Min. Co. 182 U. S. 499-510, 45 L. ed. 1200-1206, 21 Sup. Ct. Rep. 885; Stark v. Starr, 6 Wall. 418, 18 L. ed. 929; Kahn v. Old Teleg. Min. Co. 2 Utah, 174.

Conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts, or questions involving extralateral rights, are not the subject of adverse claims.

2 Lindley, Mines, § 730.

The doctrine of estoppel is not applicable.

1 Herman, Estoppel, 289-291; Lewis v. Ocean Nav. & Pier Co. 125 N. Y. 348, 26 N. E. 301; Soderberg v. Armstrong, 116 Fed. 709; Russell v. Place, 94 U. S. 606, 608, 609, 24 L. ed. 214, 215; Cromwell v. Sac County, 94 U. S. 351, 353, 24 L. ed. 195, 198.

The question of priority of location is not necessarily involved and determined by the judgment in an adverse suit.

St. Louis Min. & Mill. Co. v. Montana Min. Co. supra.

The certificates of location are presumptive evidence of discovery, and that the locators had complied with the law in this respect.

Cheesman v. Shreeve, 40 Fed. 791.

The claim of petitioners that respondent could not avail itself of the doctrine of relation, because it had failed to show in what district the claims were situated, or that its predecessors in interest in these respective claims had complied with the rules, customs, and regulations of the district, and had failed to show when in fact the locators of these respective claims made a discovery of a lode therein, are claims which are made for the first time in this court.

Houghton v. Jones, 1 Wall. 702, 705, 17 L. ed. 503, 504; Belk v. Meagher, 104 U. S. 279, 289, 26 L. ed. 735, 739; Findlay v. Pertz, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 681; O'Reilly v. Campbell, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421; Horne v. Geo. H. Hammond Co. 18 C. C. A. 54, 33 U. S. App. 362, 71 Fed. 314; Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320.

A patent in a court of law is conclusive as to all matters properly determinable by the Land Department when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts where it has jurisdiction goes so far that if, in any circumstances, under existing law, a patent would be held valid, it will be presumed that such circumstances existed.

Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878.

A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possession. In its potency, it is ironclad against all mere speculative inferences.

Eureka Consol. Min. Co. v. Richmond Consol. Min. Co. 4 Sawy. 302, Fed. Cas. No. 4,548; Carson City Gold & S. Min. Co. v. North Star Min. Co. supra.

The officers of the Land Department are merely agents of the government, and have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents of their own description, they could limit or enlarge without warrant of law.

1 Lindley, Mines, 2d ed. § 171; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Deffeback v. Hawke, 115 U. S. 399, 29 L. ed. 425, 6 Sup. Ct. Rep. 95; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858.

One holding a patent from the government for a mining claim was entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by showing that he was the owner of the vein having its top or apex in a claim owned by him, the pursuit of which, on its downward course, brought him to the ground in controversy.

Duggan v. Davey, 4 Dak. 110, 26 N. W. 887.

A patentee of the United States may assert title to the part of a vein beneath the surface of his claim when the extralateral rights of others do not extend thereto, although the apex lies within another claim.

Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 53 L.R.A. 491, 87 Am. St. Rep. 386, 64 Pac. 326; Doe v. Waterloo Min. Co. 54 Fed. 935; Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; King v. Amy & S. Consol. Min. Co. 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510.

[8] *Mr. Justice **Brewer** delivered the opinion of the court:

The first question is whether the plaintiff can maintain this suit in equity without a prior adjudication in an action at law of its legal title. The bill alleges ownership and possession. It supported this allegation by patents from the United States of the first four claims mentioned in the bill, and proved that the defendants were working on a vein or body of mineral beneath the surface and extracting ores therefrom. The bill has a double aspect, to quiet title and to restrain defendants from removing any more ores from beneath the surface of these claims. Title by patent from the United States to a tract of ground, theretofore public, prima facie carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property, this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is a part of a vein apexing in a claim belonging to some other party. But this is a matter of defense; and while proof of ownership of the apex may be proof of the ownership of the vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to the vein can be recognized. This suit was not in the nature of an ejectment, to put the defendants out of possession of the space beneath the surface of plaintiff's claims from which they had extracted ore, but to quiet the title of the plaintiff to the vein in which they had been working, and to restrain them from mining and removing any more ore.

Sec. 3511, Utah Rev. Stat. 1898, reads:

"Sec. 3511. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

*A statute of a similar character was before this court in Holland v. Challen, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495, and it was held that under it a suit might be maintained by one out of possession against another also out of possession, to quiet the title of the former to the premises. It was said, quoting from a prior opinion, that it was "a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding." It was also said (p. 20): [9]

"To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long-continued possession. Alexander v. Pendleton, 8 Cranch, 462, 3 L. ed. 624; Peirsoll v. Elliott, 6 Pet. 95, 8 L. ed. 332; Orton v. Smith, 18 How. 263, 15 L. ed. 393.

"The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of the validity of the plaintiff's right, and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title."

The same question was considered and decided in the same way in respect to a suit based upon a similar statute, in Iowa, in Wehrman v. Conklin, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129. Of course, as pointed out in Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, such a statute cannot be relied upon in the Federal courts to sustain a bill in equity by one out of possession against one in possession, for an action at law in the nature of an action of ejectment affords a perfectly adequate legal remedy. There is nothing in the point decided in Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434, which, rightly considered, conflicts with the case of Holland v. Challen.

It will be further borne in mind that this question was raised by demurrer to the plaintiff's bill and by motion after the [10]*plaintiff had finished its testimony and before the defendants had introduced theirs, and was not renewed at the close of the trial, although until then the motion was not decided. At the time the motion was made the case presented was one of a clear legal title to the four mining claims by patent from the United States, and an unauthorized entry by subterranean workings into the ground below the surface and the mining and extracting of ores therefrom,—a case for restraint by injunction, which was part of the relief asked for in the bill. It is insisted that in Park v. Wilkinson, 21 Utah, 279, 81 Am. St. Rep. 693, 60 Pac. 945, the supreme court of that state has given a different construction to the statute, but in this we think counsel are mistaken. In that case the plaintiff brought an action which the court says "was in the nature of one in ejectment." To the complaint the defendant, as authorized by the practice in Utah, answered with a cross complaint, demanding equitable relief. A jury was empaneled. After the testimony was all in the court ruled against the claim for equitable relief, discharged the jury, and entered judgment for the plaintiff. This was held to be erroneous, the supreme court saying that "after determining the equitable issue the court should have submitted the case to the jury upon proper instructions." In other words, the equitable relief sought by the defendant having been denied, the case stood as one in the nature of an action of ejectment, which was a common-law action, entitling the party to a jury. But in this case, upon the allegations of the complaint, the plaintiff was in possession, and therefore could not maintain an action of ejectment. The testimony which plaintiff offered showed that it was the owner and in possession, and, of course, at that time nothing in the nature of an action of ejectment was shown. And it was only by demurrer to the complaint and by motion after the plaintiff had rested that the question of a right to a jury was raised by the defendants. The decision of the court of appeals in this matter was right.

Coming now to the merits, it is not open to dispute that the defendants were taking ore from beneath the surface of the *plaintiff's [11] four claims. The question therefore arises, What right had they to thus mine and remove ore? They must show that the ore was taken from a vein belonging to them. Was there a vein? Where was its apex, and who was the owner of that apex? The testimony is voluminous, and even with the accompanying diagrams it is difficult to come to a satisfactory conclusion as to the facts.

It is insisted that the findings of the circuit court should have bound and concluded the court of appeals upon questions of fact. The difficulty with this contention is that there is nothing to show what the circuit court found to be the facts. Whatever might have been suggested by the course of the argument at the hearing, the comments of the court upon such argument, or in announcing its decision, there is nothing in the record to indicate whether its decision was based upon a question of fact or a matter of law. The record only contains its decree, dismissing the bill. All else is a matter of surmise, except as may be inferred from the allegations of the pleadings and the scope of the testimony. While it is apparent that the circuit court must have based its decision upon one of two or three grounds, yet upon which it is not certain. The circuit court of appeals made no separate finding of facts, but it filed an opinion which indicates the scope of its decision, and it is the decree of that court which is before us for consideration. The attitude of the case is very like that of one in which a trial court refers all things to a master, who takes the testimony and reports it, with a general finding for the plaintiff or defendant, upon which report the trial court states its views of the facts and the law and enters its decree. An appellate court, reviewing such decree, will give its consideration to the conclusions stated by the trial court, irrespective of the report of the master, unless the issue be so narrow that sustaining the decree of the court necessarily involves an overruling of the master on a matter of fact.

From the opinion of the court of appeals it appears that it found that there was a broad vein. It says: "A careful examina-[12]tion *and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral-bearing rock extending from the quartzite on one side to the quartzite on the other." This stratum of limestone underlies the four claims of the plaintiff, and one of the contentions of the defendants is that there are several independent veins, one of which has its apex within the surface lines of the Kempton and another its apex in the Ashland, that these independent veins continue down through the stratum of limestone beneath the surface of the plaintiff's claims, and that it was only from these independent veins that the defendants were mining and removing ore. Of course, this difference between the conclusions of the court and the contentions of the defendants affects materially the scope of the inquiry. If the limestone is not, strictly speaking, a vein, but a mere stratum of rock through which run several independent veins, then the inquiry must extend to the location of the apex of each separate vein; whereas, if the stratum of limestone is itself a single broad vein, then the inquiry is narrowed to the location of its apex.

With reference to the conclusion of the court of appeals it is sufficient to say that if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong.

Treating this limestone as a single broad vein, it is apparent that the entire apex is not within the surface of either the Kempton or Ashland, but that it is also found in the Old Jordan and Mountain Gem, —the properties of the plaintiff. The line which divides the surface of the claims of the defendants from the Old Jordan and Mountain Gem claims also bisects the vein as it comes to the surface. In other words, part of the apex is within plaintiff's claims and part within defendants.' In such a case the senior location takes the entire width of the vein on its dip. This was [13]the conclusion of the *court of appeals, as shown by this quotation from its opinion (p. 592):

"Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward. Rev. Stat. § 2336, U. S. Comp. Stat. 1901, p. 1436."

We fully indorse the views thus expressed. Discovery is the all-important fact upon which title to mines depends. Lindley, in his work on Mines, 2d ed. vol. 1, § 335, says:

"Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries, the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and anxiety of the discoverers, have the further effect of *stimulating others to search for[14] veins and mines, on which the general prosperity of the state depends.'"

The two thoughts here presented are reward for the time and labor spent in making the discovery, thus adding to the general wealth, and incentive to others to prosecute searches for veins and mines. To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery, and without any previous searching for mineral, is manifest injustice.

Again, as indicated in the quotation from the court of appeals, continuing the line of division shown upon the surface through the descending vein would be attended with great difficulty and uncertainty. Dealing with questions of this nature, a practical view must be taken. Veins do not continue of uniform width in their descent, but are often irregular and broken, and to attempt to make a division of ore according as it appears on the surface, or equally, would require the constant supervision of a court. It is not strange, then, that the custom of miners has been, as stated by the court of appeals, to regard and treat the vein as a unit and indivisible in point of width, and belonging to the discoverer. This question has been before this court, as well as several of the courts in the mining districts. In Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478, 484, 30 L. ed. 1140, 1142, 7 Sup. Ct. Rep. 1356, we said:

"Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

In Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 3, 11 Pac. 515, the question is discussed at some length by Chief Justice Zane. In the course of the opinion it is said (p. 54):

"Under the law of 1866 the surface ground was merely for the convenient working of the lode. The discoverer and first locator took the lode in its entirety. The law contemplated its segregation in its length, not in its width. It refers to lodes between the end lines, not to a part of a [15] lode. No expression *can be found in it indicating an intention to limit the rights of the locator to a portion of the lode in its width. The discovery of any part of the apex of a vein is regarded by it as a discovery of the entire apex. And we think that the law of 1872, when all of its provisions are considered together, and in connection with the former law on the subject, as it should be, evinces the same intent. Under this law the discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downwards vertically. While he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface."

See also St. Louis Min. & Mill. Co. v. Montana Min. Co. (C. C. App. 9th C.) 56 L.R.A. 725, 44 C. C. A. 120, 104 Fed. 664; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C. App. 9th C.) 52 C. C. A. 219, 114 Fed. 417. Also another suit between the same parties in the same court, 66 C. C. A. 99, 131 Fed. 591; Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co. (C. C. App. 9th C.) 66 C. C. A. 299, 131 Fed. 579.

But it is contended by the defendants that both the entries and patents of the Ashland and Kempton claims were prior in time to the entries and patents of the Old Jordan and Mountain Gem, and that such priority of entry and patent conclusively establishes the prior right of the owners to this broad vein; that the failure of the owners of the Old Jordan and Mountain Gem to adverse the applications of the owners of the Ashland and Kempton for patent was an admission that the latter had priority of right, and is conclusive against any present testimony as to the dates of the locations. We had occasion in the recent case of Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266, to consider to what extent the issue of a mining patent worked an estoppel of the claims of third parties, and it is unnecessary now to repeat the discussion there had.

This case presents the question under different aspects. The entries and patents of the Ashland and Kempton claims *were, as [16] stated, prior in time to the entries and patents of the Old Jordan and Mountain Gem. There is no record of any adverse suits, although it is intimated that there were such suits. In the absence of a record thereof we cannot assume that anything more was presented and decided than was necessary to justify the patents. A patent is issued for the land described, and all that is necessarily determined in an adverse suit is the priority of right to the land. This is evident from § 2325, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1429), which says: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." In the section the only matters mentioned for examination and consideration relate to the surface of the ground. There is no suggestion or provision for any inquiry or determination of subterranean rights. Lindley, in his work on Mines, 2d ed. vol. 2, § 730, says:

"An application for patent invites only such contests as affect the surface area. A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict. The rule is well settled that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. Prospective underground conflicts . . . are not the subject of adverse claims."

In New York Hill Co. v. Rocky Bar Co. 6 Land Dec. 318, the Commissioner of the General Land Office declined to recognize an adverse claim where there was no surface conflict, saying (p. 320):

"In the event that patent should be issued upon said application and any question should thereafter arise as to the right, under such patent, to follow any vein or lode, as indicated in said § 2322 (U. S. Comp. Stat. 1901, p. 1425), it would be a matter for the courts to settle, and I am of the opinion, there being no surface conflict alleged in this case, and without considering any other question relating to the sufficiency of the so-called adverse claim, that you properly [17]*declined to receive the same as an adverse claim, and to that extent your decision is affirmed."

The same ruling was made in Smuggler Min. Co. v. Trueworthy Lode Claim, 19 Land Dec. 356.

Without determining what would be the effect of a judgment in an adverse suit in respect to subterranean rights, if any were in fact presented and adjudicated, it is enough now to hold that there is no presumption, in the absence of the record, that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest and upon the surveys made under the direction of the United States surveyor general, and included only ground in respect to which there was no conflict. If the surface ground included in an application does not conflict with that of an adjoining claimant, the latter is in no position to question the right of the former to a patent. Take the not infrequent case of two claims adjoining each other, the boundary line between which is undisputed. If the owner of one applies for a patent the owner of the other is clearly under no obligation to adverse that application, even if, under any circumstances, he might have a right to do so. Other necessary conditions being proved, the applicant is entitled to a patent for the ground. Generally speaking, if the boundary between the two claims is undisputed the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the right of the patentee of adjoining tract to the ground within his claim.

Section 2336, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1436), makes provision for conflict as to certain subterranean rights. The last sentence of the section reads: "And, where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Argentine Min. Co. v. Terrible Min. Co. supra. As the place of union may be far below the surface, this evidently contemplates inquiry and decision *after patent, and then it can only be in [18] the courts. And the same rule will obtain as to other subterranean rights.

It is further contended that there is no evidence of a valid location of the "Old Jordan" and Mountain Gem prior to the entries of the Ashland and Kempton. Location notices of the Old Jordan and Mountain Gem were admitted in evidence, that of the former being as follows:

Notice. Jordan S. M. Co.

The undersigned members of the Jordan Silver Mining Co. claim for mining purposes one share of 200 feet each and one additional claim of 200 feet for original discoverer, George R. Ogilvie, on this lead of mineral ore, with all its dips, spurs, and angles, beginning at the stake situated 100 feet northeast of Gardner's shanties in Bingham (Canion) Kanyon, in West Mountain, and running 2,200 feet in a westerly direction along the side of said mountain, on a line with Bingham canyon, and intend to work the same according to the mining laws of this mining district.

(Signed by 25 locators.)

Bingham Kanyon, Salt Lake City, Utah territory, Sept. 17, 1863.

A. Gardner, Recorder.

The Mountain Gem location was similar in form, dated August 20, 1864, and recorded August 24, 1864. Now these location notices were long before the time of the locations of the defendants' claims. It is further contended that the locations of the "Old Jordan" and Mountain Gem were anterior to the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which was the first legislation of Congress in respect to the granting of mineral claims, and that while that act, in its 2d section, recognizes the rights of locators in so far as they have proceeded according to the local custom or rules of miners of the districts in which the mines are situated, yet in this case there is no evidence that these locations were made in conformity to any such local custom or rules. It is sufficient to say that by stipulation *of counsel it was [19] agreed that the patents to the "Old Jordan" and Mountain Gem were issued upon the location notices. Inasmuch as they were accepted by the government, and patents issued thereon, it was a recognition by the Department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to such notices.

Summing up our conclusions, the findings of fact as stated in the opinion of the court of appeals are not clearly against the testimony, and must, therefore, be sustained. According to those findings there was a single broad vein,—the apex or outcroppings of which extended through the limits of some of the plaintiff's and defendants' claims,—and not several independent veins. The ore which was being mined and removed by the defendants was taken from this single broad vein beneath the surface ground of claims belonging to the plaintiff. Where there is a single broad vein whose apex or outcroppings extend into two adjoining mining claims the discoverer has an extralateral right to the entire vein on its dip. Acceptance by the government of location proceedings had before the statute of 1866, and issue of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district. The priority of right to a single broad vein vested in the discoverer is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by testimony other than the entries and patents. In the absence from the record of an adverse suit there is no presumption that anything was considered or determined except the question of the right to the surface.

From these conclusions it is obvious that the decision of the Circuit Court of Appeals was right, and it is affirmed.

[20]*SAMUEL B. RAYMOND, County Treasurer of Cook County, Illinois, and *Ex Officio* County Collector of Cook County, Illinois; John J. Hanberg, His Successor as Such County Treasurer and County Collector, et al., Appts.,

v.

CHICAGO UNION TRACTION COMPANY.

(See S. C. Reporter's ed. 20–41.)

Courts — jurisdiction of circuit court — Federal question.

1. The claim that the action of a state board of equalization in making an assessment for a tax pursuant to the command of a writ of mandamus was the action of the state, and, if carried out, would violate U. S. Const., 14th Amend., by taking property without due process of law and denying the equal protection of the laws, constitutes a Federal question within the original jurisdiction of a Federal circuit court.

Constitutional law — due process of law — equal protection of the laws.

2. The Illinois state board of equalization, when making an assessment pursuant to the supposed command of a writ of mandamus, represents the state,—there being no method of reviewing its decision except by judicial proceedings for relief from the assessment,—and its action is therefore repugnant to U. S. Const., 14th Amend., if it denies anyone the due process of law or the equal protection of the laws protected by that Amendment against impairment by the state.

Constitutional law — equal protection of the laws — due process of law.

3. Assessing the franchises and other property of certain corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the due process of law and equal protection of the laws protected by U. S. Const., 14th Amend., against impairment by a state.

Injunction — against illegal taxation.

4. Equity has jurisdiction, where no remedy at law exists, upon payment of a tax fairly and equitably due, to restrain the collection of the tax assessed upon a corporation at a different rate and by a different method from that employed for other corporations of the same class and for the same year, which results in a most enormous and material discrimination against the complainant corporation.

Injunction — against illegal taxation — remedy at law.

5. The existence of an adequate remedy at law by an action to recover back illegal taxes, which will defeat injunctive relief, is negatived by allegations in a bill to restrain illegal taxation that, if complainant sues to recover back the taxes, separate suits must be brought against the several taxing bodies receiving a share of the tax; that the proportion of the tax which goes to the state cannot be recovered by any legal proceeding; that whatever repayment can be compelled from the other taxing bodies will not cover the cost, including commissions deducted for the collection of the tax; that payment of such tax will render complainant insolvent; and that a levy on its property

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NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7, and Bailey v. Mosher, 11 C. C. A. 308.

On constitutional equality in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

On due process of law in tax matters—see notes to Kuntz v. Sumption, 2 L.R.A. 656, and Read v. Dingess, 8 C. C. A. 398.

As to injunction to restrain the collection of illegal taxes—see note to Odlin v. Woodruff, 22 L.R.A. 699.

will interfere with the street-car system operated by it, to the injury of the public.

[No. 115.]

Argued April 8, 9, 1907. Decided October 21, 1907.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment enjoining the collection of a tax on the property of a corporation, which tax is asserted to violate the Federal Constitution. Affirmed.

See same case below, 114 Fed. 557.

Statement by Mr. Justice **Peckham:**

The appellants, who were defendants below, have appealed from the judgment of the circuit court of the United States for the northern district of Illinois. The case is one of several argued together, the facts in regard to which are substantially the same. It was brought to enjoin the appellants from taking any further proceedings towards the collection of certain taxes assessed against the appellee upon an assessment alleged to be in violation of the 14th Amendment to the Constitution of the United States, and which, if enforced, would result in the taking of appellee's property without due process of law, and in denying to it the equal protection of the laws.

[21] *The case was brought in the circuit court of the United States at Chicago, and an opinion was delivered by that court at the time of the judgment for appellee. 114 Fed. 557. An earlier opinion upon a previous motion in certain traction company cases, relating to one phase of the matter in controversy, which was pending at the time in the southern district of Illinois, is to be found in 112 Fed. 607. The questions arise by reason of the provisions of the Constitution of the state of Illinois and certain sections of its tax statutes or revenue laws. The material part of article 9, § 1, of the Constitution of Illinois, 1870, is as follows:

"The general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property,—such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax . . . insurance, telegraph, and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." Const. 1870, art. 9, § 1.

The following are the statutes in question:

"Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value, estimated at the price it would bring at a fair voluntary sale." Hurd's Rev. Stat. 1899, chap. 120, ¶ 4.

"Personal property shall be valued as follows: First, all personal property, except as herein otherwise directed, shall be valued at its fair cash value. . . . Fourth, the capital stock of all companies or associations now or hereafter created under the laws of this state, except those required to be assessed by the local assessors and hereinafter provided, shall be so valued by the state board of equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of *the tangible property of such company or association, 'arriving at such valuation from the best information obtainable, taking into consideration, among other things, the market value of their shares of stock, and the total amount of their indebtedness.'" Hurd's Rev. Stat. 1899, chap. 120, § 3. [22]

The state board of equalization is the body that makes the original assessments upon the capital stock, etc., of corporations like the ones in question here, and there is no appeal from its valuation or decision.

The following are some of the averments of the bill of complaint filed by the appellee in this suit: The defendants were, respectively, the town collector of the town of North Chicago and the county treasurer of Cook county, the city of Chicago being within the limits of that county. In November or December of the year 1900 a valid assessment was made by the state board of equalization, assessing the full value of the capital stock of the appellee, including franchises, at the sum of three millions of dollars over and above the value of the tangible property of the appellee, and, in accordance with the provisions of the revenue law then in force, it decided, ascertained, and set down the sum of $600,000, one fifth of the above-mentioned $3,000,000, as the assessed value of the appellee's property, designated as "capital stock, including the franchise," for all purposes of taxation. This assessment was never vacated, annulled, or set aside, but was duly certified to the proper officer, and the state, county, city, and all other kinds of taxes levied for the year 1900, for and against property situated in the said town of North Chicago, were duly extended against such assessed value of $600,000, and the taxes were also extended against said assessment made upon the tangible property of the appellee for the year 1900, and a warrant was duly issued [23] to the town collector *of the town of North Chicago, directing him to collect the taxes so extended. On or about the 28th day of January, 1901, appellee paid to the collector of the town of North Chicago the sum of $52,902, in full satisfaction of all the taxes assessed against the appellee, and no part of the money so paid by appellee in satisfaction of the taxes has ever been returned or tendered back to the company, but, on the contrary, the money has been paid over by the collector, less his commission, either directly or through the county treasurer of the county, to the various taxing and public bodies entitled to receive the same, and has been used or is still retained by said bodies, respectively.

On the 10th day of November, 1900, proceedings by taxpayers were instituted against the state board of equalization to compel that board to make an assessment for that same year against the appellee upon its capital stock and franchises. This application was made while the state board of equalization was in session, but before any final action had been taken by the board to determine and fix the proper assessment to be made on the capital stock of the appellee. It was alleged in the petition that the state board of equalization intended to adjourn its session without making any assessment upon the capital stock, including the franchises, of the appellee, and on twenty-two other corporations doing business in the city of Chicago, and that it intended illegally to neglect and refuse to discharge the statutory duty obligatory upon it in that regard. Neither the appellee nor the other corporations mentioned in the petition were made parties to the proceedings, nor did they ever become parties thereto. The defendants therein, members of the state board of equalization, denied that they had refused or intended to refuse to discharge their duties as members of the board. Thereafter the board assessed the capital stock of the respondent, including the franchise, as already stated, and on the 3d of December, 1900, adjourned *sine die.*

Before this adjournment, and on the 16th of November, 1900, the mandamus proceed- [24] ings had been continued, and no *action was thereafter taken therein until about the 12th day of March, 1901. About the 1st of May, 1901, the proceedings came on for trial and terminated in a judgment directing that a writ should issue against the members of the state board of equalization, requiring the board to convene and forthwith value and assess the capital stock of the appellee, "so as to ascertain and determine respectively, as to each of said corporations, the fair cash value of its capital stock, including its franchises, over and above the assessed value of the tangible property of such company for the year 1900."

An appeal was taken to the supreme court from that judgment, but no evidence was introduced on the trial of the case in support of the merits of the assessment theretofore made upon the capital stock, including franchises, of the appellee, and no argument was made either in the trial court or in the supreme court, upon appeal, in support of the merits of the assessment, the defense being rested almost wholly on objections to jurisdiction, and other legal grounds, touching the power of the court to grant the relief prayed for. (A method of assessing the capital stock had been adopted by the board, which omitted the indebtedness of the corporations as a factor in the valuation of such stock, and it was this error which led to the original assessments upon those corporations, and that caused the mandamus proceedings.)

The amount of the assessment against the appellee for the year 1900 appeared upon the trial of the mandamus proceedings, and it was found by the trial court that the assessment was so low as to show that it was in fact a fraudulent assessment, and therefore in law no assessment at all, and upon appeal the supreme court held that the finding of the court below was justified, and that, under such circumstances, where there was in law no assessment, the court might compel the board to fulfil its duty by assessing the property of the taxpayer thus fraudulently undervalued. See State Board v. People, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339. The state court held that under the provisions of the statute of Illinois the state board of *equalization, acting as the original [25] assessor of the capital stock and franchises of corporations, might make an assessment of omitted capital stock and franchises of corporations under the section of the statute referred to. See §§ 276, 277 of the revenue act, Hurd's Stat. 1899, page 441.

The judgment of the circuit court granting the writ of mandamus was thereupon affirmed by the supreme court, and the writ was issued on the 22d of November, 1901, against the board. The writ, as issued under the direction of the supreme court, after reciting that the previous assessment was in fact no assessment in law, and was unreasonable, arbitrary, and fraudulent, and was not the expression or the result of the honest judgment and discretion of the state board of equalization and the members thereof, and amounted to a wrongful, wilful, and arbitrary failure, omission, and refusal to assess the capital stock of the appellee at its fair cash value over and above tangible property of the appellee, and was a fraud in law and upon the relators and the people, directed the members of the board to assemble and to forthwith proceed to value and assess the capital stock, including the franchises, of the appellee as of the 1st day of April, 1900, in the manner provided by law, "and that you, the said state board of equalization and the members thereof, do value the capital stock of said corporations and each of them so as to ascertain and determine, respectively, as to each of them, the fair cash value of its capital stock, including the franchise, over and above the equalized assessed value of the tangible property of such corporation on the 1st day of April A. D. 1900, and that in arriving at said valuations and assessments of capital stock, including the franchises of the corporations herein named, the said state board and the members thereof, from the best information obtainable by it and them, shall ascertain and take into consideration, among other things, as to each said corporation, as the same was on April 1, 1900, the market value, or, if no market value, then the fair cash value, of its shares of stock and the total amount of all indebtedness, except the in-[26]debtedness *for current expenses, excluding from such expenses the amount for purchase or improvement of property and the assessed or equalized value of tangible property owned by said corporations, respectively, on April I, 1900."

Pursuant to what the defendants believed to be the command of the writ, and without any independent judgment of their own, the members of the board proceeded to make an assessment upon the aggregate of the value of the capital stock, including franchises, of the appellee, and including its indebtedness, deducting therefrom the assessed equalized valuation of the real estate and tangible personal property belonging to the appellee, and then assessing for taxation one fifth thereof. At this time and for years previous thereto all property, real and personal, corporate or individual, throughout the state, as well as in Cook county, had been assessed as not to exceed 65 or 70 per cent of its fair cash value, and one fifth of that per cent was the amount upon which the tax was laid. This assessment, however, was not so made, but one fifth of the full value was assessed, and the roll thus made up was delivered to the proper officer, and an extension of the taxes made, and a warrant delivered to the town collector for collection. The total tax of the appellee on the second assessment amounted to about the sum of $1,000,000 more than the tax paid under the first assessment. It is the duty of the collector and the county treasurer to enforce the collection of these taxes, together with a penalty by reason of the delay in payment, and to that end levy the amount by distress and sale of the goods and chattels of the appellee, and which cannot be prevented or defended by the appellee otherwise than by payment or by a bill in chancery. The appellee's personal property consists chiefly of its cars and other personal property actually used in its business of transporting passengers, and levy of said tax will greatly embarrass it in its business and also injure the public using its cars. After collecting the taxes it is the duty of the collector, and he is required by law, to pay over and distribute them in the proportions designated in the *tax book to the city treasurer of[27] the city of Chicago, the county treasurer of Cook county, the treasurer of the sanitary district, and the other officers and authorities entitled to receive the same. In order to recover back the amount thus paid to the collector appellee will be obliged to bring separate suits against each one of the bodies receiving its proportionate share of said tax, necessitating a multiplicity of suits. Repayment of the amount which should be paid for the uses and purposes of the state of Illinois could not be enforced by any legal proceeding whatever, nor could repayment be obtained from anyone which would cover the costs, including the commissions deducted for the recovery of the taxes; and if proceedings to collect the taxes were not enjoined great and irreparable injury would result to the appellee, for which there was no complete or adequate remedy at law. It was then alleged that to pay the enormous sum of over a million of dollars, claimed as the tax for 1900, would render it impossible for the company to pay its rentals or preserve its leasehold interests, and would necessarily result in its insolvency. It was also averred that there were hundreds of corporations subject to be assessed by such board in the same manner that the appellee was assessed under the writ of mandamus issued in respect to the taxes assessed against it, and that not one of such corporations was, as a matter of fact, so assessed, but a discriminating, crushing tax burden was placed upon appellee and the other corporations mentioned in the writ, contrary to the provisions of the Constitution of the United States, and in violation of the Constitution of the state of Illinois.

Within a month of the time when the assessment of 1900 was made under the command of the writ the same board of equalization made an assessment upon the property of the appellee for the year 1901, using the best judgment of its members, and at that time it equalized the assessment with other property assessed throughout the state, and the difference between the two assessments is most material. The facts are stated in the opinion of the circuit judge, as follows:

[28] *"A comparison between these records of the state board is significant. In the case of the Chicago Union Traction Company the assessment for the year 1901—capital stock and tangible property aggregated—falls from a little over fourteen millions of dollars (the reassessment for 1900) to about eight millions, two hundred and fifty thousand dollars,—a loss of about 40 per cent.

"In the case of the Chicago Consolidated Traction Company, the depreciation is from a little over three millions, seven hundred and fifty thousand dollars to about two millions of dollars, or about 47 per cent.

"In the case of the People's Gas Company, the depreciation is from over twelve millions and a half to about eight millions and a half, or about 32 per cent.

"In the case of the Chicago City Railway, the depreciation is from a little over six millions to a little over four millions and a quarter, or about 30 per cent.

"In the case of the Chicago Telephone Company, the depreciation is from a little less than two millions, six hundred thousand dollars to a little over one million, seven hundred thousand dollars, or about 34½ per cent.

"In the case of the Chicago Edison Company, the depreciation is from a little over two millions, four hundred thousand dollars, to a little over one million, three hundred thousand dollars, or about 46 per cent.

"In the case of the South Chicago City Railway, the depreciation is from nearly five hundred seventy thousand dollars to a little less than three hundred thousand dollars, or about 47 per cent.

"These assessments, so widely divergent, were upon the same properties, by the same board, entered almost on the same day. The dates of which they spoke of were, it is true, a year apart; the one being of the 1st of April, 1900, the other of the 1st of April, 1901. But the tide of stock quotations, and the tide of current values, were higher on the latter day than the former. If between these two assessments a considerable disparity [29] *should exist, the increase ought to be found in the assessment for 1901, and not in that for 1900." [114 Fed. 559.]

Other averments were made in the bill, designed to raise other questions than the ones discussed in the following opinion, and for that reason are not set forth.

The defendants put in their answer and joined issue in regard to many of the material averments contained in the bill. The case was referred to a master and testimony was taken and a report made by the master to the court, in which he found all the material averments of the bill had been proved. The court approved the findings of the master, but before granting the injunction it ordered that the appellee should pay to the city an amount which the court found was fairly and equitably due from the appellee as its proportion of the taxes for 1900. The sum was arrived at by the court by a computation which, in its judgment, produced a fair and proper result. The amount directed to be paid by the court before the injunction should issue was the sum of $134,350.03, which sum the appellee paid, and the injunction issued as directed. The appellants duly excepted to the findings of the master that the amount of taxes equitably due from the appellee was as just stated, and the appellants insisted that the finding of the master of the amount of tax to be paid should have been the sum of $961,154.15 for general taxes, and $58.057.63 for interest thereon, making a total of $1,019,211,78 as due from the appellee for the taxes of 1900, as evidenced by the collector's warrant in the hands of the defendants in this suit.

It was also averred that the assessment was grossly excessive and the property greatly overvalued.

Messrs. **David K. Tone** and **James Hamilton Lewis** argued the cause, and, with Messrs. Harry A. Lewis, William F. Struckman, William H. Stead, and George B. Gillespie, filed a brief for appellants:

Equality and uniformity of taxation is not a right guaranteed by the Federal Constitution.

State Railroad Tax Cases, 92 U. S. 575, 618, 23 L. ed. 663, 675; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461–464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 295, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Missouri v. Dockery, 191 U. S. 165, 170, 48 L. ed. 133, 134, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 371, 46 L. ed. 949, 954, 22 Sup. Ct. Rep. 673; Coulter v. Louisville & N. R. Co. 196 U. S. 597, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

Where the Constitution and the laws of a state are just and fair, and the sole grievance of which a party complains is that the officers of the state, charged with executing those laws, have deprived that party of his property, contrary to the Constitution and the laws of the state, and in violation of the terms thereof, no Federal question is presented; for, under the above circumstances, it will be presumed that the state courts will give full relief against the illegal and unauthorized acts of the officers of the state.

. Illinois C. R. Co. v. Hodges, 113 Ill. 323; New Haven Clock Co. v. Koehersperger, 175 Ill. 383, 51 N. E. 629; Coxe Bros. & Co. v. Salomon, 188 Ill. 571, 59 N. E. 422; Siegfried v. Raymond, 190 Ill. 424, 60 N. E. 868.

The distinction between state action that gives rise to Federal jurisdiction within the meaning of the 14th Amendment and the mere unauthorized acts of state officers, when performed contrary to state law, which fails to give Federal jurisdiction, has been frequently pointed out by this court when determining under what circumstances a criminal prosecution may be removed from a state court into a court of the United States by reason of the denial by the state of the rights and immunities guaranteed to accused persons under the 14th Amendment.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Virginia v. Rives (Ex parte Virginia), 100 U. S. 313, 25 L. ed. 667.

In the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18, this court, in declaring unconstitutional the civil rights acts, passed pursuant to § 5 of the 14th Amendment, clearly pointed out the distinction we have contended for.

So long as a state, by its legislature, has guaranteed to persons and corporations within its jurisdiction equality and uniformity of taxation, no violation of the 14th Amendment has occurred simply because the state officers charged with the duty of administering the state law have failed to do their duty.

Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387; Gibson v. Mississippi, 162 U. S. 565-581, 40 L. ed. 1075-1078, 16 Sup. Ct. Rep. 904.

The decision of this court in Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502, is of controlling importance in this case, and requires that appellee's bill of complaint be dismissed for want of jurisdiction.

And see Manhattan R. Co. v. New York, 18 Fed. 195; Kiernan v. Multnomah County, 95 Fed. 849; Re Storti, 109 Fed. 807; St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 629; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Owensboro Waterworks Co. v. Owensboro, 200 U. S. 45, 50 L. ed. 363, 26 Sup. Ct. Rep. 249; Carfer v. Caldwell, 200 U. S. 293, 296, 50 L. ed. 488, 489, 26 Sup. Ct. Rep. 264.

Equally untenable is the claim in appellee's bill of complaint, that, under the circumstances there described, the appellee was deprived of its property without due process of law, because it had no opportunity to be heard at the time the assessment complained of was levied against it.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421-425, 38 L. ed. 1031-1036, 14 Sup. Ct. Rep. 1114; Michigan C. R. Co. v. Powers, 201 U. S. 245, 301, 50 L. ed. 744, 764, 26 Sup. Ct. Rep. 459; Public Clearing House v. Coyne, 194 U. S. 497, 509, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

Courts of equity in the state of Illinois furnish complete redress in case the state board of equalization has exceeded its authority, or if its action is palpably wrong.

Illinois C. R. Co. v. Hodges, 113 Ill. 323; New Haven Clock Co. v. Koehersperger, 175 Ill. 383, 51 N. E. 629; Coxe Bros. & Co. v. Salomon and Siegfried v. Raymond, supra.

The testimony of the individual members of the state board of equalization in reference to the operation of their minds at the time they made the assessment complained of was incompetent, and should have been excluded by the circuit court.

Wright v. Chicago, 48 Ill. 292; Quick v. River Forest, 130 Ill. 325, 22 N. E. 816; Ryder v. Alton, 175 Ill. 100, 51 N. E. 821; Washington Park Club v. Chicago, 219 Ill. 325, 76 N. E. 383; Republic L. Ins. Co. v. Pollak, 75 Ill. 298; New York & C. Grain & Stock Exchange v. Gleason. 121 Ill. 512, 13 N. E. 204; Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580-592, 18 L. ed. 550-553; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Coulter v. Louisville & N. R. Co. supra.

The extracts from the reports of the railroad and warehouse commissioners and from the reports of the board of agriculture for the state of Illinois were incompetent.

The state of Illinois could, without violating the Federal Constitution, tax the property of steam railroads at a different rate and upon a different basis than it taxed the property of corporations engaged in operating street railroad, gas, electric light, and telephone plants.

Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Coulter v. Louisville & N. R. Co. supra.

In order to make a public record competent evidence of a fact therein recited, two things are necessary: First, that the fact therein recited is required by law to be recorded by the official; second, that the person recording the fact must have had personal knowledge of the matters he was registering at the time. Unless both of the above conditions coexist, a public record is incompetent when offered as evidence tending to establish a fact in a court of justice.

Hegler v. Faulkner, 153 U. S. 109, 38 L. ed. 653; 14 Sup. Ct. Rep. 779; Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908; Swift v. State, 89 N. Y. 64; Culver v. Caldwell, 137 Ala. 125, 34 So. 13; Gordon v. Bucknell, 38 Iowa, 438; State v. Krause, 58 Kan. 651, 50 Pac. 882; Wellington v. Boston & M. R. Co. 158 Mass. 185, 33 N. E. 393; Jones v. Cordele Guano Co. 94 Ga. 14, 20 S. E. 265; State v. Wells, 11 Ohio, 261.

The figures taken from the books of the Union Stock Yard & Transit Company and from Brown's Directory of American Gas Companies were not competent evidence and should have been excluded.

Seymour v. McCormick, 19 How. 96, 15 L. ed. 557; Langley v. Smith, 3 N. Y. S. R. 276; State v. Daniels, 44 N. H. 385; Richardson Bros. & Co. v. Stringfellow, 100 Ala. 418, 14 So. 283; Cooke v. Penrhyn Slate Co. 36 Ohio St. 135, 38 Am. Rep. 568; Spalding v. Hedges, 2 Pa. St. 240; Payson v. Everett, 12 Minn. 216, Gil. 137; Vogt v. Cope, 66 Cal. 31, 4 Pac. 915; Whiton v. Albany City Ins. Co. 109 Mass. 31; North Chicago Rolling Mill Co. v. Monka, 107 Ill. 341; Bloomington v. Shrock, 110 Ill. 221, 51 Am. Rep. 679; Tichenor v. Newman, 186 Ill. 282, 57 N. E. 826; Yoe v. People, 49 Ill. 412; Gale v. Rector, 5 Ill. App. 484; Chicago City R. Co. v. Douglas, 104 Ill. App. 45; Sisson v. Cleveland & T. R. Co. 14 Mich. 496, 90 Am. Dec. 252; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; Gallagher v. Market Street R. Co. 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869.

The records of the state board of equalization do not sustain any of the allegations of appellee's bill.

Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; State Railroad Tax Cases, 92 U. S. 575–618, 23 L. ed. 663–675.

A construction placed by the highest court of the state upon the taxing laws of that state is binding upon a Federal court.

State Railroad Tax Cases, supra.

Where a tax collector attempts to collect an illegal tax, the aggrieved party may pay the tax under protest and recover the money back in an action of assumpsit.

Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 44, 1 L.R.A.(N.S.) 770, 75 N. E. 803; Cook County v. Fairbank, 222 Ill. 589, 78 N. E. 895.

Where a tax is illegal and void and can be paid under protest and then recovered back from the collector, the aggrieved party has an adequate remedy at law, and a court of equity will not assume jurisdiction.

Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 38, 43 L. ed. 356, 19 Sup. Ct. Rep. 90.

Overvaluation of property by an assessing body, unaccompanied with fraud or bad faith, furnishes no ground for equitable intervention.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 434, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Maish v. Arizona, 164 U. S. 599, 611, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193.

Before a court of equity will grant an injunction to restrain the collection of taxes on the ground of excessive valuation and unfair discrimination on the part of assessors, complainant must distinguish by his bill of complaint the legal from the illegal part of the tax, and must actually pay the tax which is due; otherwise he is not entitled to relief.

Cummings v. Merchants' Nat. Bank, 101 U. S. 154, 25 L. ed. 903; Albuquerque Nat. Bank v. Perea, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; Cincinnati Southern R. Co. v. Guenther, 19 Fed. 399; State Railroad Tax Cases, 92 U. S. 616, 23 L. ed. 674; German Nat. Bank v. Kimball, 103 U. S. 733, 26 L. ed. 469.

The capitalization method of assessment adopted by the circuit court was illegal, unfair, and directly contrary to the statutes of the state of Illinois, as those statutes had been interpreted both by the highest court of the state and by this court.

State Railroad Tax Cases, supra; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 222, 225, 41 L. ed. 965, 978, 979, 17 Sup. Ct. Rep. 604; Walker v. People, 192 Ill. 106, 61 N. E. 489; National Bank of Commerce v. New Bedford, 175 Mass. 262, 56 N. E. 288; Re Gould, 19 App. Div. 352, 46 N. Y. Supp. 506.

There is no competent evidence tending to sustain the assessment made by the circuit court, even assuming that the court had a right to ignore the method of assessment provided for by the laws of the state of Illinois and adopt a plan of its own, different from and contrary to the provisions of those laws.

Books of account of a party are not evidence except of charges made by the creditor against the debtor when they stand to each other in the relation of plaintiff and defendant. When a question of fact is at issue between the parties in a court, and that question does not involve the relation of debtor or creditor, such a fact cannot be proved by a party's own books, for such books are merely the self-serving declarations of the party producing them, and are incompetent under familiar rules of evidence.

Woodes v. Dennett, 12 N. H. 510; Little v. Wyatt, 14 N. H. 23; Batchelder v. Sanborn, 22 N. H. 325; Lassone v. Boston & L. R. Co. 66 N. H. 345, 17 L.R.A. 525, 24 Atl. 902; Juniata Bank v. Brown, 5 Serg. & R. 226; McKenney v. Waite, 20 Me. 349; Miller v. Clark, 5 Lans. 388; Union Bank v. Call, 5 Fla. 409; Jermain v. Worth, 5 Denio, 342; Boyd v. Yerkes, 25 Ill. App. 527; Minton v. Underwood Lumber Co. 79 Wis. 646, 48 N. W. 857; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; Eshleman v. Harnish, 76 Pa. 97.

In Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, this court held that the production of figures of the general character here under consideration, without any testimony from witnesses showing how the expenses were disbursed, and their necessity and reasonableness, was insufficient upon which to base a decree.

Messrs. David K. Tone, James Hamilton Lewis, Harry A. Lewis, William F. Struckmann, Frank L. Shepard, William H. Stead, and George B. Gillespie filed a brief in reply for appellants:

The testimony of the four members of the state board of equalization in reference to the operation of their minds at the time they made the assessment complained of is incompetent.

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326.

The mere fact that a claim is made in good faith that a case is one arising under the Constitution of the United States does not make out a case cognizable in a circuit court of the United States, where there is no diversity of the citizenship of the parties.

Defiance Water Co. v. Defiance, 191 U. S. 184–194, 48 L. ed. 140–144, 24 Sup. Ct. Rep. 63; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327–336, 40 L. ed. 444–447, 16 Sup. Ct. Rep. 307; Arbuckle v. Blackburn, 191 U. S. 405–413, 48 L. ed. 239–241, 24 Sup. Ct. Rep. 148; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; Manhattan R. Co. v. New York, 18 Fed. 195; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

Messrs. William W. Gurley, Arthur Dyrenforth, and Howard M. Carter for appellee:

The acts complained of are acts of the state.

Ex parte Virginia, 100 U. S. 339–347, 25 L. ed. 676–679; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305.

The state board of equalization, being the supreme taxing agency of the state, its action is the action of the state.

Porter v. Rockford, R. I. & St. L. R. Co. 76 Ill. 561; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Missouri v. Dockery, 191 U. S. 165–170, 48 L. ed. 133, 134, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Coulter v. Louisville & N. R. Co.; Railroad & Teleph. Cos. v. Board of Equalizers; Nashville, C. & St. L. R. Co. v. Taylor; Taylor v. Louisville & N. R. Co. and Louisville Trust Co. v. Stone,—supra.

The final judgment of a state supreme court is the action of a state.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

The fixing of rates by a state railroad commission is the act of the state.

Reagan v. Farmers' Loan & T. Co. supra.

Discriminating administration of a city

ordinance by public officers charged with such administration is the act of the state.

Yick Wo v. Hopkins, supra.

Under the terms of the leases and assignments of leases from said companies to the Chicago Union Traction Company, dated June 1, 1899, all property rights and franchises were absolutely transferred to and vested in the lessee for the terms of the leases, respectively. The supreme court of Illinois has passed upon one of these leases. and has held that the conveyance therein was practically absolute, leaving in the lessor no reversionary interest in the property and franchises conveyed of any substantial value whatever.

Chicago West Div. R. Co. v. Metropolitan West Side Elev. R. Co. 152 Ill. 525, 38 N. E. 736.

To constitute due process, every step provided by law must be duly observed.

Chicago, B. & Q. R. Co. v. Chicago, supra.

The members of the state board did not exercise their judgment.

Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 594; Chicago, B. & Q. R. Co. v. Paddock, 75 Ill. 616.

The state board of equalization did not equalize the assessment so made with the assessments of other property in the state of Illinois.

Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 184; Law v. People, 87 Ill. 405; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 306; Chicago, B. & Q. R. Co. v. Chicago, supra.

The reassessments made by the state board are so grossly excessive as to amount to fraudulent assessments.

State Bd. of Equalization v. People, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339.

Other corporations of the same class were not assessed on the same basis.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153–156, 25 L. ed. 903, 904; Porter v. Rockford, R. I. & St. L. R. Co. 76 Ill. 596; Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591; Pacific Hotel Co. v. Lieb, 83 Ill. 602; La Salle & P. H. & D. R. Co. v. Donoghue, 127 Ill. 27, 11 Am. St. Rep. 90, 18 N. E. 827; Williams v. Dutton, 184 Ill. 608, 56 N. E. 868; Coxe Bros. & Co. v. Salomon, 188 Ill. 571, 59 N. E. 422; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516–525, 28 L. ed. 1098–1101, 5 Sup. Ct. Rep. 601; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Pacific Exp. Co. v. Seibert, 142 U. S. 339–348, 35 L. ed. 1035–1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Ogden City v. Armstrong, 168 U. S. 224–237, 42 L. ed. 444–451, 18 Sup. Ct. Rep. 98; San Francisco Nat. Bank v. Dodge, 197 U. S. 70–75, 49 L. ed. 669–673, 25 Sup. Ct. Rep. 384; Sandford v. Poe, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 547; Western U. Teleg. Co. v. Norman, 77 Fed. 21; Central P. R. Co. v. Evans, 111 Fed. 74; Dundee Mortgage Trust Invest. Co. v. Parrish, 11 Sawy. 92, 24 Fed. 202; Balfour v. Portland, 28 Fed. 739; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 305; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 374.

The appellee had no hearing as to the power of the board to reassess or as to the value to be placed on its property.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; Fallbrook Irrig. Dist. Co. v. Bradley, 164 U. S. 157, 158, 41 L. ed. 388, 17 Sup. Ct. Rep. 56; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Wurtz v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Powell v. People, 214 Ill. 475, 105 Am. St. Rep. 117, 73 N. E. 795; Fallbrook Irrig. Co. v. Bradley, 164 U. S. 150, 41 L. ed. 385, 17 Sup. Ct. Rep. 56; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Flanders v. Seelye, 105 U. S. 718, 26 L. ed. 1217; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Green v. Bogue, 158 U. S. 478, 39 L. ed. 1061, 15 Sup. Ct. Rep. 975.

The members of the state board of equalization were competent witnesses.

Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; 1 Wigmore, Ev. 350; State Bd. of Equalization v. People, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339; Cummings v. Merchant's Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Pelton v. Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 434, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490–500, 48 L. ed. 761–765, 24 Sup. Ct. Rep. 498; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 307; Cincinnati Southern R. Co. v. Guenther, 19 Fed. 399; First Nat. Bank v. Lucas County, 25 Fed. 749.

The duty of the board to equalize is not a matter of discretion, but a mandatory duty;

and the violation of that mandate is the denial of the equal protection of the laws.

Law v. People, 87 Ill. 405; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 733; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 397; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Railroad & Teleph. Cos. v. Board of Equalizers, supra; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Louisville Trust Co. v. Stone, supra; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; German Nat. Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep. 384.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The claim that the action of the state board of equalization in making the assessment under consideration was the action of the state, and if carried out would violate the provisions of the 14th Amendment to the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a Federal question beyond all controversy. How that question should be decided is another matter, which we will proceed at once to discuss.

The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. In regard to corporations of the class of which the appellee and the other corporations involved here are members, it is the duty of that board to make an original assessment upon them. From the decision of the board in making such assessment no appeal is provided for, and each decision is therefore conclusive, except as proceedings for relief may thereafter be taken in the courts. As to the assessments of local assessing bodies, the board is one of review, but its decisions are equally conclusive, as in the case of original assessments. Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the [36]14th *Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. Following the above case, the Federal courts throughout the country have frequently reviewed the action of taxing bodies when, under the facts, such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the Amendment in question. See Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, the court said: "It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment."

The same principle has been recognized in Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 565, 42 L. ed. 853, 857, 18 Sup. Ct. Rep. 445; Fargo v. Hart, 193 U. S. 490, 502, 48 L. ed. 761, 766, 24 Sup. Ct. Rep. 498.

The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in *the case of other like corporations[37] whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state, which the state might do (Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L.

ed. 615, 25 Sup. Ct. Rep. 342), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the Constitution of the state in levying a tax by valuation, "so that every person shall pay a tax in proportion to the value of his, her, or its property," was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination which, under these facts, was the action of the state through the board. Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here.

We are also of opinion that the case is one over which equity has jurisdiction. In Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the court held that the position of the bank as trustee entitled it to maintain an action in equity and also under the statute of Ohio, it was further held (page 157): "Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, [38]and when *this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake on the part of the state, through its board of equalization, and while acting as a quasi-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity.

In all these cases, however, where there is jurisdiction to tax at all, equity will not grant an injunction to restrain the collection, even of an illegal tax, without the payment on the part of the taxpayer of the amount of a tax fairly and equitably due. People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68, and cases cited. Acting upon this principle, the circuit court refused to issue the injunction until the appellee paid the amount which the court found to be a fair and just amount due from the appellee for the tax of the year 1900, based upon a tax at the same rate as that levied upon other property and on corporations of the same class within the state. The sum to be paid by the appellee herein, as decided by the circuit judge, was $134,350.03. That sum was paid instead of $1,019,211.78, called for by the warrant in the hands of the collector.

Finally, it is objected that the appellee had a complete and adequate remedy at law by paying the amount of the warrant, and then suing the collector to recover the same back as money paid under duress, although upon a void warrant. Undoubtedly, if there be a complete and adequate remedy at law in such *a case as this, the remedy in equity[39] will not be recognized. Assuming the tax to be void, equity will not restrain, by injunction, its collection, unless there be some other ground for equitable interposition. Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

In the cases in 139 U. S., supra, it was recognized that no ground appeared for the interposition of a court of equity, because of the existence of a statute in the state of Tennessee providing for paying the amount of the alleged illegal tax to the officer holding the warrant, and granting to the taxpayer a right to commence an action to recover back the tax thus paid, the statute providing that the officer should pay the amount received into the state treasury, where it was to remain until the question was decided, and, if it was decided in favor of the taxpayer, provision was made for the repayment of the amount by the state. The other averments, beside that of the illegality of the tax, made in these two cases, were held not to constitute a ground for the interposition of a court of equity by restraining the collection of the tax. In the case in 142 U. S., supra, the court held that there was no ground to warrant the interposition of a court of equity. The case was decided upon the ground that the averment of illegality of the tax was not sustained. There is no statute of a similar kind in Illinois which has been called to our attention, but some of the cases in that state hold that such a suit may be maintained against the collector when the money was paid under protest.

In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of [40]the tax, *thereby necessitating a multiplicity of suits, and the proportion of the tax which would go to the state of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax, and in that way it was averred that the appellee would be subjected to great and irreparable injury, for which there was not a complete or adequate remedy at law. There was also the allegation, already referred to in the foregoing statement, that, if compelled to pay this enormous tax, it would be rendered insolvent. We think all these allegations combined take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality, for any other reason, of the tax itself, and bring the case within the jurisdiction of a court of equity. And, in addition, there is the allegation that a levy upon the property of the appellee would interfere with the operation of the street car system in the city of Chicago, operated by the appellee, and would greatly embarrass and injure the public who have to use the cars.

Upon the whole, we think it is apparent that no adequate remedy at law exists in this case, and that the judgment enjoining the collection of the balance of the tax levied against the appellee, above that which has been paid under the direction of the circuit court, must be affirmed.

Mr. Justice **Holmes**, dissenting:

Notwithstanding my unfeigned deference to the judgment of my brethren, I cannot but think that the circuit court was wrong in taking jurisdiction of this case. We all agree, I suppose, that it is only in most exceptional cases that a state can be said to deprive a person of his property without due process of law merely because of the decision of a court, without more. The discussion in Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, concerned a judgment assumed to be authorized by a *statute of the state, and[41] in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a circuit court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the 14th Amendment.

It seems to me that the appellee should not be heard until it has exhausted its local remedies; that the action of the state board of equalization should not be held to be the action of the state until, at least, it has been sanctioned directly, in a proceeding which the appellee is entitled to bring, by the final tribunal of the state,—the supreme court. I am unable to grasp the principle on which the state is said to deprive the appellee of its property without due process of law because a subordinate board, subject to the control of the supreme court of the state, is said to have violated the express requirement of the state in its Constitution,—because, in other words, the board has disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property. I should have thought that the action of the state was to be found in its Constitution, and that no fault could be found with that until the authorized interpreter of that Constitution, the supreme court, had said that it sanctioned the alleged wrong. Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502.

As I think that the circuit court ought to be ordered to dismiss this case, I shall not discuss the merits. But I cannot forbear adding that, so far as the appellee is complaining that it has been compelled to pay the full amount of the tax due from it, and is founding its complaint on the fact that other parties are escaping their liabilities, whether through mistake or still uncorrected fraud, it seems to me to show no sufficient ground for relief, unless exceptional reasons exist, not adverted to in the judgment of the court.

Mr. Justice **Moody** concurs in this dissent.

[42] SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
CHICAGO EDISON COMPANY.
(No. 116.)

SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
CHICAGO CITY RAILWAY COMPANY.
(No. 117.)

SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
SOUTH CHICAGO CITY RAILWAY COMPANY.
(No. 118.)

SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
PEOPLE'S GASLIGHT & COKE COMPANY. (No. 119.)

SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
CHICAGO TELEPHONE COMPANY.
(No. 120.)

SAMUEL B. RAYMOND, County Treasurer, etc., Appts.,
v.
CHICAGO CONSOLIDATED TRACTION COMPANY. (No. 121.)

(See S. C. Reporter's ed. 42.)

These cases are governed by the decision in Raymond v. Chicago Union Traction Company, ante, 78.

[Nos. 116, 117, 118, 119, 120, 121.]

Argued April 8, 9, 1907. Decided October 21, 1907.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois to review judgments enjoining the collection of a tax on the property of certain corporations, which tax is claimed to violate the Federal Constitution. Affirmed.

See same cases below, 114 Fed. 557.

Messrs. **David K. Tone** and **James Hamilton Lewis** argued the cause, and, with Messrs. Edward J. Brundage, Harry A. Lewis, William F. Struckmann, Frank L. Shepard, William H. Stead, and George B. Gillespie, filed a brief for appellants:

Where the sessions of a state board of equalization are public and are held at a time and place fixed by law, it is the duty of all persons to be present and take notice of the board's action.

Lander v. Mercantile Nat. Bank, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908.

The regularity of the procedure in the levying and collection of taxes is a question that arises under the Constitution and laws of the state. So long as no right guaranteed by the Federal Constitution is infringed, this court is controlled by the interpretation placed by the highest court of the state upon such statutes.

Bailey v. Magwire, 22 Wall. 215, 22 L. ed. 850; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595.

Where a person can recover back an illegal tax by an action at law, no relief can be had in a court of equity.

Shelton v. Platt, 139 U. S. 591–595, 35 L. ed. 273–276, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 38, 43 L. ed. 356, 19 Sup. Ct. Rep. 90.

Where a municipal or state officer demands money which he has no right to receive, and a party pays such money to prevent injury to his business or property, the money may be recovered back from the state or the municipality.

Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A.(N.S.) 770, 75 N. E. 803; Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895.

A court of equity should never interfere with the taxing machinery of a state, where the aggrieved party has an adequate remedy by an action at law.

Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co.; Pacific Exp. Co. v. Seibert; and Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works,—supra.

Any citizen and taxpayer who shows that he is interested in having any public official perform his duty may make a demand upon such official for the performance of that duty, and, if that official refuses, such citizen and taxpayer may himself institute a mandamus suit and compel the performance of that duty.

Pike County v. People, 11 Ill. 202; Ottawa v. People, 48 Ill. 240; Hall v. People, 57 Ill. 313; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; State Bd. of Equalization v. People, 191 Ill. 528, 58 L.R.A. 513, 61 N. E. 339.

Even should we concede that the appellee and the corporations named in the mandamus suit were taxed upon their capital stock and franchises at a higher rate and under different rules than were all other corporations for the year 1900, such acts by the state board do not infringe any right or privilege guaranteed by the Federal Constitution.

Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342.

A state may levy a franchise tax to any amount upon a domestic corporation not engaged in interstate commerce, and neither the extortionate amount of such a tax, nor its inequality, presents any question arising under the Constitution of the United States.

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; California v. Central P. R. Co. 127 U. S. 1–41, 32 L. ed. 150–157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

A corporation organized under the laws of Illinois has no right or power to subscribe for or purchase the stock of another corporation.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Harding v. American Glucose Co. 182 Ill. 551, 64 L. R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Dunbar v. American Teleph. & Teleg. Co. 224 Ill. 23, 115 Am. St. Rep. 132, 79 N. E. 423.

The cases here under consideration present no question arising under the Constitution and the laws of the United States.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kelly v. Pittsburgh, 104 U. S. 78, 83, 26 L. ed. 658, 660; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; Kirtland v. Hotchkiss, supra.

Mr. **William G. Beale** argued the cause, and, with Messrs. Gilbert E. Porter, Buell McKeever, and Waldo F. Tobey, filed a brief for the Chicago Edison Company:

The allegations of the bill show a substantial claim in good faith arising under the Federal Constitution, and this is sufficient to give Federal jurisdiction.

Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 562, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653.

The allegations of the bill justify resort to a court of equity, and similar bills have been repeatedly entertained.

Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767, 24 Sup. Ct. Rep. 498; People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. Rep. 68; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan), 113 U. S. 516, 525, 28 L. ed. 1098, 1101, 5 Sup. Ct. Rep. 601; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305.

Resort to the Federal court under the equitable circumstances shown was proper, also, because the state was attempting to tax, indirectly, the patent rights and licenses owned by appellee. Such patent rights are Federal franchises, and the bill alleged that the state had no power to tax capital stock represented by them.

Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 532, 537; Bloomer v. Millinger, 1 Wall. 340, 351, 17 L. ed. 581, 584; Seymour v. Osborne, 11 Wall. 516, 533, 20 L. ed. 33, 35; Cammeyer v. Newton, 94 U. S. 225, 226, 24 L. ed. 72; De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 220, 37 L. ed. 138, 142, 13 Sup. Ct. Rep. 283; Southern P. R. Co. v. California, 118 U. S. 109, 112, 30 L. ed. 103, 104, 6 Sup. Ct. Rep. 993.

The power of the states to tax patent rights has been twice questioned in this court, but under such circumstances that the court was not required to pass specifically upon it and did not do so.

Holt v. Indiana Mfg. Co. 176 U. S. 68, 72, 44 L. ed. 374, 376, 20 Sup. Ct. Rep. 272; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 690, 47 L. ed. 651, 656, 23 Sup. Ct. Rep. 452.

Federal franchises cannot be taxed by the states in the absence of legislation by Congress permitting such taxation.

California v. Central P. R. Co. 127 U. S. 1, 40, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 668, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537.

Rights under the patent laws of the United States cannot be taxed or otherwise burdened under state authority.

M'Culloch v. Maryland, 4 Wheat. 316, 431, 436, 4 L. ed. 579, 607, 608; Weston v. Charleston, 2 Pet. 449, 466–469, 7 L. ed. 481, 487, 488; Ex parte Robinson, 2 Biss. 313, Fed. Cas. No. 11,932; Re Sheffield, 64 Fed. 833.

And it does not matter that the burden attempted to be imposed is an indirect one through a tax on corporate capital stock represented in part by an investment in patent rights.

Fargo v. Hart, 193 U. S. 490, 500, 48 L.

ed. 761, 765, 24 Sup. Ct. Rep. 498; Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669.

It has been specifically decided in at least two states, that capital stock represented by an investment in patent rights cannot be taxed by the states.

Com. v. Westinghouse Electric & Mfg. Co. 151 Pa. 265, 24 Atl. 1107, 1111; Com. v. Edison Electric Light Co. 157 Pa. 529, 37 Am. St. Rep. 747, 27 Atl. 379; People ex rel. Edison Electric Illuminating Co. v. Board of Assessors, 156 N. Y. 417, 42 L. R.A. 290, 51 N. E. 269.

If the assessment of so much of appellee's capital stock as represented its investment in patent rights is not separable from the entire second assessment, then the entire assessment is a nullity.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 415, 30 L. ed. 118, 124, 6 Sup. Ct. Rep. 1132; California v. Central P. R. Co. 127 U. S. 1, 29, 32 L. ed. 150, 153, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

This court has carefully refrained from enunciating any general definition of "due process of law," and has likewise deliberately avoided unnecessary decisions upon the troublesome subject.

Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; California v. Central P. R. Co. 127 U. S. 1, 28, 32 L. ed. 150, 153, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

It is, however, well settled that the prohibitions of the 14th Amendment refer to all agencies and instrumentalities of a state,—legislative, executive, and judicial.

Fayerweather v. Ritch, 195 U. S. 276, 297, 49 L. ed. 193, 209, 25 Sup. Ct. Rep. 58; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; Neal v. Delaware, 103 U. S. 370, 397, 26 L. ed. 567; Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Virginia v. Rives (Ex parte Virginia) 100 U. S. 313, 25 L. ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676.

And in determining what is due process of law, regard must be had to substance, not to form.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

While in this instance appellee did know in advance of the proposed reassessment, it had no opportunity to question the right and power of the board to make it; and, although it was heard by the board, as a matter of grace and favor, respecting the amount of it, such hearing cannot save the statute from unconstitutionality.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 87; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Weyerhaueser v. Minnesota, 176 U. S. 550, 556, 44 L. ed. 583, 586, 20 Sup. Ct. Rep. 485; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 535-538, 40 L. ed. 247, 250, 252, 16 Sup. Ct. Rep. 83; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The power of the board to assess the capital stock of appellee had been exercised and exhausted until the original assessment should be set aside in a proper legal proceeding.

Wabash R. Co. v. People, 196 Ill. 608, 63 N. E. 1084.

Neither by the Illinois courts nor by the state board was anything said or done about giving appellee a credit for the tax already paid under the original assessment. What was done was in fact to burden appellee with two assessments. Whatever the form in which this was done, the result was contrary to the fundamental principles of justice which are an element in due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

Of course, appellee is equitably entitled to such a credit.

Mix v. People, 116 Ill. 273, 4 N. E. 783.

Under the Constitution of Illinois the legislature may provide for some differences in taxation from time to time, by a general law, uniform as to the class upon which it operates, but it has never exercised this power, and, under existing laws, certainly all capital stock assessment and taxation must be uniform and proportionate.

Chicago & A. R. Co. v. Livingston County, 68 Ill. 458; Law v. People, 87 Ill. 385; Chicago v. Fishburn, 189 Ill. 377, 59 N. E. 791.

The supreme court of Illinois has in late years refused to declare taxes invalid in cases where objections have been based solely on violations of the constitutional requirement of uniformity; but it has commonly held, as in the Law Case, supra, that it is the duty of assessing officers and bodies to observe the requirement.

Keokuk & H. Bridge Co. v. People, 161 Ill. 138, 43 N. E. 691; Keokuk & H. Bridge Co. v. People, 161 Ill. 514, 44 N. E. 206.

In this case is shown an unequal and unjust administration of law, practically under the direction of the state supreme court, not unlike that condemned in respect of the fair-seeming San Francisco laundry ordinance.

Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064.

Rights secured by the supreme law of the land cannot be impaired under the state taxing power.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 563, 46 L. ed. 679, 691, 22 Sup. Ct. Rep. 431.

The "equal protection" clause of the 14th Amendment means that state taxation must apply uniformly to corporations of the same class.

Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

The inequality in the second assessment was proved by the testimony of members of the board of equalization familiar with the matter, and this was in accordance with a course frequently followed in other cases in this court.

Pelton v. Commercial Nat. Bank, 101 U. S. 143, 146, 147, 25 L. ed. 901, 902; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 161–163, 25 L. ed. 903, 906, 907; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421–434, 38 L. ed. 1031–1039, 14 Sup. Ct. Rep. 1114; Maish v. Arizona, 164 U. S. 599, 611, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193.

The supreme court of Illinois criticized the failure of the members of the board of equalization to testify in the mandamus suit, saying that they were competent witnesses, and might have been called to explain their methods.

State Bd. of Equalization v. People, 191 Ill. 551, 58 L.R.A. 513, 61 N. E. 339.

Mr. John P. Wilson argued the cause and filed a brief for the Chicago City Railway Company:

Equality is the requirement of the Constitution, and applies to all assessing bodies, even although they act under a statute requiring the assessment to be made at the fair cash value.

Chicago & A. R. Co. v. Livingston County, 68 Ill. 458; Darling v. Gunn, 50 Ill. 424; Chicago & N. W. R. Co. v. Boone County, 44 Ill. 240.

The claim that relief should have been denied on the ground that appellee had an adequate remedy at law is made for the first time in this court, and comes too late.

Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

Where the tax is illegal the remedy is in equity.

Huling v. Ehrich, 183 Ill. 315, 55 N. E. 636; Kimball v. Merchants' Sav. Loan & T. Co. 89 Ill. 613; Weber v. Baird, 208 Ill. 209, 70 N. E. 231; Darling v. Gunn, supra.

The contention that relief should not have been granted on account of the failure of complainant to make a proper tender of the amount due, and that the court did not require a sufficient payment as the condition of granting relief, is not well taken.

Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.

Messrs. John S. Miller and Merritt Starr filed a brief for the South Chicago City Railway Company:

The court below had jurisdiction.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Booth v. Lloyd, 33 Fed. 593; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Smyth v. Ames, 169 U. S. 466, 516–518, 42 L. ed. 819, 838, 839, 18 Sup. Ct. Rep. 418; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 140, 141, 26 L. ed. 98; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 6, 7, 43 L. ed. 341, 343, 344, 19 Sup. Ct. Rep. 77; City R. Co. v. Citizens' Street R. Co. 166 U. S. 562, 567, 41 L. ed. 1116, 1117, 17 Sup. Ct. Rep. 653; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 15, 16, 45 L. ed. 395, 404, 405, 21 Sup. Ct. Rep. 240; Illinois C. R. Co. v. Adams, 180 U. S. 28, 35–37, 45 L. ed. 410, 412, 413, 21 Sup. Ct. Rep. 251; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

Diversity of citizenship is not necessary to confer Federal jurisdiction where the bill shows that, by action of the state, complainant will be deprived of its property without due process of law, or of the equal protection of the laws, in breach of the Federal Constitution.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 26, 45 L. ed. 395, 408, 21 Sup. Ct. Rep. 240, 282; Illinois C. R. Co. v.

Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; Vicksburg Waterworks Co. v. Vicksburg, supra; Smyth v. Ames, 169 U. S. 466, 516, 42 L. ed. 819, 828, 18 Sup. Ct. Rep. 418; Riverside & A. R. Co. v. Riverside, 118 Fed. 736.

And the jurisdiction vested upon this ground extends to every question in the case.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Nashville v. Cooper, 6 Wall. 247, 18 L. ed. 851; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Gregory v. Van Ee, 160 U. S. 643, 646, 40 L. ed. 566, 567, 16 Sup. Ct. Rep. 431; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 140, 141, 26 L. ed. 96, 98.

The state acts through the state board of equalization. Its acts are the acts of the state.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Yick Wo v. Hopkins, supra; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305.

The reassessment in the case deprived appellee of due process of law, and of the equal protection of the laws.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 397, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Berthold v. Hoskins, 38 Fed. 772; Martin v. Barbour, 34 Fed. 701; Huntington v. Central P. R. Co. 2 Sawy. 503; Fed. Cas. No. 6,911; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 183.

The testimony of the members of the state board that they were coerced was competent.

State Bd. of Equalization v. People, 191 Ill. 540, 58 L.R.A. 513, 61 N. E. 339; Pelton v. Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Fargo v. Hart, 193 U. S. 490, 500, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498; Louisville Trust Co. v. Stone, supra.

Mr. **James F. Meagher** argued the cause and filed a brief for the People's Gaslight & Coke Company:

The complainant was not a party to the mandamus suit, and no notice was given to it.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; High, Extr. Legal Rem. 3d ed. ¶ 458; Winstanley v. People, 92 Ill. 402; Gray, Limitations of Taxing Power & Public Indebtedness, § 1295.

The board did not use its own judgment upon arriving at the full value, but, through judicial coercion, used a false standard.

Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 311; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 29, 35 L. ed. 59, 11 Sup. Ct. Rep. 478.

A valuation of property at its full worth, in accordance with the state law, is invalid where there is a systematic, habitual, and intentional undervaluation of other property of the same class throughout the state.

Bureau County v. Chicago, B. & Q. R. Co. 44 Ill. 229; Chicago & N. W. R. Co. v. Boone County, 44 Ill. 240; Randell v. Bridgeport, 63 Conn. 321, 28 Atl. 523; Santa Clara County v. Southern P. R. Co. 18 Fed. 394; Chicago, B. & Q. R. Co. v. Republic County, 14 C. C. A. 456, 32 U. S. App. 224, 67 Fed. 411; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903.

The assessment made by the state board of equalization in 1900 was final. There is no board or body in the state to exercise a revisory power over their judgment.

Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53.

The acts complained of in the case at bar were state actions.

Ex parte Virginia, 100 U. S. 339, 347, 25 L. ed. 676, 679; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Guthrie's 14th Amendment, p. 45.

The case made is clearly one of equitable jurisdiction.

Cummings v. Merchants' Nat. Bank; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 369; Kansas City, Ft. S. & M. R. Co. v. King, 57 C. C. A. 278, 120 Fed. 620; Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591; Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418.

In the bill filed by appellee there is an offer to do equity. Appellee tendered whatever sum the chancellor might decree to be rightfully due. It is true that no specified amount was tendered, for the reason that no portion of the reassessment was valid. If any reliance should be placed by the appellants upon the failure of the bill to tender a specific amount, that contention would be readily met by Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Fargo v. Hart, 193 U. S. 490, 502, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.

Messrs. William G. Beale. Charles S. Holt, and William P. Sidley for the Chicago Telephone Company.

Messrs. William W. Gurley, Isaac M. Jordan, Arthur Dyrenforth, and Howard M. Carter for the Chicago Consolidated Traction Company.

Mr. Justice **Peckham** delivered the opinion of the court:

These cases involve the same principle as that already decided in No. 115 [207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7], and although the facts differ somewhat in the various cases, yet they present substantially the same questions, and the judgment in each case is therefore affirmed.

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[43]*ADELAIDE V. TILT, Benjamin B. Tilt, Joseph W. Congdon, and John R. Curran, as Executors of the Last Will and Testament and Codicil of Albert Tilt, Deceased, Plffs. in Err.,

v.

OTTO KELSEY, Comptroller of the State of New York.

(See S. C. Reporter's ed. 43-60.)

Error to state court — Federal question — how raised.

1. The objection that no Federal right was "specially set up and claimed" within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), governing the appellate jurisdiction of the Federal Supreme Court over state courts, cannot successfully be maintained, where judicial proceedings in New Jersey were clearly relied upon in New York by executors in an "appeal to the surrogate" as a defense to the assessment of the New York transfer tax, although such right was not in terms stated to be one claimed under the Federal Constitution,—especially where the constitutional right was specifically claimed in writing while the surrogate still had the "appeal" under consideration, and its denial was made the subject of exceptions.

Judgment — of sister state — full faith and credit.

2. The full faith and credit due the probate proceedings of the New Jersey courts do not require that the courts of New York shall be bound by the adjudication of the New Jersey courts on the question of domicil.

Judgment — of sister state — full faith and credit.

3. The conclusiveness attending, under the New Jersey practice, the probate of a will, the settlement of the executors' account, and the final distribution of the estate pursuant to orders which the court made, after having decreed that all those who had neglected to bring in their claims were forever barred from their action therefor against the executors, renders repugnant to the full faith and credit clause of the Federal Constitution—where no attack on the jurisdiction of the New Jersey courts was made—the subsequent assessment, under N. Y. Laws 1896, chap. 908, upon the personal estate of the decedent as a resident of New York, of a succession tax, which, under § 222 of that act, is made a lien on the property and a personal obligation of the transferees and executors.

[No. 18.]

Argued and submitted January 28, 1907. Decided October 21, 1907.

IN ERROR to the Surrogate's Court of the County and State of New York to review a judgment entered in pursuance of an order of the Court of Appeals of that state, affirming a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed the order of the surrogate, assessing a succession tax upon the personal estate of a decedent. Reversed.

See same case below in court of appeals, 182 N. Y. 557, 75 N. E. 1134.

Statement by Mr. Justice **Moody**:

This is a writ of error from this court to the surrogates' court of the county and state of New York, to review a judgment entered in that court in pursuance of an order of the court of appeals of that state. The judgment assessed a succession tax upon

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NOTE.—On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

the personal estate of Albert Tilt, deceased, upon the ground that he was, at the time of his death, a resident of the state of New York. Before the assessment of the tax the estate of Tilt, who died testate, was fully [44] administered in *the courts of New Jersey, where the will was probated. In the course of the administration all the personal property, after paying debts, taxes, and charges of administration, was distributed by the executors to the beneficiaries under the will. A reversal of the judgment of the surrogates' court is sought for the reason that it did not give full faith and credit to the judicial proceedings of the state of New Jersey, as required by the Constitution and laws of the United States.

Mr. **William G. Wilson** argued the cause and filed a brief for plaintiffs in error:

The legal residence of Albert Tilt at the time of his death was in the state of New Jersey.

Dupuy v. Wurtz, 53 N. Y. 556; Thorndike v. Boston, 1 Met. 242; Thayer v. Boston, 124 Mass. 139, 26 Am. Rep. 650; Story, Confl. L. § 47; Somerville v. Somerville, 5 Ves. Jr. 750; Bassett v. Wheeler, 84 N. Y. 466; Re Roberts, 8 Paige, 519.

The probate of the will of Albert Tilt in New Jersey is conclusive upon the question of his residence for purposes of administration and tax.

Plant v. Harrison, 36 Misc. 649, 74 N. Y. Supp. 411; Re Coursen, 4 N. J. Eq. 408; Re Straub, 49 N. J. Eq. 264, 24 Atl. 569; Quidort v. Pergeaux, 18 N. J. Eq. 472; Ryno v. Ryno, 27 N. J. Eq. 522; Bolton v. Schriever, 135 N. Y. 69, 18 L.R.A. 242, 31 N. E. 1001; Roderigas v. East River Sav. Inst. 63 N. Y. 467, 20 Am. Rep. 555, 76 N. Y. 316, 32 Am. Rep. 309; Kinnier v. Kinnier, 45 N. Y. 540, 6 Am. Rep. 132; Schluter v. Bowery Sav. Bank, 117 N. Y. 130, 5 L.R.A. 541, 15 Am. St. Rep. 494, 22 N. E. 572.

The administration in New Jersey is a bar.

Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091; State v. McGlynn, 20 Cal. 264, 81 Am. Dec. 118; Deslonde v. Darrington, 29 Ala. 95; Bogardus v. Clark, 4 Paige, 625; Woodruff v. Taylor, 20 Vt. 65; Peck v. Jenness, 7 How. 612, 624, 12 L. ed. 841, 846; Peale v. Phipps, 14 How. 368, 374, 14 L. ed. 459, 461; Byers v. McAuley, 149 U. S. 608, 615, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369.

Mr. **George M. Judd** submitted the cause for defendant in error:

This court has not jurisdiction of the writ of error.

Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 Sup. Ct. Rep. 995; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709.

The Federal question was not specially set up or claimed at the proper time and in the proper way:

(a) It was not specially set up or claimed before the decision rendered by the surrogate of New York county upon the appeal to him.

(b) It has been decided by the court of appeals of the state of New York that the only questions on appeal which can be reviewed by it or by the surrogate are those presented by the appellants in the notice of appeal to the surrogate; and the notice of appeal to the surrogate does not raise a Federal question.

Re Davis, 149 N. Y. 547, 44 N. E. 185; Re Manning, 169 N. Y. 451, 62 N. E. 565.

(c) The record in this case shows that neither the surrogate nor the appellate division nor the court of appeals considered a Federal question.

The only question considered by the surrogate was the question of the residence of the decedent, which was a question of fact.

Dupuy v. Wurtz, 53 N. Y. 562.

When, therefore, an appeal was taken from the order of the surrogate to the court of appeals, the only question presented to said court was the question of law as to whether there was any evidence to support the decision of the surrogate. This was an independent question of law, not involving any Federal question.

Dower v. Richards, 151 U. S. 658, 666, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452.

It must affirmatively appear that a Federal question was raised and presented to the court of appeals for decision, and that such question was decided.

Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; California Powder Works v. Davis, 151 U. S. 389, 393, 38 N. E. 206, 14 Sup. Ct. Rep. 350.

If the probate decree in New Jersey was not conclusive, and the surrogate of New York county has jurisdiction to pass upon the question of residence, then this court cannot review the facts of residence presented to said surrogate, for the question of residence so presented is a question of fact, and, on appeal to the court of appeals, becomes an independent question of law, not involving any Federal question.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Eustis v. Bolless, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep.

131; California Powder Works v. Davis, supra.

The decree of a probate court is in the nature of a proceeding *in rem;* and therefore any ground or fact upon which that decree professes to be founded can be inquired into in a proceeding in another state, brought by a person not a party to the probate proceedings.

Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 238, 241, 23 L. ed. 314, 316; Brigham v. Fayerweather, 140 Mass. 413, 5 N. E. 265; 3 Wigmore, Ev. § 1347, p. 1636; Thormann v. Frame, 176 U. S. 350, 356, 44 L. ed. 500, 503, 20 Sup. Ct. Rep. 446; Overby v. Gordon, 177 U. S. 214, 223, 44 L. ed. 741, 745, 20 Sup. Ct. Rep. 603; 2 Black, Judgm. 2d ed. §§ 635, 794, 795, 808; 1 Woerner, American Law of Administration, 2d ed. p. 337; Townsend v. Van Buskirk, 22 App. Div. 445, 48 N. Y. Supp. 260; Re Law, 56 App. Div. 456, 67 N. Y. Supp. 857.

The Supreme Court of the United States has held that the probate court of one state does not possess the power to bind all the world conclusively as to the fact of domicil by a mere finding of such fact in an *ex parte* proceeding for the appointment of an administrator.

Thormann v. Frame, 176 U. S. 350, 353, 44 L. ed. 500, 502, 20 Sup. Ct. Rep. 446; Overby v. Gordon, 177 U. S. 214, 218, 44 L. ed. 741, 743, 20 Sup. Ct. Rep. 603.

Leaving out of consideration the *ex parte* nature of the probate proceedings, in view of the fact that, by § 15 of the statutes of New Jersey, residence of the decedent in the county is made one of the jurisdictional facts upon which the probate court of that county bases its decree admitting the will to probate, and in view of the further fact that an exemplified copy of the decree of that probate court has been offered in evidence by the appellants claiming a benefit under it, it is a general rule of law that this court is not precluded from inquiring into the question of residence.

The fact that the record of the probate proceedings in New Jersey recites the jurisdictional fact of residence can make no difference.

Hard v. Shipman, 6 Barb. 623; Bolton v. Schriever, 135 N. Y. 73, 18 L.R.A. 242, 31 N. E. 1001; Re Law, 56 App. Div. 457, 67 N. Y. Supp. 857; Ferguson v. Crawford, 70 N. Y. 257, 26 Am. Rep. 589; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Thormann v. Frame, 176 U. S. 350, 356, 44 L. ed. 500, 503, 20 Sup. Ct. Rep. 446.

The surrogate of New York county had jurisdiction to take testimony and pass upon the question of the domicil of the testator.

Re Fitch, 160 N. Y. 91, 54 N. E. 701; Re Bishop, 82 App. Div. 112, 81 N. Y. Supp. 474.

Mr. Justice **Moody** delivered the opinion of the court:

In the disposition of this case we are somewhat embarrassed by our ignorance of the reasons which controlled the decision of the highest court of the state. The opinion of the surrogate *was very brief. His judgment [47] was affirmed upon appeal successively by the supreme court and the court of appeals,—in each court without an opinion and with two judges dissenting. The record shows the following facts: Albert Tilt was engaged in business as a silk manufacturer in Paterson, New Jersey, until the time of his death. Until 1888 he was a resident and citizen of Paterson. In that year he removed to New York city, became a resident and citizen of New York, and remained such until some time in the year 1899. He died in New York on May 2, 1900. His residence and citizenship at the time of his death was in dispute. For many years he had owned a house in New York City, where he lived during the greater part of the year, and another house in Roxbury, New Jersey, where he lived during the summer and early autumn. It is contended by the executors of his will, the plaintiffs in error, that in the last year of his life he changed his domicil from New York City to Roxbury, and that at the time of his death he was domiciled in New Jersey. On the other hand it is contended by the comptroller of New York, the defendant in error, that his domicil continued until his death to be in New York. Upon this question the evidence was conflicting.

After the death of Mr. Tilt, his will was admitted to probate by the surrogate of Morris county, New Jersey, who by law had jurisdiction to do this if the testator resided in the county at the time of his death. The petition for probate described the testator as "late of the township of Roxbury, in said county," and the letters testamentary granted on May 23, 1900, by the surrogate, described him as "late of the county of Morris, deceased." An order was made fixing a time within which creditors must prove claims against the estate. On the expiration of this time a further order was made, that all creditors who had neglected to bring in their claims and demands should "be forever barred from their action therefor against the executors of said deceased." Succession taxes, imposed by the law of New Jersey and the law of the United *States, and all [48] debts, were paid. The executors presented their accounts to the orphans' court of the county, and that court, acting within its jurisdiction, on June 20, 1901, allowed the accounts and directed the distribution of the estate, according to the terms of the will. The executors made the distribution in conformity with the court's order, thereby parting with all the property of the testator which had been in their hands. After the distribution had been accomplished, the state of New York for the first time made known its claim for a transfer tax. The comptroller of the state filed his petition with the surrogate of the county of New York. In response to this petition, on August 16, 1901, Robert Mazet was appointed by the surrogate as appraiser, to fix the fair market value of the property of Albert Tilt, deceased. This was done with the view of ascertaining the amount of a transfer tax due under a section of a statute providing for such a tax "when the transfer is by will or by the intestate laws of this state from any person dying seised and possessed of the property while a resident of the state." On March 6, 1903, Mazet filed his report in the surrogate's court. The material part of this report was: First, that the net personal property of the deceased "subject to tax herein" was, at the time of his death, of the fair market value of $1,056,951.22; second, that Tilt was a resident of New York City at the time of his death; third, that he left a will which had been "duly admitted to probate in the surrogate's court of the county of Morris, state of New Jersey;" fourth, after stating the disposition of his property made by the testator by this will, the report appraised the estate "subject to tax herein" at its fair market value at the amount already stated. On June 15, 1903, the surrogate entered an order adopting the value of the property reported by the appraiser and assessing the amount of the transfer tax specifically on each bequest contained in the will. The total tax amounted to about $13,000. On August 10, 1903, a paper, entitled "Appeal to the Surrogate," was filed by the executors. This paper gave [49] notice of an appeal *to the surrogate from the appraisement, assessment, and determination of the transfer tax, and from the surrogate's own order of June 15. The only ground of appeal which need be stated here is the fifth, which alleged "that the right to assess or impose a tax under the laws of the state of New York upon the transfer of the property of the testator, if there ever was any such right, was barred before the commencement of this proceeding, by a decree of the orphans' court of Morris county, New Jersey, a court of competent jurisdiction, made on the 25th day of February, 1901, barring all claims against the said testator or his estate which had not been presented and proved to said executors, pursuant to public notice heretofore given and published, as prescribed by the laws of the state of New Jersey; and by the further decree of the same court, made on the 20th day of June, 1901, directing the distribution of the estate of said testator in the hands of said executors, according to the terms of the will of the said Albert Tilt, deceased; in obedience to which the said executors, without any notice or knowledge of any claim or liability for the payment of a transfer tax under the laws of the state of New York, distributed the said estate, so that there was not, at the time of the commencement of this proceeding, and is not now, any property of the said estate in the hands of said executors." It was then agreed by counsel that the surrogate should determine on affidavits whether or not Albert Tilt was a resident of New York at the time of his death. Pending the consideration of this question the executor requested in writing certain findings of facts and conclusions of law, of which only two need be stated here. They are as follows: (2) "Under the Constitution of the United States full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the state of New Jersey, and to the accounting and distribution made by his executors under the decree of the orphans' court of Morris county, in said state, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death." (3) "None of the personal *estate [50] of said Albert Tilt is subject to the payment of a transfer tax under the laws of the state of New York, excepting only such of his personal estate as was actually within the state of New York at the time of his death." These requests were refused by the surrogate, who, in a short opinion, found as a fact that Tilt was a resident of New York at the time of his death, and ruled that his personal estate, wherever situated, was subject to the payment of a transfer tax under the laws of New York. An order was accordingly entered affirming the order of June 15. Thereupon the executors filed exceptions, the last two of which were as follows: (20) "To the refusal of the said surrogate to find, as a conclusion of law, that, under the Constitution of the United States, full faith and credit must be given to the probate of said will and codicil of said Albert Tilt in the state of New Jersey, and to the accounting and distribution made by his executors under the decree of the orphans' court of Morris county in said state, of the estate of said Albert Tilt as a resident of New Jersey at the time of his death. (21) To the refusal of the said surrogate to find, as a conclusion of law, that none of the personal estate of said Albert Tilt is subject to the payment of a transfer tax under the laws of the state of New York, excepting only such of his personal estate as was actually within the state of New York at the time of his death." An appeal was then taken, and, as already stated, the action of the surrogate was affirmed by the supreme court and the court of appeals. The proceedings before the surrogate are somewhat fully set forth, because it is contended that no Federal question was properly and seasonably raised in the state courts. We think, however, that a right under the Constitution of the United States was specially set up and claimed by the executors, as required by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), and denied by the highest court of the state, and that therefore we have authority to re-examine the decision. It appears clearly in the paper entitled "Appeal to the Surrogate" that the executors relied upon the judicial proceedings in New Jersey as a defense to the assessment [51]of *the New York tax. They "specially set up and claimed" a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another state, has been held to be a sufficient compliance with the statute. Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; Andrews v. Andrews, 188 U. S. 15, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; and see the remark of the Chief Justice in Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, at page 311, 47 L. ed. 480, at page 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375. Moreover, while the surrogate still had the appeal under consideration and undecided, requests in writing were made to him which clearly and specifically set up the claim that the full faith and credit due, under the Constitution, to the judicial proceedings of the state of New Jersey, forbade the assessment of the tax. These requests were entertained and the claim denied by the surrogate and an exception taken. Upon the record thus made an appeal was taken, and in the disposition of the appeal the Federal question was necessarily passed upon by the highest court of the state, whose decision, therefore, we may re-examine.

That re-examination, however, must be confined to the single question whether, by the assessment of the tax, full faith and credit has been denied to the judicial proceedings of the state of New Jersey, in violation of article 4, § 1, of the Constitution. In the consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was, at the time of his death, a resident of New Jersey, was conclusive upon the state of New York, a stranger to the proceedings. If it was, that is the end of the case; because then New York could not take the first step necessary to bring the estate within the provision of the tax law of that state. But, upon principle and authority, that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicil, nor even evidence of it in a collateral proceeding. Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446; *Overby v. Gordon, 177 U. S. 214, 44 L. ed.[52] 741, 20 Sup. Ct. Rep. 603; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224, and see Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. ed. 314; De Mora v. Concha, L. R. 29 Ch. Div. 268, Affirmed in L. R. 11 App. Cas. 541; Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265. The difference in the effect of a judgment on the *res* before the court and of the adjudication of the facts on which the judgment is based is pointed out by Mr. Justice Holmes in the last case. In an opinion holding that a decree of a probate court admitting a will to probate was not, on an issue between parties, one of whom was not a party to the probate proceedings, competent evidence of the testator's mental capacity, he said: "A judgment *in rem* is an act of the sovereign power; and, as such, its effects cannot be disputed; at least, within the jurisdiction. If a competent court declares a vessel forfeited, or orders it sold free of all claims, or divorces a couple, or establishes a will, . . . a paramount title is passed, the couple is divorced, the will is established as against all the world, whether parties or not, because the sovereign has said that it shall be so. . . . But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it. And it does not follow in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they were rendered. . . . We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard; and, as strangers in interest are not entitled to be heard, there is no reason why they should be [53]bound by the *findings of fact, although bound to admit the title or status which the judgment establishes." We think that this quotation expresses the correct rule and that it is sustained by the decisions of this court. Applying it here, it follows that the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any state, in the trial of a collateral issue, to determine, upon the evidenee produced, the true domicil of the deceased.

But assuming that the New York court had the right to determine, and determined rightly, the domicil of the deceased, what then? The grievance here is not the finding that Mr. Tilt died a resident of New York. It is the assessment, based upon that finding, of a transfer tax upon the legaeies contained in his will. The real question in the case is whether the assessment of that tax by the state of New York is consistent with the full faith and credit required by the Constitution to be given to the judicial proceedings of another state. After the will had been allowed and letters testamentary had been issued by the New Jersey surrogate, the executors named in the will took possession of all the personal property of the testator (the real property not being concerned in this litigation) and began to administer it in accordance with the terms of the will and under the direction of the court. That property, appraised at about $1,000,000, consisted of bank deposits almost entirely in New Jersey banks, life insurance policies, a few small mortgages, notes, and accounts receivable, furniture, horses and carriages, and (constituting more than eight tenths of the whole of the personal estate) stock in New Jersey corporations. A limit of time was fixed for the presentation of claims against the estate, at the expiration of which it was decreed that all creditors who had neglected to bring in their demands should be barred from any action thereon against the executors. What was then done appears in an affidavit of a witness, which was agreed by [54]counsel in *the hearing before the New York surrogate to show the facts. The affidavit is in part as follows: "Said executors accounted as such in the orphans' court of said Morris county, New Jersey, which court had jurisdiction under the laws of New Jersey to entertain such accounting and to direct final distribution of the estate of said testator thereon, and such proceedings were thereupon had that on June 20, 1901, a decree was made in said orphans' court by the judge presiding therein, finally settling and allowing the accounts of said executors, and directing the distribution of the balance of the estate of said Albert Tilt remaining in the hands of said executors according to the terms of said will. Thereupon and prior to August, 1901, such distribution was made by said executors pursuant to the terms of said will, in conformity with the direction of said decree, and thereafter there remained in the hands of said executors no money or personal property whatsoever of the estate of said Albert Tilt."

Thus, executors appointed by a court having, upon the face of the record, authority to make the appointment, had accounted for the property which had come into their hands to the court having jurisdiction, under the laws of the state, to pass on the accounts, and, without knowledge of any claim by the state of New York, had, by the direction of the court, acting within its jurisdiction, paid out the whole estate to those who were entitled to it by the will. All that was done by the executors, and all that was received by the beneficiaries in the disposition of the estate, was done and received by orders of court, duly entered in the course of judicial proceedings. For the purpose of enabling the executors to distribute the estate with safety to themselves, in accordance with a common practice in the settlement of the estate of deceased persons, and under authority conferred by the laws of the state, the court, prior to the distribution, had decreed that all those who had neglected to bring in their claims should be "forever barred from their action therefor against the executors of the deceased." Upon these facts, does the assessment of this *transfer tax by the state of[55] New York, by whose laws the tax thus assessed is made a lien on the property transferred and a personal obligation of the transferee and the executors (Laws of 1896, chap. 908, § 222), give the full faith and credit to which these judicial proceedings are entitled? The answer to this question depends upon the nature of the proceedings and their effect upon the rights of those persons who were not parties or privies to them. If they are binding upon such persons, the state of New York may not levy a tax upon property which has been transferred free from the burden, and impose a personal liability on the executors, who have been declared forever exempt from all demands against the estate. The enforcement of the claim for such a tax against the property, against the distributees of the property, and against those who have distributed it, under the direction of the court, and with its assurance that no claims against them shall longer exist, is plainly inconsistent with the judicial proceedings of which the property has been administered. Is, then, the nature of the proceedings such that they are binding not only upon those who were parties or privies to them, but upon all others as well?

When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the state, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be en-[56]titled to it. Sometimes this duty is *performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans,' surrogate, or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the succession. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, p. 519, 22 L. ed. 599, p. 605: "The world must move on and those who claim an interest in persons and things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*." It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession, through their officers, the executors or administrators, to determine finally, as against the world, all questions which arise therein. Grignon v. Astor, 2 How. 319, 11 L. ed. 283, *per* Baldwin, J., p. 338; Beauregard v. New Orleans, 18 How. 497, 15 L. ed. 469; Foulke v. Zimmerman, 14 Wall. 113, 20 L. ed. 785; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 22 L. ed. 599; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Goodrich v. Ferris, 145 Fed. 844; Loring v. Steineman, 1 Met. 204; Kellogg v. Johnson, 38 Conn. 269; State v. Blake, 69 Conn. 64, 36 Atl. 1019; Exton v. Zule, 14 N. J. Eq. 501; Search v. Search, 27 N. J. Eq. 137; Harlow v. Harlow, 65 Me. 448; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99.

In respect to the settlement of the successions to property on death the states of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable.

*But though a state may attach to the ju-[57] dicial proceedings of the courts through which the devolution of the estates of deceased persons is accomplished, the conclusive effect which has been described, it may not choose to do so, or may choose to do so only in respect of part of the adjudications made in the course of the settlement of the succession. It may, for instance, choose to regard the probate of a will or the grant of letters of administration as conclusive on all, and, on the other hand, to regard an order of distribution as open to attack in a collateral proceeding by those who were not parties to it. The extent to which such proceedings shall be held conclusive is a matter to be determined by each state according to its own views of public policy. The variation in practice in the different states is considerable and no good purpose would be served by considering them. It is enough to instance that in the states of Connecticut and Massachusetts, according to the cases just cited, a decree of distribution is binding upon all, while in the state of New York it appears not to be binding on one who was not a party to it. Re Killan, 172 N. Y. 547, 63 L.R.A. 95, 65 N. E. 561.

When, therefore, we come to consider what faith and credit must be given to these judicial proceedings of New Jersey, we must first ascertain what effect that state attaches to them. The statute enacted to carry into effect the constitutional provision provided that they should have, in any court within the United States, such faith and credit "as they have by law or usage in the courts of the state from which they are taken." Act May 26, 1790 [1 Stat. at L. 122, chap. 11], now § 905, Rev. Stat. (U. S. Comp. Stat. 1901, p. 677). They can have no greater or less or other effect in other courts than in those of their own state. Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687; Robertson v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. In ascertaining, on a writ of error to a state court, what credit is given to these judicial proceedings by the laws and usages of the state of New Jersey, we are limited to the evidence on that subject before the court whose judgment we are reviewing. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 [58]Sup. Ct. Rep. 242; *Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 622, 30 L. ed. 522, 7 Sup. Ct. Rep. 398. The only evidence upon this point was in an affidavit of an attorney and counselor at law of that state. The evidence is meagre and not entirely satisfactory and conclusive. It was, however, uncontradicted. It tended to show that the surrogate had jurisdiction to probate the will and issue letters testamentary, and that the probate and issue of letters could not be impeached in a collateral proceeding; that the surrogate had "under the laws of New Jersey full and competent jurisdiction" to make the order limiting the time for creditors of the estate to bring in their demands, and the subsequent order that all who had neglected to do so "should be forever barred from their action therefor against the executors of said deceased;" that the acts of the surrogate cannot be impeached collaterally, and that the orphans' court had jurisdiction under the laws of New Jersey "to direct final distribution of the estate of said testator," and it cited four cases from the New Jersey reports (Re Coursen, 4 N. J. Eq. 408; Quidort v. Pergeaux, 18 N. J. Eq. 472; Ryno v. Ryno, 27 N. J. Eq. 522; and Re Straub, 49 N. J. Eq. 264, 24 Atl. 569). In relying upon evidence of this kind we are quite aware that we may not ascertain with the precision which might be desired the credit which the state of New Jersey attaches to these judicial proceedings. But it is all that we can have. We think that we may safely infer from it that the order of the surrogate barring all creditors who had failed to bring in the demand from any further claim against the executors was binding upon all. It was an order which he had "full and competent authority to make," and it was one of the acts which could not be impeached collaterally. We think, also, that the jurisdiction to direct a final distribution means a distribution which shall be final, so far, at least, as any person having a demand against the estate is concerned. If we have discerned correctly the effect which New Jersey gives to these judicial proceedings, it is obvious that the assessment of this tax denies them full faith and credit in two respects: First, in seeking a part of an estate *which has been finally distributed to those[59] who were entitled to it under the will; and, second, in fixing a personal responsibility for the tax upon the executors who had been conclusively exonerated from such a liability.

Up to this point it has been assumed that the New Jersey court had jurisdiction to probate the will and administer the estate, and what has been said upon the effect of the judicial proceedings has been based upon that assumption. When, however, full faith and credit is demanded for a judgment in the courts of other states, an inquiry into the jurisdiction is always permitted, and if it be shown that the proceedings relied upon were without the jurisdiction of the court they need not be respected. Thompson v Whitman, 18 Wall. 457, 21 L. ed. 897; Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446, and cases cited.

The defendant in error, acting upon this well-settled rule, might have attacked the jurisdiction of the New Jersey courts, and thus brought forward for consideration many important questions which, in the view we take of the case, need not even be stated. But there was no attempt, except in argument here, to deny the right of the New Jersey court to act upon the paper writing purporting to dispose of the estate of Tilt, and, by admitting it to probate, to convert it into an operative will. It is true that, as a basis of assessing transfer taxes, it was proved that Tilt was a resident of New York at the time of his death,—a fact which would be relevant to the question of jurisdiction. But that fact was not proved or used for the purpose of invalidating the proceedings taken in probating the will and administering the estate. On the contrary, the taxes were based upon the provisions of the instrument, which derived all its authenticity as a will and all its capacity to transmit property from the judicial proceedings in New Jersey. It appears conclusively from the action taken in the New York surrogate court that there was no attempt to declare the New Jersey proceedings void because they were taken without jurisdiction. In the appraiser's report it is said that the deceased had left a will "which was duly admitted to probate in *the surrogate's court of the coun-[60] ty of Morris, state of New Jersey, and that letters testamentary were issued by said surrogate court." The specific legacies and the disposition of the residue of the estate were then stated. The surrogate, in assessing the taxes, assessed them specifically on the beneficiaries, giving their respective names and the values of the property they respectively took under the will. Two life estates and several remainders, created by the will, were valued appropriately and the taxes assessed accordingly. All this is utterly inconsistent with an attack upon the jurisdiction, and we need not consider whether it could have been made with success.

It is quite obvious that what was done here was the assessment by one state of taxes upon transfers of personal property, taking effect under the laws of another state, entirely regardless of the situs of the property transferred. This suggests grave constitutional questions, which we cannot consider because they were not properly and seasonably raised in the court below.

For the foregoing reasons we think that the judgment below denied to the New Jersey proceedings the full faith and credit to which they were entitled by the Constitution and laws of the United States, and accordingly it is reversed.

Mr. Justice **Harlan** dissents.

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[61]*EX PARTE FIRST NATIONAL BANK OF CHICAGO, H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, Petitioners. (No. 8, Original.)

FIRST NATIONAL BANK OF CHICAGO and H. W. Rogers and James C. Rogers, as H. W. Rogers & Brother, Plffs. in Err.,
v.
CHICAGO TITLE & TRUST COMPANY, Trustee of Alexander Rogers, Bankrupt, and James A. Patten. (No. 38.)

(See S. C. Reporter's ed. 61–67.)

Error to circuit court of appeals — parties.

1. A writ of error to the circuit court of appeals to review a judgment of that court issuing a peremptory mandamus requiring a district court to modify its judgment entered in supposed compliance with the mandate of the Supreme Court will not be dismissed because the district judge obeyed the order and did not sue out the writ, where it appears on the record that the judge declined to join, that he has no personal interest in the judgment, and that the plaintiffs in error have such an interest, and were made parties for the purpose of protecting their rights.

Courts — jurisdiction of circuit court of appeals — mandamus to enforce mandate of Supreme Court.

2. A circuit court of appeals to which is addressed the mandate of the Supreme Court directing the remanding of the cause to the district court for further proceedings in conformity with the opinion upon which the mandate was based has no jurisdiction to compel the district court, by mandamus, to modify the decree entered in supposed compliance with such mandate, to conform to the view of the Supreme Court's opinion entertained by the circuit court of appeals.

Appeal — compliance with mandate.

3. A decree of a Federal district court for the transfer to certain adverse claimants of a part of the proceeds of a sale of property not in possession of the trustee in bankruptcy, without prejudice to the rights of such trustee, "if this court shall so authorize," to litigate in any proper court the question of his right to recover such funds as a part of the bankrupt's general estate, is a sufficient compliance with the mandate of the Federal Supreme Court, which had directed the remanding of the case for further proceedings in conformity with its opinion, in which it was stated that the district court's original decree should have been "without prejudice to the right of respondents to litigate in a proper court."

[Nos. 8, Original, and 38.]

Submitted May 13, 1907. Decided October 28, 1907.

PETITION for mandamus directed to the Judges of the United States Circuit Court of Appeals for the Seventh Circuit and to the Honorable Solomon H. Bethea as Judge of the District Court of the United States for the Northern District of Illinois to compel the setting aside of a decree of the District Court, entered in conformity to the mandate of the Circuit Court of Appeals, directing a modification of a decree entered by the District Court in supposed compliance with the mandate of the Supreme Court. Granted. Also

A WRIT of error to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment issuing a peremptory mandamus requiring the District Court for the Northern District of Illinois to modify its judgment entered in supposed compliance with the mandate of the Supreme Court. Reversed.

See same case below in No. 38, 77 C. C. A. 408, 146 Fed. 742.

The facts are stated in the opinion.

Mr. **Henry S. Robbins** submitted the

NOTE.—On parties in proceedings for appellate review by Federal Supreme Court—see notes to Wedding v. Meyler, 66 L.R.A. 854, and Owings v. Kincannon, 8 L. ed. U. S. 727.

On the jurisdiction of the circuit court of appeals—see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; Salmon v. Mills, 13 C. C. A. 374; and United States Freehold Land & Immigration Co. v. Gallegos, 32 C. C. A. 475.

On the enforcement of a decree of the appellate court by mandamus—see note to Ex parte Chicago Title & T. Co. 77 C. C. A. 409.

cause for petitioners and plaintiffs in error. Messrs. Wallace Heckman and James G. Elsdon were on the brief:

In mandamus suits parties interested in, or to be affected by, the judgment, may be allowed to intervene and become parties for the purpose of resisting the issuance of the writ.

State ex rel. Southern Bank v. Pilsbury, 31 La. Ann. 1; State ex rel. Graber v. Matley, 17 Neb. 564, 24 N. W. 200; Watkins v. Kirchain, 10 Tex. 375; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539; Bohnet v. New York, 150 N. Y. 279, 44 N. E. 949; Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933; Williams v. Morgan, 111 U. S. 696, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; Ex parte Jordan, 94 U. S. 248, 24 L. ed. 123; Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636.

The district judge appearing by counsel and declining to sue out or join in such writ of error, the court ordered that these plaintiffs in error be allowed to sue out a writ of error. This was a sufficient summons and severance to make the appearance of the district judge as plaintiff in error unnecessary.

Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 19 L. ed. 953; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39.

The district judge has no personal interest in the case. He is a party only in his representative capacity. The record sufficiently discloses that he is not interested on the side of defendants in error, nor in sustaining the order sought to be reviewed. He is, therefore, not within the rule which requires that all the parties to the record who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard on such appeal.

Davis v. Mercantile Trust Co. 152 U. S. 590, 593, 38 L. ed. 563, 564, 14 Sup. Ct. Rep. 693.

At best, he was, after severance, only a nominal party, and as such was properly omitted.

Amadeo v. Northern Assur. Co. 201 U. S. 194, 201, 50 L. ed. 722, 726, 26 Sup. Ct. Rep. 507; Germain v. Mason, 12 Wall. 259, 20 L. ed. 392; Basket v. Hassell, 107 U. S. 602, 610, 27 L. ed. 500, 502, 2 Sup. Ct. Rep. 415.

But, if this were otherwise, the objection is not a substantial one, because, while he is not named in the writ of error, he accepted service of the citation. Under these circumstances, this court should, if necessary, allow the writ of error to be amended by inserting his name therein, as it has the power to do.

Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432, 6 Sup. Ct. Rep. 74; Walton v. Marietta Chair Co. 157 U. S. 342, 39 L. ed. 725, 15 Sup. Ct. Rep. 626.

The modified order first entered in the district court, which the mandamus writ sought to change, was in effect the decree of this court, and the circuit court of appeals was without jurisdiction to change it.

Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1045; Kimberly v. Arms, 40 Fed. 549; Southard v. Russell, 16 How. 547, 569, 14 L. ed. 1052, 1062; Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Skillern v. May, 6 Cranch, 267, 3 L. ed. 220; Livingston v. Story, 12 Pet. 339, 9 L. ed. 1108; United States v. Knight (United States v. Moorehead) 1 Black, 488, 17 L. ed. 80.

The power to construe and enforce a decision of this court by mandamus is exclusively in this court.

Rosenbaum v. Bauer, 120 U. S. 459, 30 L. ed. 747, 7 Sup. Ct. Rep. 633; Bath County v. Amy, 13 Wall. 244, 20 L. ed. 539; Smith v. Bourbon County, 127 U. S. 105, 112, 32 L. ed. 73, 77, 8 Sup. Ct. Rep. 1043; Davenport v. Dodge County, 105 U. S. 242, 26 L. ed. 1020; United States ex rel. Iron County v. Severens, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768; United States ex rel. Mudsill Min. Co. v. Swan, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647; Re Sanford Fork & Tool Co. 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291.

Messrs. **Newton Wyeth** and **Joseph E. Paden** submitted the cause for respondents and defendants in error:

There are cases wherein the judgment or decree is against several parties, in which there may be a severance and appeal or writ of error by a part, the others appearing and refusing to join.

Hardee v. Wilson, 146 U. S. 181, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Beardsley v. Arkansas & L. R. Co. 158 U. S. 127, 39 L. ed. 919, 15 Sup. Ct. Rep. 786.

But there can be severance only where the person severed is a party.

McGuire v. Hurst, 23 Ky. L. Rep. 846, 64 S. W. 435; Osborne v. Kammer, 96 Va. 228, 31 S. E. 19.

Here, the plaintiffs were not parties, and they had only an academic interest, and no interest in law in the mandamus proceeding. The only question involved was, Had the judge of the district court conformed, or not, with the directions of the court of appeals? and whether any property rights would be affected. The judge represented his own ministerial interest and official relation to the order of November 1, 1905, involved in the mandamus. If it could properly be done in a case of this character, there was no order of court substituting the plaintiffs in error for the district judge, or allowing them to represent him. They had no interest or power either to restrain him in complying with the directions of the judgment or to prosecute the defense further.

Davis v. Mercantile Trust Co. 152 U. S. 593, 38 L. ed. 564, 24 Sup. Ct. Rep. 693.

The parties against whom the writ of error was sued out did not include the district judge, nor was any citation issued against him. Under these circumstances it would appear that the writ of error has no standing.

Mason v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062.

The judgment has been executed and satisfied; the peremptory writ was voluntarily and promptly complied with by the district judge. The respondent in the mandamus proceedings, if entitled to prosecute the writ of error, declined to sue out a writ of error, and so stated by his counsel, and instead thereof chose to comply with the writ. The interveners neither prosecuted the writ in the name of the district judge, nor was the writ of error made a supersedeas. No controversy remains between the parties entitled to litigate, and review would be immaterial and ineffectual.

Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Tennessee v. Condon, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619; San Diego School Dist. v. San Diego County, 97 Cal. 438, 32 Pac. 517; Jacksonville School Dist. v. Crowell, 33 Or. 11, 52 Pac. 693.

Mr. Justice **Holmes** delivered the opinion of the court:

These cases arise out of the proceedings subsequent to the decision of this court in First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693. In that case the trust company, as receiver, subsequently trustee in bankruptcy, filed a petition in the district court, alleging possession of certain property and asking for directions in respect of a sale. The district court found that a storage company had the possession and right of possession, but nevertheless retained jurisdiction, and, a sale having been had by consent, made a summary order for transfer to the petitioner of part of the proceeds of the sale. An appeal was taken to the circuit court of appeals, and that court sustained the jurisdiction of the district court. On certiorari this court held that the circuit court of appeals had no jurisdiction of the appeal, and that the district court, having found that the receiver and trustee was not in possession of the fund, had no jurisdiction to proceed further. It thereupon rendered a judgment and issued a mandate reversing the decree of the circuit court of appeals, and directing that court to dismiss the appeal and to remand the case to the district court for further proceedings in conformity with the opinion upon which the mandate was based.

The circuit court of appeals thereupon dismissed the appeal and remanded the cause for further proceedings as directed. The opinion to which the proceedings of the district court were to conform concluded with these words: "In our *view the district [65] court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made." The district court made a decree "without prejudice to the rights of the Chicago Title & Trust Company, the trustee herein, if this court shall so authorize, to litigate in any proper court the question of the right of said trustee to recover said funds as a part of the bankrupt's general estate." The trustee complained of the form of this decree, especially because of the insertion of the words "if this court shall so authorize," and moved in this court for leave to file a petition for mandamus requiring the district judge to modify it, but leave was denied. 200 U. S. 613, 50 L. ed. 620, 26 Sup. Ct. Rep. 753.

The trustee next made a similar application to the circuit court of appeals, whereupon that court granted it and issued a peremptory writ requiring modifications to be made. 77 C. C. A. 408, 146 Fed. 742. The petitioners and plaintiffs in error, claiming an interest in the fund, then applied for leave to intervene for the purpose of prosecuting a writ of error; their application was allowed, and leave was granted them to sue out the writ, the order reciting that the district judge was present by counsel, but declined to sue out or join in the same. On the same day the circuit court of appeals refused to make the writ act as a supersedeas, and on the next day the district judge entered a decree conforming to the mandate of the circuit court of appeals. The present proceedings are brought for the purpose of reversing the action of the circuit court of appeals and of reinstating the former decree of the district court.

There is a motion to dismiss the writ of error on the grounds that the judge, who was the only party to the mandate alleged to be erroneous, did not sue out the writ, but that, on the contrary, he has obeyed the order, and that the plaintiffs in error are not privy to the judgment. We deem it a [66]sufficient answer *to this motion to say that it appears on the record that the judge declined to join (Masterson v. Herndon [Masterson v. Howard] 10 Wall. 416, 19 L. ed. 953; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39), that he has no personal interest in the judgment (Davis v. Mercantile Trust Co. 152 U. S. 590, 593, 38 L. ed. 563, 564, 14 Sup. Ct. Rep. 693), and that the plaintiffs have such an interest, and were made parties for the purpose of protecting their rights. The fact that the judge obeyed the order in force against him cannot prejudice the position of the plaintiffs. They have the same interest in having the former decree of the district court reinstated that they had in having it stand.

We are of opinion that the order of the circuit court of appeals was wrong. The mandate of this court was addressed to it alone, it is true, in point of form. It is customary to issue but a single mandate. But the directions as to the further proceedings of the district court were not an order to the circuit court of appeals to issue an order to the district court. They were directions which the circuit court of appeals was simply to communicate to the district court, and which the district court was to follow on the authority of this court, not of the circuit court of appeals. The suggestion of the need of speedy relief seems to have counted for something in the making of the order appealed from, and the denial of a mandamus by this court was treated as an intimation that the final direction to the district court was to be regarded as proceeding from the circuit court of appeals. Such was not the import of the action of this court. The circuit court of appeals had no jurisdiction in the matter, and the denial of a mandamus by this court did not confer or declare jurisdiction to grant what this court denied. It follows that the judgment of the circuit court of appeals must be reversed.

As the judgment reversed has been acted upon by the district court it becomes necessary to consider whether the former or the present decree of the district court was the proper one to enter. The present one might be right notwithstanding the want of jurisdiction on the part of the higher court to order it to be made. We need not determine [67]whether the language *quoted from our former opinion was improvidently used. It is enough to say that the opinion did not purport to fix the words of the new decree. It merely gave a general direction which was to be carried out in a form to be settled by the district court. It declared, perhaps unnecessarily, that the decree was to be without prejudice to whatever right the respondents might have to litigate in a proper court, not that they were entitled to litigate, or that the authority given by the bankruptcy law, § § 2 (7), 11 c, 47 (2),† to the district court to control such litigation, was superseded. We are of opinion that the decree first entered by the district court complied with the language of the opinion, and that the subsequent decree, having been entered only in obedience to an unwarranted judgment, should be set aside. Re Potts, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Ex parte Dubuque & P. R. Co. (Dubuque & P. R. Co. v. Litchfield) 1 Wall. 69, 17 L. ed. 514.

Judgment of the Circuit Court of Appeals reversed.

Mandamus to go to the District Court to set aside its decree entered in pursuance of said judgment.

URIAH S. LEE, Frank B. Lee, and Harry Sutton, Plffs. in Err.,
v.
STATE OF NEW JERSEY.

(See S. C. Reporter's ed. 67-72.)

Error to state court — moot question.

1. A judgment of a state court which does not so enforce a state statute as to deprive the party complaining of rights which are protected by the Federal Constitution will not be reversed in the Supreme Court of the United States because such statute, when enforced against a class to which the party complaining does not belong, may work a deprivation of such constitutional rights.

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†Act July 1, 1898, chap. 541, 30 Stat. at L. 546, 549, 557 (U. S. Comp. Stat. 1901, pp. 3421, 3426, 3438).

NOTE.—On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Olfield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. People, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On the regulation of oyster fisheries—see note to Bradshaw v. Lankford, 11 L.R.A. 583.

On shell fisheries, see note to State v. Shaw, 60 L.R.A. 516.

Commerce — state regulation of oyster industry.

2. Rights under the commerce clause of the Federal Constitution or under the 14th Amendment are not infringed by the provisions of N. J. act March 24, 1899, § 20, as amended by the act of March 22, 1901, under which a conviction may be had for using a dredge in tidal waters of the state for the purpose of catching oysters upon leased lands without the consent of the lessees.

[No. 16.]

Argued October 16, 1907. Decided October 28, 1907.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment affirming a judgment of the Supreme Court of that state, which affirmed a conviction in the Court of Quarter Sessions of Cumberland County of unlawfully dredging upon oyster beds. Affirmed.

See same case below (N. J.) 59 Atl. 1118.

The facts are stated in the opinion.

Mr. **E. A. Armstrong** argued the cause, and, with Mr. William T. Read, filed a brief for plaintiffs in error.

Mr. **Nelson B. Gaskill** argued the cause, and, with Mr. Robert H. McCarter, filed a brief for defendant in error.

Mr. Justice **Day** delivered the opinion of the court:

The plaintiffs in error were convicted in the court of quarter sessions of Cumberland county, New Jersey, at the May term, 1903, of the offense of unlawfully dredging upon certain oyster beds for the purpose of catching oysters, contrary to the statute enacted in that state. This judgment was affirmed in the court of errors and appeals of New Jersey and this writ of error seeks the reversal of that judgment.

Section 20 of the act of 1899, amended, Laws of 1901, p. 307, provides:

"Any person or persons who shall hereafter dredge upon or throw, take, or cast his oyster dredge, or any other instrument used for the purpose of catching oysters, upon any oyster bed or ground duly marked, buoyed, or staked up within the waters of the Delaware river, Delaware bay, and Maurice River cove, in this state, belonging to any other person, without the permission of the lessee or lessees thereof, shall be guilty of a misdemeanor and of the violation of the provisions of this act."

It is the contention of the plaintiffs in error that this statute violates the right of free navigation, and undertakes to regulate interstate commerce in violation of § 8, article 1, of the Federal Constitution, and deprives the plaintiffs in error of rights secured by the 14th Amendment.

The power of the state to regulate the oyster industry, *although the same is carried [70] on under tidal waters in the state, is not contested, and could not successfully be. Smith v. Maryland, 18 How. 71, 15 L. ed. 269; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

The objection to the legality of the conviction from the standpoint of rights protected by the Federal Constitution, as urged upon our attention, rests upon the argument that § 20, amended as above quoted, permits the conviction of a person who shall *take* an oyster dredge or other instrument used for the purpose of catching oysters, on any oyster bed or grounds within such navigable waters, thereby abridging and interfering with the right of free commerce with foreign nations, and among the several states. And it is argued that persons sailing over such waters, having an oyster-dredge aboard a boat, might be convicted of thus taking a dredge over such ground, in violation of the statute. Of this contention it is enough to say that in this case no such construction of the statute was made or enforced against the plaintiffs in error. Nor were they convicted because of any such state of facts; and it is well settled in this court that, because a state statute, when enforced in a state court against a class to which the party complaining does not belong, may work a deprivation of constitutional rights, that fact does not authorize the reversal of a judgment of a state court not enforcing the statute so as to deprive the party complaining of rights which are protected by the Federal Constitution. New York ex rel. Hatch v. Reardon, 204 U. S. 152-160, 51 L. ed. 415-422, 27 Sup. Ct. Rep. 188, and cases there cited.

An inspection of this record shows that the count of the indictment under which the plaintiffs in error were convicted charged them with unlawfully dredging, throwing, and casting dredges for the purpose of catching oysters upon certain leased lands, in violation of the statute.

The testimony offered on the part of the state tends to show that certain dredges were thus thrown and cast for the purpose of catching oysters upon leased lands belonging to one Allen.

*On the part of the defense the witnesses [71] testify that the dredges were not thus cast and used upon the lands in question. There was no pretense in the charge in the indictment, or in the testimony offered by the people, that a conviction could be had for the mere taking of a dredge over the leased lands. The conviction depended, both in the charge and in the testimony, upon establishing the fact that the plaintiffs in error thus illegally used the dredges.

It is contended that the plaintiffs in error might have been convicted for the mere sailing over the lands with a dredge aboard the boat, because of the following language in the court's charge:

"It then remains to be considered whether or not the defendants on that day dredged or threw, took or cast, a dredge or other instrument used for the purpose of catching oysters upon that ground. If they find that they did, then they should be convicted of illegal dredging, as charged in the first count of the indictment."

But this excerpt must be read in connection with the rest of the charge, and it is perfectly apparent that it was not intended that the jury might convict for taking a dredge across the lands in sailing over them, under the indictment which made no mention of such taking, but distinctly counted upon the unlawful throwing and casting of the dredge upon the leased ground for the purpose of catching oysters. For immediately following the language quoted the learned judge goes on to say:

"Now, the state produces, bearing upon that question, the owner of the ground, and he testifies that on the day named in the indictment he, aboard of the Golden Light, with Captain Hilton, visited his ground; that as they approached it,—you will recall just how near they placed themselves, from their testimony,—as they approached it they saw these defendants aboard of a vessel called the Lee. maneuvering up and down this ground, No. 137, section B, of Captain Allen, and heaving their dredges thereon. Now, gentlemen, if you believe [72]that *testimony, if you believe that occurred as these witnesses for the state say it occurred, then, regardless of whether or not they got any oysters, if they were throwing their dredges there upon that ground they should be convicted under the first count of this indictment.

. . . . . .

"Now, considering all of this testimony and any other testimony in the case, you ought to determine whether or not the defendants were there heaving their dredges and dredging upon this ground. And in endeavoring to ascertain the truth from this conflicting testimony it is but the dictate of common sense that you should consider whether any of the witnesses have a motive to testify falsely."

It is therefore apparent that the possible construction of the statute in such manner as to convict plaintiffs in error of a crime in merely exercising their right to navigate interstate waters was not made essential to the determination of the case.

A conviction was had because of the use of a dredge upon leased lands, in violation of the New Jersey statute for the protection of the oyster industry. Against the statute, as thus enforced, no valid objection can be urged for want of power to pass or enforce it because of rights protected by the Federal Constitution.

Judgment of the Court of Errors and Appeals of New Jersey is affirmed.

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*SEABOARD AIR LINE RAILWAY, Plff. in Err., [73]
v.
A. L. SEEGERS and W. B. Seegers, Doing Business as Seegers Bros.

(See S. C. Reporter's ed. 73–79.)

Constitutional law — equal protection of the laws — regulation of common carrier.

Common carriers are not denied the equal protection guaranteed by U. S. Const., 14th Amend., by the provisions of S. C. act February 23, 1903, p. 81, § 2 requiring them to adjust and pay every claim for loss or damage to an intrastate shipment within forty days after the filing of a claim, under penalty of $50 for each failure or refusal, where there can be no award of a penalty under the statute unless there is a recovery of the full amount claimed.

[No. 15.]

Argued October 16, 1907. Decided November 4, 1907.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which reversed a judgment of a Circuit Court of that state, reversing a judgment of the Magistrate's Court in the County of Chesterfield, assessing a penalty against a common carrier for its failure to adjust and pay a claim as required by statute, and affirmed the judgment of the Magistrate's Court. Affirmed.

See same case below, 73 S. C. 71, 52 S. E. 797.

The facts are stated in the opinion.

Mr. **William F. Stevenson** argued the cause, and, with Messrs. Edward McIver and Stevenson & Matheson, filed a brief for plaintiff in error:

A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

NOTE.—On constitutional inequality or discrimination in statutes allowing attorneys' fees—see note to Farmers' & M. Ins. Co. v. Dobney, 47 L. ed. U. S. 821.

Clear and hostile discrimination against particular persons and classes cannot be made.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

Porter v. Charleston & S. R. Co. 63 S. C. 180, 90 Am. St. Rep. 670, 41 S. E. 108.

A Texas statute very much like the one under consideration has been held unconstitutional.

Gulf, C. & S. F. R. Co. v. Ellis, supra.

Similar statutes in the states of Alabama, Mississippi, Michigan, Arkansas, Nebraska, Illinois, and West Virginia have been held unconstitutional.

South & North Ala. R. Co. v. Morris, 65 Ala. 193; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641; Wilder v. Chicago & W. M. R. Co. 70 Mich. 382, 38 N. W. 289; St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

Laws imposing heavy penalties on the laborer for violating a contract to labor, and imposing none on the employer, are unconstitutional.

State v. Williams, 32 S. C. 125, 10 S. E. 876.

There can be no certain remedy in the laws where the legislature may prescribe one rule for one suitor, or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it; thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision.

Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500.

Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss?

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Williams, supra; Davidson v. Jennings, 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641; Wilder v. Chicago & W. M. R. Co. 70 Mich. 382, 38 N. W. 289; Randolph v. Builders & Painters Supply Co. 106 Ala. 501, 17 So. 721; 8 Cyc. Law & Proc. p. 1139.

No counsel appeared for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The question in this case is the constitutionality of § 2 of an act of the state of South Carolina, approved February 23, 1903 (24 Stat. at L. 81), which reads:

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor *until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of $50 for each and every such failure, to be recovered by any consignee or consignees aggrieved, in any court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of § 1710, vol. 1, of the Code of Laws of South Carolina, 1902." [76]

The difference between the value of the goods shipped and the freight charges, $1.75, and the amount of the penalty, $50, naturally excites attention. The supreme court of the state held the section constitutional, —a decision conclusive so far as the state Constitution is concerned,—and therefore we are limited to a consideration of its alleged conflict with the Constitution of the United States. The shipment was wholly intrastate, being from Columbia, South Carolina, to McBee, South Carolina, and undoubtedly subject to the control of the state. It is, of course, unnecessary to consider the validity of the statute when applied to a shipment from without the state.

It is contended that the equal protection of the laws, guaranteed by the 1st section of the 14th Amendment, is denied. The power of classification is conceded, but this will not uphold one that is purely arbitrary. There must be some substantial foundation and basis therefor. It is asserted that this is merely legislation to compel carriers to pay their debts within a given time, by an unreasonable penalty for any delay, while no one else is so punished, and that there is no excuse for such distinction. We have had before us several cases involving classification statutes, and while the principles upon which classifications may rightfully be made are clear and easily stated, yet the application of those principles to [77] the different *cases is often attended with much difficulty. See, among others, on the general principles of classification, Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, and of cases making application of those principles: Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, and cases cited in the opinion; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debts. As the supreme court of South Carolina said in Best v. Seaboard Air Line R. Co. 72 S. C. 479, 484, 52 S. E. 223, 225:

"The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in a court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary."

This ruling of the supreme court finds support, if any be needed, in the preamble of the statute, which reads: "An Act to Regulate the Manner in Which Common Carriers Doing Business in This State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight."

It is not an act leveled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guaranty against excessive claims in that, as held by the supreme court of the state in Best v. Seaboard Air Line R. Co. supra, there can be no award of a penalty unless there be a recovery of the full amount claimed.

*Further, the matter to be adjusted is one [78] peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification.

While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go even in cases where classification is legitimate; but we are not prepared to hold that the amount of penalty imposed is so great, or the length of time within which the ad-[79]justment and payment are to be *made is so short, that the act imposing the penalty and fixing the time is beyond the power of the state.

The judgment of the Supreme Court of South Carolina is affirmed.

Mr. Justice **Peckham** dissents.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 79-88.)

Corporations — conditions of incorporation — general reference to existing laws.

A street railway company whose charter subjects it to "all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force, relating to street railway companies," is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations.

[No. 13.]

Argued October 15, 16, 1907. Decided November 4, 1907.

IN ERROR to the Superior Court of the State of Massachusetts to review a conviction of a street railway company, on appeal from the First District Court of Bristol County, in that state, for refusing to transport school children at a reduced rate, exceptions having been heard by the Supreme Judicial Court and overruled. Affirmed.

See same case below, 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530.

The facts are stated in the opinion.

Mr. **Everett Watson Burdett** argued the cause, and, with Mr. Joseph H. Knight, filed a brief for plaintiff in error:

Arbitrary discrimination between persons or corporations is unlawful.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

The mere fact of classification is not sufficient; in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155-160, 41 L. ed. 666, 668-670, 17 Sup. Ct. Rep. 255.

The classification of freight bears no analogy to such discrimination between persons.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900.

If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 290, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465.

A question of constitutional law cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

Here the court refers to the police power in its more narrow and exact sense,—that is, the power to preserve and promote public morals, health, and safety,—and expressly says that even such an exercise of the police power is subject to constitutional limitations. If so, how much more subject to such limitations must be those broader exercises of the power inexactly called the police power, which is really and more exactly the general power of sovereignty to promote the general welfare. It is in the latter sense only that a statute such as that under discussion—which the Massachusetts court calls "a police regulation in the interest of education"—can be termed a police regulation at all.

This court has spoken of the constitutional limitation of the exercise of the police power, in its exact sense, in other cases in the same way as already quoted.

Barbier v. Connolly, 113 U. S. 27, 31, 32, 28 L. ed. 923-925, 5 Sup. Ct. Rep. 357; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

But certain exercises of the strict police power, that is, those involving a destruction, but not a taking, of property, may well be free of one constitutional guaranty; to wit, that property shall not be taken without just compensation. The abatement of nuisances, the destruction of buildings to check the course of conflagrations, the burning of gambling paraphernalia, the spilling of intoxicating liquors, the prohibition of the use of buildings for illegal purposes, and like cases, suggest themselves as instances of the exercise of the police power free of the obligation to make just or any compensation for the property destroyed or put out of use.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

If otherwise valid as a police regulation, the statute is partial and unequal in its application, and is therefore invalid.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The right to the equal protection of the laws is a right which preceded the adoption of the Constitution, and does not depend for its existence upon that instrument. When it guaranteed to all citizens the equal protection of the laws it was merely declaratory of a fundamental and inalienable right of every citizen of a free republic.

United States v. Cruikshank, 92 U. S. 542, 555, 23 L. ed. 588, 592.

The statute prescribes that the rate to be charged for public school children shall be one half the regular rate. The regular rate of a common carrier must be a reasonable one. Such is the universal rule derived from the common law. This court has referred to it as "that rule which is as old as the existence of common carriers,—to wit, that rates must be reasonable."

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896.

The statute, therefore, in effect prescribes that public school children shall be carried at one half the reasonable rate, and hence on its face deprives the transportation company of its service, that is to say, its property, without just compensation. It is no answer that the regular rate charged by the particular company may, for the time being, be unreasonably high,—the public may at any time refuse to pay that rate, and by appropriate proceedings compel the company to abandon it and charge the legal rate,—that is, the reasonable rate,—which, therefore, must always be presumed to be the existing rate.

Hutchinson, Carr. 3d, ed. § 521, p. 568; Rorer, Railroads, 1372; Tift v. Southern R. Co. 123 Fed. 789.

Mr. **Dana Malone** argued the cause, and, with Mr. Fred T. Field, filed a brief for defendant in error:

Since the decision of Munn v. Illinois and the railroad cases, decided at the same time (94 U. S. 113, 24 L. ed. 77 et seq.), the law has been settled that a state has power to limit the amount of charges by railroad companies for the transportation of persons or property within its own jurisdiction.

Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812; 2 Sup. Ct. Rep. 832; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

A rate or schedule of rates is presumed to be reasonable, or, rather, not so unreasonable as to be repugnant to constitutional provisions, and the burden of proof is upon the railroad company to show the contrary.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 695, 43 L. ed. 858, 863, 19 Sup. Ct. Rep. 565; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 264, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

The 14th Amendment is not violated by the subjecting of a corporation to the general laws in force at the time of its incorporation. See Capital City Dairy Co. v. Ohio, 183 U. S. 238, 247, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120. A state may properly impose such a restriction as that contained in Mass. Rev. Laws, chap. 112, § 72, as a condition upon which it grants a franchise.

Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Purdy v.

Erie R. Co. 162 N. Y. 42, 48 L.R.A. 669, 56 N. E. 508.

The fact that the plaintiff in error was authorized to take over the property of a foreign corporation does not affect the case.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 702, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714; Ashley v. Ryan, 153 U. S. 436, 442. 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

Even if the plaintiff in error had not accepted its charter subject to the provisions of Mass. Rev. Laws, chap. 112, § 72, this statute would not be unconstitutional as applied to it. It differs from rate laws generally, in that it fixes the maximum rate with reference to another rate, and not at an arbitrary amount. This in itself is clearly unobjectionable, as in the case of the long and short haul clause (Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95), provided the rate is not thereby fixed too low, and provided the law does not unreasonably discriminate.

Under some circumstances a rate is not so unreasonable as to be repugnant to constitutional provisions, even if so low that the company cannot pay dividends (see Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 412, 38 L. ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Co. v. Sanford, 164 U. S. 578, 595-597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 268, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900), or even if so low that it cannot pay operating expenses (see Minneapolis & St. L. R. Co. v. Minnesota, supra). The reasonableness of a rate involves an element of reasonableness as regards the public, as well as the railroad (Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Covington & L. Turnp. Co. v. Sandford, supra; San Diego Land & Town Co. v. National City, 174 U. S. 739, 749, 43 L. ed. 1154, 1158, 19 Sup. Ct. Rep. 804). No evidence was offered in the present case tending to show that any rate greater than a half-fare rate for pupils of the public schools would be reasonable as regards the public.

That the application of a given rate to the entire business of the company would reduce its earnings so that it could not pay operating expenses and reasonable dividends is not decisive of the unreasonableness of the particular rate.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900. This is as true of classes of passengers as of classes of freight. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484.

Even if it were possible to determine the amount of excess of earnings over operating expenses from the evidence offered, it would not be possible to determine whether or not the plaintiff in error could have paid reasonable dividends, since no evidence was offered as to the fair or reasonable value of its property.

Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 747, 43 L. ed. 1154, 1157, 19 Sup. Ct. Rep. 804.

Furthermore, the effect of the statute in question is not necessarily to diminish the income of the plaintiff in error.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 343, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400.

Even if, at a regular rate of 5 cents per passenger, and a half rate for pupils of public schools of 2½ cents, the company could not pay operating expenses and reasonable dividends, the statute is not necessarily objectionable as fixing too low a rate.

Com. v. Interstate Consol. Street R. Co 187 Mass. 437, 11 L.R.A.(N.S.) 973, 73 N. E. 530.

State-made rates are regularly based on classifications of traffic, and are not thereby invalidated (Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900). Undoubtedly these classifications must, as in other matters, be founded on reasonable distinctions in principle (Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43).

The case is to be distinguished from Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, which held a law requiring the sale of one-thousand-mile tickets to be unconstitutional. In that case the classification was of persons who bought tickets for a given number of miles, and persons who did not. The court said that the legislation was arbitrary, and not for the safety, health, or proper convenience of the public. See Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. In the present case the classification is not arbitrary, but is based on a reasonable distinction in principle. Moreover, the effect of the statute is to promote the proper convenience of the public.

If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

Dow v. Beidelman, 125 U. S. 680, 691, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 163, 24 L. ed. 94, 95; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 633, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 397, 49 L. ed. 1097, 1099, 25 Sup. Ct. Rep. 690; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 47, 50 L. ed. 65, 79, 25 Sup. Ct. Rep. 705; Ames v. Union P. R. Co. 64 Fed. 165.

The statute before the court, unlike that considered in the case of Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, does not base its classification solely on volume of business.

Mr. Justice **Holmes** delivered the opinion of the court:

This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one half the regular fare charged by it, as required by Mass. Rev. Laws, chap. 112, § 72. At the trial the railway company admitted the fact, but set up that the statute was unconstitutional, in that it denied to the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. In support of this defense it made an offer of proof which may be abridged into the propositions that the regular fare was 5 cents; that during the last fiscal year the actual and reasonable cost of transportation per passenger was $3\frac{86}{100}$ cents, or, including taxes, $4\frac{10}{100}$ cents; that pupils of the public schools formed a considerable part of the passengers carried by it, and that the one street railway expressly exempted by the law transported nearly one half the passengers transported on street railways and received nearly one half the revenue received for such transportation in the commonwealth. The offer was stated to be made for the purpose of showing that the plaintiff in error could not comply with the statute without carrying passengers for less [84] than a reasonable compensation *and for less than cost. The offer of proof was rejected, and a ruling that the statute was repugnant to the 14th Amendment was refused. The plaintiff in error excepted and, after a verdict of guilty and sentence, took the case to the supreme judicial court. 187 Mass. 436, 73 N. E. 530. That court overruled the exceptions, whereupon the plaintiff in error brought the case here.

This court is of opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. The section of the Revised Laws (chap. 112, § 72) was a continuation of Stat. 1900, chap. 197. Rev. Laws, chap. 226, § 2. Com. v. Anselvich, 186 Mass. 376, 379, 380, 104 Am. St. Rep. 590, 71 N. E. 790. The act of incorporation went into effect March 15. 1901. Stat. 1901, chap. 159. By the latter act the plaintiff in error was "subject to all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railway companies, except," etc. § 1. See also § 2. There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. Laws, chap. 112, § 72, Stat. 1900, chap. 197, if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability, and could not be heard to complain. Rockport Water Co. v. Rockport, 161 Mass. 279, 37 N. E. 168; Ashley v. Ryan, 153 U. S. 436, 443, 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Wight v. Davidson, 181 U. S. 371, 377, 45 L. ed. 900, 903, 21 Sup. Ct. Rep. 616; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 579, 48 L. ed. 795, 800, 24 Sup. Ct. Rep. 553.

If the charter, instead of writing out the requirements of Rev. Laws, 112, § 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it *by reference and [85] incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. See Com. v. Melville, 160 Mass. 307, 308, 35 N. E. 863. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear. Corry v. Baltimore, 196 U. S. 466, 477, 49 L. ed. 556, 562, 25 Sup.

Ct. Rep. 297. See Purdy v. Erie R. Co. 162 N. Y. 42, 48 L.R.A. 669, 56 N. E. 508.

Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error has accepted it. See W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468, 45 L. ed. 619, 626, 21 Sup. Ct. Rep. 423. Therefore I proceed to state my grounds for thinking the statute constitutional irrespective of any disabilities to object to its terms.

The discrimination alleged is the express exception from the act of 1900 of the Boston Elevated Railway Company and the railways then owned, leased, or operated by it. But, in the first place, this was a legislative adjudication concerning a specific road, as in Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616, not a general prospective classification as in Martin v. District of Columbia, 205 U. S. 135, 138, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440. A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld. But the local facts are not before us, and it follows that we cannot say that the legislature could not have been justified in thus limiting its action. Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 597, 598, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198. In the next place, if the only ground were that the charter of the elevated railway contained a contract against the imposition of such a requirement, it would be attributing to the 14th Amendment an excessively nice operation to say that the immunity of a single corporation prevented the passage of an otherwise desirable and wholesome law. It is unnecessary to consider what would be the [86]*effect on the statute by construction in Massachusetts if the exception could not be upheld. For, if in order to avoid the Scylla of unjustifiable class legislation, the law were read as universal (see Dunbar v. Boston & P. R. Corp. 181 Mass. 383, 386, 63 N. E. 916), it might be thought by this court to fall into the Charybdis of impairing the obligation of a contract with the elevated road, although that objection might, perhaps, be held not to be open to the plaintiff in error here (New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188).

The objection that seems to me, as it seemed to the court below, most serious, is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of 5 cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute, fairly construed, means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations (Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900), it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears (Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 24, 25, 51 L. ed. 933, 944, 945, 27 Sup. Ct. Rep. 585).

Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights, like others, *are matters of degree, and that [87] the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation. Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864.

If the 14th Amendment is not to be a greater hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that Amendment was passed.

Education is one of the purposes for which what is called the police power may be exercised. Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or working men, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax, —a class of quasi public corporations specially subject to legislative control.

Thus the question narrows itself to the magnitude of the burden imposed,—to [88] whether the tax is so great as to exceed *the limits of the police power. Looking at the law without regard to its special operation I should hesitate to assume that its total effect, direct and indirect, upon the roads outside of Boston, amounted to a more serious burden than a change in the law of nuisance, for example, might be. See further, Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440. Turning to the specific effect, the offer of proof was cautious. It was simply that a "considerable percentage" of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the legislature and of the highest court of Massachusetts, that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

Mr. Justice **Harlan** is of opinion that the constitutionality of the act of 1900 is necessarily involved in the determination of this case. He thinks the act is not liable to the objection that it denies to the railway company the equal protection of the laws. Nor does he think that it can be held, upon any showing made by this record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law. Upon these grounds alone, and independent of any other question discussed, he joins in a judgment of affirmance.

Judgment affirmed.

Mr. Justice **Moody**, having been of counsel, did not sit in this case.

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*JAMES H. CHAPMAN, as Trustee in [89]
Bankruptcy of the Estate of Alfred McCoy, Appt.,
v.
ABNER T. BOWEN.

(See S. C. Reporter's ed. 89-92.)

Appeal — from circuit court of appeals — in bankruptcy case — findings of fact.

1. Failure of the circuit court of appeals to make and file findings of facts and conclusions of law, as required by general order in bankruptcy 36, clause 3, when an appeal to the Federal Supreme Court is desired, cannot be supplied by reference to the opinion of the circuit court of appeals.

Appeal — from circuit court of appeals — bankruptcy case — Federal question.

2. A decision of a circuit court of appeals that a creditor is entitled to have his claim allowed against the bankrupt estate of an individual partner as well as against the estate of the bankrupt partnership, which proceeds upon a well-settled principle of general law, broad enough to sustain it without reference to the provisions of the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), is not reviewable in the Federal Supreme Court under § 25b of that act, as involving a question which would sustain a writ of error to a state court.

Appeal — from circuit court of appeals — bankruptcy case — Federal question.

3. The bare denial by a trustee in bankruptcy of a claim of a creditor asserted under the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), is not the assertion by the trustee of a right under such statute, so as to give him the right to appeal to the Federal Supreme Court from a decision of a circuit court of appeals in favor of the creditor, under § 25b of that act, which gives such appeal when the question involved is one which would sustain a writ of error to a state court.

[No. 168.]

NOTE.—On appeal and review in bankruptcy cases—see note Re Eggert, 43 C. C. A. 9.

On review of decisions of state courts in cases involving questions of bankruptcy—see note to Thompson v. Fairbanks, 49 L. ed. U. S. 577.

Submitted October 14, 1907. Decided November 11, 1907.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which, reversing a judgment of the District Court for the District of Indiana, remanded the cause with instructions to allow the claim of a creditor against the bankrupt estate of an individual partner as well as against the estate of the bankrupt partnership. On motion to dismiss or affirm, dismissed.

See same case below, 80 C. C. A. 60, 150 Fed. 106.

Statement by Mr. Chief Justice **Fuller**:

The firm of A. McCoy & Company, a banking copartnership at Rensselaer, Indiana, was composed of Alfred McCoy and Thomas McCoy, and on July 11, 1904, the copartnership and its individual members were respectively adjudicated bankrupts.

Abner T. Bowen presented claims, on notes signed by the firm and also by its members, against the estate of the copartnership, which were allowed, and against the individual estate of Alfred McCoy, which were disallowed, by the referee, "subject only to such right as said claimant may have in said estate as a creditor of the estate of the firm of A. McCoy & Company, bankrupts, after the payment of the individual creditors of the estate of said Alfred McCoy, bankrupt."

Petition for review was filed and the matter certified to the district court for the district of Indiana, by which the decision and order of the referee were approved and affirmed. Thereupon the case was carried by appeal to the circuit court of appeals for the seventh circuit, which reversed the judgment of the district court and remanded the cause "with instructions . . . to allow the claim as a debt against the individual [90]estate *of Alfred McCoy, to be paid therefrom ratably with other creditors of that estate to the extent that such debt is not paid in the administration of the estate of the firm of McCoy & Company." 80 C. C. A. 60, 150 Fed. 106.

An appeal to this court was allowed by a judge of the circuit court of appeals, and the case having been docketed here was submitted on a motion to dismiss or affirm.

Mr. **Harry R. Kurrie** submitted the cause for appellant. Messrs. Frank Foltz and Simon P. Thompson were on the brief.

Mr. **M. Winfield** submitted the cause for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The motion to dismiss was rested on two grounds: (1) That appellant had failed to comply with clause 3 of general order in bankruptcy 36; (2) that the case was not appealable to this court.

Clause 3 of general order 36 reads as follows:

"In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

No such finding of facts and conclusions of law was made in this case, nor was the court requested to make such finding. The appeal was a general appeal, and the entire record was sent up. The omission cannot be supplied by reference to the opinion, as is attempted in argument. British Queen Min. Co. v. Baker Silver Min. Co. 139 U. S. 222, 35 L. ed. 147, 11 Sup. Ct. Rep. 523, and cases cited; Lehnen v. Dickson, 148 U. S. 71, 74, 37 L. ed. 373, 374, 13 Sup. Ct. Rep. 481.

But if the case was not appealable, the appeal must be dismissed, even though clause 3 had been complied with.

The bankruptcy act provides, § 25b:

"From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which *might[92] have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

"2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432.]

As to paragraph 2, there was no such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a state to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or an authority exercised under, any state, on the ground of repugnancy to the Constitution, treaties, or laws of the United States; nor was any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against.

The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute. Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276.

Appeal dismissed.

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[93] *SAMUEL H. LEATHE, Plff. in Err.,

v.

EDWARD L. THOMAS.

(See S. C. Reporter's ed. 93–100.)

Error to state court — Federal question — decision on non-Federal ground.

No Federal question respecting due process of law or full faith and credit which will sustain a writ of error from the Federal Supreme Court to the highest court of a state is involved in a suit in which the state court, after reversing a judgment for defendant on the ground that a judgment of a Federal circuit court, set up as *res judicata* in a special replication to two of four pleas in set-off, is binding, decided on rehearing that, conceding the judgment of the Federal court to be binding as to the two pleas to which the replication of *res judicata* applies, judgment for defendant can be upheld upon the other two pleas referring to earlier stages of the same transaction; nor does it matter that the Federal Supreme Court may think the state court wrong in believing that there is evidence to support these pleas.

[No. 21.]

Argued October 17, 1907. Decided November 11, 1907.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming, on rehearing, a judgment of the Appellate Court for the Fourth District of that state, which had in turn affirmed a judgment of the Circuit Court of St. Clair County in favor of defendant in an action upon foreign judgments. Dismissed.

See same case below, 218 Ill. 246, 75 N. E. 810.

The facts are stated in the opinion.

Mr. **John Maynard Harlan** argued the cause, and, with Mr. Victor Koerner, filed a brief for plaintiff in error:

The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of this court.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472.

This court, when necessary to a correct understanding of the merits of a controversy brought to it on appeal or writ of error, will examine the entire record, including even the evidence introduced below.

Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

Under Hurd's Rev. Stat. (Ill.) 1905, chap. 37, § 16, justices of the supreme court are required, in cases submitted to it, to deliver and file written opinion. It is also provided that such opinions shall also be spread at large upon the records of the court. The opinions of the supreme court of Illinois are therefore properly a part of its records, and it has been so held by this court.

Gross v. United States Mortg. Co. 108 U. S. 477, 486, 27 L. ed. 795, 798, 2 Sup. Ct. Rep. 940; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111.

Messrs. John Maynard Harlan, Victor Koerner, and James S. Harlan filed a brief in reply for plaintiff in error.

Mr. **Edward L. Thomas** *in propria per-*

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Allegheny Co. 49 L. ed. U. S. 551.

On writs of error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

sona argued the cause and filed a brief for defendant in error:

The errors assigned on the record upon the appeal from the appellate court to the supreme court of Illinois were too general to raise the question of former adjudication, and presented no question for determination upon that issue.

Louisiana, A. & M. R. Co. v. Levee Comrs. 31 C. C. A. 121, 58 U. S. App. 281, 87 Fed. 594.

Not being properly presented to the court below, this court will not consider them.

Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

This court will not review or reverse a decision of a state court upon a question of statutory practice.

Nobles v. Georgia, 168 U. S. 398–405, 42 L. ed. 515–518, 18 Sup. Ct. Rep. 87; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Before this court can take jurisdiction upon a Federal question, four things must concur:

1st. There must be a Federal question presented by the record.

2d. The determination of that Federal question in the court below must have been necessary to the proper determination of the cause.

3d. The decision of the Federal question by the lower court must have been adverse to the plaintiff in error.

4th. There must be no other grounds outside of the Federal question upon which the judgment of the lower court was predicated or might stand.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 344–351, 46 L. ed. 941–944, 22 Sup. Ct. Rep. 691; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 339, 45 L. ed. 222, 21 Sup. Ct. Rep. 171; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Swafford v. Templeton, 185 U. S. 493, 46 L. ed. 1008, 22 Sup. Ct. Rep. 783; Iowa v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; Sweringen v. St. Louis, 185 U. S. 45, 46 L. ed. 799, 22 Sup. Ct. Rep. 569; Hale v. Lewis, 181 U. S. 479, 45 L. ed. 962, 21 Sup. Ct. Rep. 677.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action upon judgments obtained in Missouri by the plaintiff in error against the defendant in error, hereafter called respectively plaintiff and defendant. The defendant, not denying the judgments, pleaded four pleas in set-off. The first was for money had and received, interest, and upon an account stated. The second was upon an alleged contract of January 24, 1893. The third set up an alleged contract of March 25, 1893, to pay the debt of a railroad company to the defendant, a suit and judgment for the defendant against the railroad company, a bill in equity brought by the plaintiff to enjoin the proceedings in that suit, upon which one of the issues was the liability under the contract, and that after a hearing the bill was dismissed. The fourth plea was on the contract of March 25, without more. There was a general replication denying the pleas, and also a special replication to the third and fourth, to the effect that a suit upon the alleged contract was brought against the plaintiff for the use of the defendant and removed to the United States circuit court and there determined in favor of the present plaintiff, the proceedings set up in the third plea being held not conclusive. The suit referred to is Belleville & St. L. R. Co. v. Leathe, 28 C. C. A. 279, 53 U. S. App. 718, 84 Fed. 103. The case was sent to a referee to report his conclusions of law and fact. The referee reported in favor of the defendant and also reported the evidence. The trial court ordered judgment on the referee's report. This judgment was affirmed by an intermediate court and then was taken by writ of error to the supreme court of the state. That court held that the judgment of the United States circuit court made the matter of the third and fourth pleas in set-off *res judicata,* and reversed the judgment of the court below. But, upon a rehearing, the court, while adhering *to its judgment upon the third and [**97**] fourth pleas, stated that it had overlooked the first and second, that the judgment could be sustained upon them, that there was evidence to support them both, or at least the first, and that the referee's finding might be supported under the first. On these grounds the judgment was affirmed. 218 Ill. 246, 75 N. E. 810.

The case now is here on a writ of error, the errors alleged being that full faith and credit was not given to the judgment of the United States court, and that the present judgment was rendered without due process of law. It is true that the judgment of the United States court was held binding against the pleas to which it applies, but it is said that it is emptied of all real effect if a judgment can be entered upon the first and second pleas, referring to earlier stages of the same transaction, because it is said that there was no evidence to support those pleas and no finding upon them, so that to support the judgment by their presence on the record is a mere pretense, and either is a denial of due credit to the former judgment or deprives the plaintiff of his property without due process of law.

In order to dispose of the case it is not necessary to state the dealings in detail;

the following outline is enough: The defendant wanted money from the plaintiff to start a railway company. An agreement with regard to it was made on January 24, 1893, out of which, with the accompanying and subsequent transactions, the defendant sought to establish a right to be reimbursed for his advances to the road. Later, on March 25 of the same year, there was a conveyance of its property by the railway company to the plaintiff and a conveyance by him to another company. The former deed was for $1 and "other valuable considerations to it from him moving," and the defendant alleged that the other considerations embraced a promise of the plaintiff to reimburse him. The referee's report refers to the dealings of January, but seemingly discovers no contract of reimbursement in them. It shows that the plaintiff insisted that all that he did was under the agreement of that month, but says that the evidence [98] does not prove it conclusively. *It says that matters culminated in the agreement of March 25, and finds that as part of the consideration of that deed the plaintiff promised to pay.

The judgment purported to be based upon the referee's report, and it may be that, if it were our concern to deal with it, we should find it hard to discover sufficient warrant for a judgment on the first or second pleas. The general line of thought which the report follows seems to lead to the third and fourth. The conclusion is that the defendant is entitled to recover the amount of the judgment mentioned in the third plea, and this follows immediately after the finding of the plaintiff's promise. The plaintiff excepted to the referee's failure to find that everything was done under the January contract. And further reasons might be given for thinking that the court below was wrong. Even if the words of the judgment, "renders judgment on said referee's report," should be held to include the evidence as well as the referee's findings, and if it should be presumed that one of the courts below the supreme court of the state had reconsidered the evidence before entering or affirming the judgment, still, although there was evidence enough of the defendant's advances to the railway company, we might assume, for purposes of argument, that there was nothing sufficient to make out a promise on the plaintiff's part before March. But on the most favorable statement that we can make on the side of the plaintiff in error we can see no ground for coming to this court.

It is admitted that the general and well-settled rule is that in a case coming from a state court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Sauer v. New York, 206 U. S. 536, 546, 51 L. ed. 1176, 1181, 27 Sup. Ct. Rep. 686. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. *Murdock [99] v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis v. Bolles, 150 U. S. 361, 369, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; Castillo v. McConnico, 168 U. S. 674, 679, 42 L. ed. 622, 624, 18 Sup. Ct. Rep. 229.

Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111. But there is nothing of that sort in this case. At first, having in mind only the third and fourth pleas, to which alone the judgment of the United States court was a bar, the supreme court decided in favor of the plaintiff. It affirmed the judgment below only upon a rehearing, and after its attention had been called to the first and second pleas. It did not recede from or qualify its former decision so far as that went, but simply pointed out that there were other pleas to which the replication of *res judicata* did not apply, and on which the judgment might be upheld. Suppose that it was mistaken as to the evidence, the mistake was upon a matter admitting of hesitation, for which it would seem from the opinion that there were special reasons in the state of the record and the admission of counsel. The question is one with which, by the general rule, we have nothing to do, and we see no reason why the general rule should not be applied.

The first and second pleas were on the [100]record and at issue. *The plaintiff had notice that the defendant meant to prevail on whatever ground he could. He had his hearing, even if it should be thought that he might have insisted on a ruling that there was no evidence to support those pleas. However it is put, the claim of a right to resort to this court after the only Federal question has been decided in the plaintiff's favor must fail.

Writ of error dismissed.

Mr. Justice **Harlan** and Mr. Justice **Day** dissent.

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN McNICHOLS, Plff. in Err.,

v.

JAMES PEASE, Sheriff of Cook County, Illinois.

(See S. C. Reporter's ed. 100–112.)

Habeas corpus — to review extradition proceedings — prima facie case — rebuttal.

The prima facie case arising on habeas corpus from an extradition warrant, regular on its face, and the requisition papers on which it was issued, charging a larceny from the person, committed at Kenosha, Wisconsin, on a specified day, is not rebutted by affidavits which import nothing more than that the accused was in Chicago, Illinois, at 1 o'clock and during the whole of the afternoon of that day, although the petition for habeas corpus contains an allegation that the accused had heard the person against whom the crime is alleged to have been committed testify in another habeas corpus proceeding that such crime was committed at 2 o'clock in the afternoon of the day named.

[No. 19.]

Argued and submitted October 16, 17, 1907. Decided November 18, 1907.

IN ERROR to the Supreme Court of the State of Illinois to review a decree denying a writ of habeas corpus. Affirmed.

The facts are stated in the opinion.

Mr. **John F. Geeting** argued the cause and filed a brief for plaintiffs in error:

The term "fugitive from justice," as used in U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, does not apply to one who constructively commits a crime in another state, but only to such a person as was physically present within a state at the time of the commission of a crime, and subsequently fled therefrom.

Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; Re Tod, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968.

The fact that the person demanded is a fugitive from justice is a jurisdictional prerequisite to an extradition warrant. The governor upon whom the demand is made has no authority to issue his extradition warrant unless competent proof has been made to him that the person demanded was within the jurisdiction of the demanding state at the time of the commission of the crime in question, and subsequently fled therefrom.

Ex parte Reggel, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Hyatt v. New York, supra; Re Jackson, 2 Flipp. 183, Fed. Cas. No. 7,125; Re Doo Woon, 9 Sawy. 417, 18 Fed. 898.

In determining whether an accused person is a fugitive from justice, the date of the alleged crime as charged in the accusation must be accepted as correct, unless there is proof to the contrary.

Hyatt v. New York, supra.

Each state has a right to create its own code of criminal procedure; but unless the practice of the demanding state comes within the requirements of U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, that state is not entitled to the benefit of extradition proceedings. Thus, the filing of an information, although consistent with the practice of the demanding state, is not a basis for extradition proceedings; for the accused is not indicted, neither is he charged by affidavit before a magistrate.

Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

In the state of Wisconsin, where a justice of the peace sits as an examining magistrate, to hold to bail or to commit for trial, an affidavit is not necessary, but the warrant issues upon oral testimony taken by the justice.

State v. Davie, 62 Wis. 305, 22 N. W. 411.

An affidavit is a written statement of material facts, made with that degree of positiveness and certainty that, if falsely made, the affiant would be guilty of perjury.

Billings v. Noble, 75 Wis. 325, 43 N. W. 1131; Myers v. People, 67 Ill. 503; Neal v. Gordon, 60 Ga. 112; People ex rel. Cook v.

NOTE.—On habeas corpus to review extradition proceedings—see notes to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; State v. Jackson, 1 L.R.A. 373; and Bruce v. Rayner, 62 C. C. A. 506.

Becker, 20 N. Y. 354; People v. Heffron, 53 Mich. 527, 19 N. W. 170; Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619; Ex parte Lane, 6 Fed. 34; People ex rel. Smith v. Brown, 6 Chicago Legal News, 392.

A written statement under oath, made simply upon information and belief, does not possess the qualities of an affidavit.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; Lippman v. People, 175 Ill. 110, 51 N. E. 872; Johnston v. United States, 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187; Ex parte Hart; Ex parte Lane; Ex parte Smith; and Ex parte Dimmig,—supra; United States v. Collins, 79 Fed. 65; United States v. Sapinkow, 90 Fed. 654; Ex parte Morgan, 20 Fed. 298; State v. Gleason, 32 Kan. 245, 4 Pac. 363; State ex rel. Register v. McGahey, 12 N. D. 535, 97 N. W. 865; Schustek Case, 11 Am. Crim. Rep. 372, note.

A written statement under oath, made in the positive form, if made under circumstances, or as to matters, which indicate that it was made upon information and belief, will be so considered.

Mechanics & T. Bank v. Loucheim, 55 Hun, 396, 8 N. Y. Supp. 520; Tin v. Smith, 93 N. Y. 91; Hart v. Grant, 8 S. D. 248, 66 N. W. 322; Finlay v. De Castroverde, 68 Hun, 59, 22 N. Y. Supp. 716.

Applying the above doctrine, it has been held that an affidavit of an attorney is presumed not to be on personal knowledge, but on information and belief; and that the source of the "information" and the grounds of belief should be stated in the affidavit.

Crowns v. Vail, 51 Hun, 206, 4 N. Y. Supp. 324.

It is not sufficient that such attorney states that he is well acquainted with the facts; he must show how he is so acquainted.

Cutler v. Rathbone, 1 Hill, 206; Cribben v. Schillinger, 30 Hun, 249; Cowles v. Hardin, 79 N. C. 579; Widner v. Hunt, 4 Iowa, 355; Bank of Pittsburgh v. Murphy, 45 N. Y. S. R. 824, 18 N. Y. Supp. 575; Van Ingen v. Herold, 46 N. Y. S. R. 425, 19 N. Y. Supp. 456; Talbert v. Storum, 50 N. Y. S. R. 267, 21 N. Y. Supp. 719; Griel v. Buckius, 114 Pa. 190, 6 Atl. 153; Davis v. John Mouat Lumber Co. 2 Colo. App. 387, 31 Pac. 187; Shattuck v. Myers, 13 Ind. 49, 75 Am. Dec. 236; People v. Spalding, 2 Paige, 326.

Perjury cannot be assigned upon an affidavit not required by law.

Silver v. State, 17 Ohio, 365; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

A criminal complaint which does not set out facts sufficient to constitute a crime is void, and does not confer jurisdiction upon the magistrate taking it.

Moore v. Watts, Breese (Ill.) 18; Housh v. People, 75 Ill. 487; Re Way, 41 Mich. 299, 1 N. W. 1021; United States v. Collins, 79 Fed. 65; Schustek Case, supra; Warenzak's Case, 11 Am. Crim. Rep. 376, note; Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510.

All of the elements of the crime must be stated.

State v. Murray, 41 Iowa, 580; Cranor v. State, 39 Ind. 64; Slusser v. State, 71 Ind. 280; Barfield v. State, 39 Tex. Crim. Rep. 342, 45 S. W. 1015; State v. Cruickshank, 71 Vt. 94, 42 Atl. 983; State v. Fiske, 18 R. I. 416, 28 Atl. 348.

A criminal complaint, being a statement of the facts, should be at least as specific as an indictment.

People ex rel. Lawrence v. Brady, 56 N. Y. 182; Vandever v. State, 1 Marv. (Del.) 209, 40 Atl. 1105.

The words "complaint" and "affidavit" are not synonymous; and accordingly, the word "affidavit," instead of "complaint," should be used in extradition proceedings.

State ex rel. Stundahl v. Richardson, 34 Minn. 115, 24 N. W. 354.

The following are several extradition cases in which the affidavit or complaint was held insufficient:

Smith v. State, 21 Neb. 552, 32 N. W. 594; Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608; Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 363; Re Heilbonn, 1 Park. Crim. Rep. 429; Ex parte Rowland, 35 Tex. Crim. Rep. 108, 31 S. W. 651; Re Coleman, 15 Blatchf. 406, Fed. Cas. No. 2,980; People ex rel. Lawrence v. Brady, supra.

Mr. S. S. Gregory also for plaintiffs in error.

Mr. **E. C. Lindley** submitted the cause for defendant in error. Messrs. John J. Healy and F. L. Barnett were on the brief:

The only questions which may be raised to defeat a governor's warrant for extradition, properly issued, are: 1. Is the governor's warrant valid upon its face? 2. Was the governor's warrant properly issued? 3. Is the person apprehended the identical person demanded? 4. Is the person demanded a fugitive from justice?

Church, Habeas Corpus, §§ 478, 480.

A fugitive from justice is a person charged with a crime in the courts of one state, and, being there wanted to answer for said offense, is found in another state.

Church, Habeas Corpus, §§ 478, 480; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148.

Wherever the validity of a governor's warrant is made the subject of judicial inquiry, the recitals in such warrant are to be taken prima facie as true.

Ex parte Stanley, 25 Tex. App. 372, 8 Am. St. Rep. 440, 8 S. W. 645; Church, Habeas Corpus, p. 626, § 486; Re Leary, 10 Ben. 197, Fed. Cas. No. 8,162; Hyatt v. New York, 188 U. S. 709–715, 47 L. ed. 660–662, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 372, 49 L. ed. 516, 25 Sup. Ct. Rep. 282.

The technical sufficiency of the indictment or complaint charging a crime against a defendant will not be considered on writ of habeas corpus in extradition procedure; that is a question for the courts of the demanding state.

Davis's Case, 122 Mass. 324; Brown's Case, 112 Mass. 409, 17 Am. Rep. 114; Ex parte Sheldon, 34 Ohio St. 319; State v. Schlemn, 4 Harr. (Del.) 577; Re Voorhees, 32 N. J. L. 141; People ex rel. Lawrence v. Brady, 56 N. Y. 182; Re Greenough, 31 Vt. 279; Re Manchester, 5 Cal. 237; Re Leland, 7 Abb. Pr. N. S. 64; Re Briscoe, 51 How. Pr. 422; Re Clark, 9 Wend. 212.

Technical defect of indictment, apparent upon its face, will not make void governor's warrant.

Church, Habeas Corpus, § 246, p. 316.

Evidence of an alibi cannot defeat extradition warrant. It is not conclusive evidence.

Hyatt v. New York, 188 U. S. 715, 47 L. ed. 662, 23 Sup. Ct. Rep. 456.

The issue of a warrant of extradition is wholly a matter of executive discretion, which discretion is not subject to review by the courts. Only questions of law and fact arising upon the face of the record are subjects of judicial inquiry.

State ex rel. Arnold v. Justus, 84 Minn. 237, 55 L.R.A. 325, 87 N. W. 770; Garvey's Case, 7 Colo. 384, 49 Am. Rep. 358, 3 Pac. 903; State v. Ross, 21 Iowa, 467; Roberts v. Reilly, and Leary's Case, supra; 2 Spelling, Inj. & Extr. Rem. § 1291.

Evidentiary facts need not be set out in the affidavit. It is sufficient to make the charge explicit and certain.

Hurd, Habeas Corpus, 2d ed. p. 611.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a final judgment of the supreme court of Illinois in a case of habeas corpus arising under that clause of the Constitution providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime" [art. 4, § 2]; also, under § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), which provides, among other things, that "whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

It appears from the record that the governor of Wisconsin *made his requisition up- [**105**] on the governor of Illinois, stating that John McNichols (the present plaintiff in error) was charged by affidavit with the crime of larceny from the person of one Thomas Hansen,—a crime under the laws of Wisconsin,—committed in the county of Kenosha, Wisconsin, and that he had fled from the justice of that state and taken refuge in Illinois, and requiring that McNichols be apprehended and delivered to the appointed agent of Wisconsin, who was authorized to receive and convey the accused to Wisconsin, there to be dealt with according to law. Accompanying the requisition were duly certified copies of three documents: 1. An official application to the governor of Wisconsin, by the district attorney for Kenosha county for a requisition upon the governor of Illinois for McNichols as a fugitive from the justice of Wisconsin, it being stated in such application that McNichols was there charged by affidavit before a justice of the peace with the crime of larceny from the person, committed in that county on the 30th day of September, 1905. 2. A verified complaint or affidavit before a Wisconsin justice of the peace, alleging that McNichols did, on the 30th day of September, A. D. 1905, at the city of Kenosha feloniously steal, take, and carry away from the person of Thomas Hansen, against his will, $200, lawful money of the United States, etc. 3. A warrant of arrest issued by such justice of the peace, based on the above affidavit, for the apprehension of McNichols.

The governor of Illinois, in conformity

with the demand of the governor of Wisconsin, issued his warrant for the arrest and delivery of McNichols to the agent designated by the governor of the latter state. That warrant recited—and its recitals are important: "The executive authority of the state of Wisconsin demands of me the apprehension and delivery of John McNichols, represented to be a fugitive from justice, and has, moreover, produced and laid before me the copy of a complaint and affidavit made by and before a properly empowered officer in and of the said state, in accordance with the laws thereof, charging John McNichols, the person so demanded, [106] *with having committed against the laws of the said state of Wisconsin the crime of larceny from the person, which appears by the said copy of a complaint and affidavit certified as authentic by the governor of the said state, now on file in the office of the secretary of state of Illinois, and being satisfied that said John McNichols is a fugitive from justice and has fled from the state of Wisconsin." etc.

Having been arrested under the authority of that warrant, and being in the custody of the sheriff of Cook county, Illinois, McNichols presented his petition to the supreme court of that state,—whose jurisdiction in the premises is not disputed,—praying to be discharged from custody. That petition states that, prior to the issuing of the above extradition warrant, he was arrested upon a warrant issued by a justice of the peace in Chicago, based upon the supposed criminal offense, and that he presented his petition to the criminal court of Cook county for a writ of habeas corpus setting forth that he was not a fugitive from justice; that pending that proceeding the above extradition warrant was issued and brought to the attention of the criminal court, and thereupon that court, because of the gravity of the case, suspended proceedings in order to give the accused an opportunity to apply to the supreme court of Illinois for a writ of habeas corpus.

The present petition for habeas corpus presented to the supreme court of Illinois contained this paragraph: "Your petitioner further shows that he has heard Thomas Hansen testify in a certain habeas corpus proceeding heretofore pending regarding this same matter [no doubt, the above proceeding in the Cook criminal court], the said Thomas Hansen stating in his testimony that he was the same person mentioned in said complaint, and the said Thomas Hansen then and there testifying that the said supposed crime occurred on September 30, 1905, at the hour of 2 P. M., about a block and a half from the Northwestern depot in Kenosha, Wisconsin; and your petitioner states that he was not in the state of Wisconsin on September 30, 1905, and did not commit the said offense, and *in further proof thereof your petitioner [107] herewith presents and attaches to this petition the affidavits of John F. Graff, William Oakley, Simon F. Bower, John A. Dennison, and Hugh Campbell, the same being marked respectively exhibits C, D, E, F, and G." In one of the affidavits here referred to the affiant stated "that upon the 30th day of September, A. D. 1905, the said John McNichols, to this affiant's personal knowledge, was in the city of Chicago at about the hour of *1* o'clock P. M., and that this affiant remained in the company of the said McNichols until 2: 15 P. M., and again met the said McNichols about 3 o'clock, P. M., said day; this affiant further says that it would have been impossible for the said McNichols to have been in the city of Kenosha, state of Wisconsin, on the said 30th day of September, A. D. 1905. In the remaining five affidavits the respective affiants, using precisely the same words, stated "that upon the 30th day of September, A. D. 1905, said John McNichols, to this affiant's personal knowledge, was in the city of Chicago, the whole of the *afternoon* of the said day, this affiant and the said John McNichols *during the said afternoon* being in attendance at a baseball game in the said city of Chicago, between the Chicago and Boston teams, which said game was played at the West Side Ball Park."

The record shows that the case was heard in the supreme court of Illinois upon "the allegations and proofs" of the parties, and it was adjudged that the custody of the sheriff who held the accused should not be disturbed. But no bill of exceptions was taken embodying any evidence before the supreme court of Illinois. So that we do not know what were the "proofs" adduced by the parties. The sheriff stood upon his answer to the petition for the writ of habeas corpus. That answer, it will be recalled, embodied the extradition warrant issued by the governor of Illinois.

Did the supreme court of Illinois err when adjudging, as in effect it did, that the accused did not appear to be held in custody in violation of the Constitution and laws of the United States?

*Some of the questions discussed at the [108] bar have been concluded by decisions in former cases involving the meaning and scope of the above constitutional and statutory provisions. We will not extend this opinion by giving a full analysis of those cases. It is sufficient to say that the following principles are to be deduced from Robb v. Connolly, 111 U. S. 624, 639, 28

L. ed. 542, 547, 4 Sup. Ct. Rep. 544; Ex parte Reggel, 114 U. S. 642, 652, 653, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148; Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 719, 47 L. ed. 657, 664, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 364, 372, 49 L. ed. 515, 516, 25 Sup. Ct. Rep. 282; Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111; and Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122:

1. A person charged with crime against the laws of a state, and who flees from justice, that is, after committing the crime leaves the state, in whatever way or for whatever reason, and is found in another state, may, under the authority of the Constitution and laws of the United States, be brought back to the state in which he stands charged with the crime, to be there dealt with according to law.

2. When the executive authority of the state whose laws have been thus violated makes such a demand upon the executive of the state in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes,—producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate, charging the person demanded with a crime against the laws of the demanding state, —it becomes, under the Constitution and laws of the United States, the duty of the executive of the state where the fugitive is found to cause him to be arrested, surrendered, and delivered to the appointed agent of the demanding state, to be taken to that state.

3. Nevertheless, the executive upon whom such demand is made, not being authorized by the Constitution and laws of the United States to cause the arrest of one charged with crime in another state unless he is a fugitive from justice, may decline to issue an extradition warrant, unless it is made to appear to him, by competent proof, that the accused is substantially charged with crime against the laws of the demanding [109] *state, and is, in fact, a fugitive from the justice of that state.

4. Whether the alleged criminal is or not such fugitive from justice may, so far as the Constitution and laws of the United States are concerned, be determined by the executive upon whom the demand is made in such way as he deems satisfactory, and he is not obliged to demand proof apart from proper requisition papers from the demanding state, that the accused is a fugitive from justice.

5. If it be determined that the alleged criminal is a fugitive from justice,—whether such determination be based upon the requisition and accompanying papers in proper form, or after an original, independent inquiry into the facts,—and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a prima facie case in favor of the demanding state, and as requiring the removal of the alleged criminal to the state in which he stands charged with crime, unless, in some appropriate proceeding, it is made to appear that he is not a fugitive from the justice of the demanding state.

6. A proceeding by habeas corpus in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating.

7. One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant.

Turning now to the record of this case, we find that the accused is in custody under an extradition warrant which appears upon its face to be warranted by the Constitution and laws of the United States. But we fail to find evidence sufficient to *overcome the prima facie case thus made by [110] that warrant. It is said that the plaintiff in error was not in the state of Wisconsin on the day when the alleged larceny from the person of Hansen was committed; therefore, it is contended, he could not have committed the crime charged, and thereafter become a fugitive from the justice of that state. If the authorities of Wisconsin were bound by the date named in the requisition papers, which we do not concede (1 Pomeroy's Archbold, Crim. Pr. & Pl. 363), still the record presents no such case as is contended for by the accused. It was incumbent upon him, by competent proof, to rebut the presumption arising on the face of the extradition warrant and requisition papers that he was a fugitive from justice for a crime committed in Wisconsin on September 30th, 1905. As already stated, no bill of exceptions embracing the evidence was taken and we cannot, therefore, say that the proofs established the fact that the accused was not a fugitive as charged, as stated in the warrant of arrest.

It is argued, however, that the affidavits accompanying the petition for habeas corpus show that the accused was not in Wisconsin when the crime in question was alleged to have been committed. The record does not justify us in assuming that those affidavits were in fact offered as evidence, or were used with the consent of the state as evidence, or were treated as evidence by the supreme court of Illinois. It is true that the counsel for the sheriff uses some language in his brief which is construed as admitting that the affidavits were used, without objection, as evidence. But such an apparent admission cannot control or affect our decision; for whether the supreme court of Illinois erred in its final judgment must be determined by the record before us.

But if it be assumed that the affidavits were accepted in the court below as evidence, the result must still be the same; for the affidavits do not satisfactorily establish the fact that the accused was absent from Wisconsin when the alleged crime in question was committed. The charge, as set forth in the requisition papers, was that **[111]** he committed the crime of larceny *from the person of Hansen on the 30th day of September, 1905,—no particular hour of that day being mentioned,—while the affidavits import nothing more than that McNichols was at Chicago at 1 o'clock and during the whole of the *afternoon* of that day. The affidavits give no account of the wherabouts of McNichols during the forenoon of the day specified in the papers accompanying the requisition by the governor of Wisconsin. We know, because everyone knows, without the testimony of witnesses, that Kenosha, the place of the alleged crime, is only a short distance—within not more than one hour and a half's travel, by rail—from Chicago. It was entirely possible for the accused to have passed the whole or a larger part of the forenoon of September 30th in that city, and yet have been in Chicago at 1 o'clock and during the whole afternoon of the same day. So that the affidavits relied on by no means prove the absence of the accused from Wisconsin during the whole of the 30th day of September.

Here, it is suggested that the crime, if committed at all, was committed at 2 o'clock of September 30th, while the affidavits show that McNichols was at Chicago at 1 o'clock and during the entire afternoon of that day. So far as the record discloses this suggestion finds no support in anything said or done at the hearing by those who opposed the discharge of the accused. The requisition papers do not state that the alleged crime was committed at 2 o'clock or at any other specified hour of the day named. The whole foundation for the suggestion was an allegation in the petition for the writ, in this case, to the effect that the accused had *heard* Thomas Hansen testify in another habeas corpus proceeding that the crime was committed at 2 o'clock on the day named. But the record does not show that Hansen or any other person so testified in the present case. Indeed, it does not appear that anyone testified orally before the court,—not even McNichols. Upon the record before us it must be taken that McNichols was charged with committing the crime in question on the 30th day of September, and that he could have been at *Kenosha during the fore- **[112]** noon of that day, although he may have been, as stated in the affidavits, in Chicago during the whole of the afternoon of the same day. So that the accused entirely failed to overcome the prima facie case made by the official documents before the court of his having become a fugitive from the justice of Wisconsin, after committing a crime against its laws on the 30th day of September, 1905.

When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States. We may repeat the thought expressed in Appleyard's Case, above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the states, and that "while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

No error appearing in the record, the judgment of the Supreme Court of Illinois must be affirmed.

It is so ordered.

[113] *JAMES E. KENT, Plff. in Err.,

v.

PEOPLE OF PORTO RICO.

(See S. C. Reporter's ed. 113–120.)

Error to Porto Rico supreme court—frivolousness of Federal question.

1. The Federal question presented by the contention that the changes made by the Porto Rico legislature in the boundaries of judicial districts and in the number of judges deprived the courts affected of their validity under the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 33, legalizing existing tribunals, must be deemed too frivolous to sustain a writ of error to the supreme court of Porto Rico under § 35 of that act, when the whole of § 33 is considered together with the context of the act, and especially with § 15, giving the local legislature the power of amendment, alteration, modification, or repeal.

Error to Porto Rico supreme court—Federal question.

2. Errors assigned with respect to the action of the trial court with reference to an alleged confession of guilt furnish no basis for the exercise by the Supreme Court of the United States of its appellate jurisdiction over the Porto Rican supreme court, under the act of April 12, 1900, § 35, where the record does not show even the semblance of the assertion or denial of a right under the Federal Constitution.

[No. 31.]

Argued and submitted October 30, 31, 1907. Decided November 18, 1907.

IN ERROR to the Supreme Court of Porto Rico to review a judgment affirming a conviction of embezzlement in the District Court for the Judicial District of San Juan. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **N. B. K. Pettingill** argued the cause, and, with Messrs. Nemesio Perez Moris and Harry B. Leake, filed a brief for plaintiff in error.

Mr. **Frank Feuille** submitted the cause for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Whether the supreme court of Porto Rico erred in affirming the conviction and sentence of the plaintiff in error of a crime held to constitute embezzlement is the question presented by this record. Twenty-seven errors [114] are assigned. At the threshold *we are concerned with our right to consider them. Our jurisdiction arises from the 35th section of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191). For the purposes of this case it suffices to say that by the section in question our power to review extends, first, to "the same cases as from the supreme courts of the territories of the United States;" and, second, to "all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied." As we have no authority to review the action of the supreme court of a territory of the United States in a criminal case like this (Amado v. United States, 195 U. S. 175, 49 L. ed. 146, 25 Sup. Ct. Rep. 13), the first of the above clauses may be put out of view. A few only of the errors assigned are relied upon at bar as presenting Federal questions within the scope of the second clause, yet it is urged that all the assigned errors are open. This rests upon the proposition that, in a case coming from Porto Rico, where jurisdiction arises from the presence of a Federal question, the duty devolves of passing upon all the errors relied upon, irrespective of their Federal character. Passing for the moment a consideration of the deduction involved in the proposition, we come to consider the premise, that is, the alleged existence of Federal contentions embraced by the second clause of § 35. We do this because, if it be that there are no such questions, it will become unnecessary further to notice the argument. In determining whether the assignments of error present Federal questions it is to be borne in mind that the mere fact that some of the assignments relied on assert Federal rights is not determinative, since, even although the assignments formally involve such rights, we are nevertheless without jurisdiction "where it indubitably appears that the Federal right asserted is frivolous; that is, without color of merit." American R. Co. v. Castro, 204 U. S. 453, 51 L. ed. 564, 27 Sup. Ct. Rep. 466.

The first error assigned alleged to embody a Federal right is that the trial below was absolutely void because the district court in which the information was filed and trial had was not *a legal tribunal within the intendment [115] of the act of Congress of April 12, 1900, the organic act of Porto Rico. To test the merit of the contention it is necessary to briefly state the organization of the judicial system of Porto Rico under the American domination and the legislation of Congress relating to the same. By an order promulgated during the control of Porto Rico by the military authorities the judicial system was made to consist, generally speaking, of district courts composed of three judges, and of a supreme court. By

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NOTE.—On the appellate jurisdiction of the Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

§ 33 of the act of Congress above referred to, it was, in part, provided:

"That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of general orders, numbered one hundred and eighteen, as promulgated by Brigadier General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts, established by general orders numbered one hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all which courts and tribunals are hereby continued."

In March, 1904, a law was enacted by the legislature of Porto Rico, modifying the judicial system as established by the military orders referred to in the act of Congress. For the purposes of the contention now under consideration it suffices to say that by this local law the boundaries of the judicial districts were changed, caused by the creation of additional districts, and it was provided that such courts, instead of being composed of three, should consist of one, judge in each district. The argument is that this local law, in so far as it changed the district courts, and especially in so far as it provided for one instead of three judges to preside over each court, was void, because in conflict with the provision of the 33d sec-
[116]tion of the *act of Congress. The contention amounts to this: that there were no district courts in Porto Rico from the time of the going into effect of the Porto Rican act, in 1904, up to the present time. Whilst the proposition presents a formal Federal question, we think it is clear that it is so frivolous as to bring it within the rule announced in American R. Co. v. Castro, supra. We say this because we think that no other conclusion is reasonably possible from a consideration of the whole of § 33 of the act of Congress and the context of that act, particularly § 15 thereof, both of which are reproduced in the margin.†

We do not deem it necessary to analyze the text of the act *of Congress to point out[117]
the inevitable result just stated, since the obvious meaning of the act is established by a decision heretofore rendered. Dones v. Urrutia, 202 U. S. 614, 50 L. ed. 1172, 26 Sup. Ct. Rep. 767. In that case Dones, who had been convicted and sentenced to death for murder, unsuccessfully sought release by habeas corpus at the hands of the supreme court of Porto Rico upon the identical ground presented in the assignment of error which we are considering, and upon an additional ground relating to an alleged personal disqualification of the judge who presided at his trial. On appeal to this court the questions raised were fully argued in printed briefs, but were deemed to be of such a frivolous character as not to require an opinion, and were hence disposed *per curiam*, referring to the provisions of the statute and pertinent authorities. True it is that in the Dones Case, in conformity to the practice in cases of habeas corpus, the formal order was to affirm, but this would not justify us in assuming jurisdiction on this record when the necessary result of the action of the court in the Dones Case is to establish the frivolous nature of the contention here relied upon as the basis of jurisdiction. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 314, 47 L. ed. 190, 192, 193, 23 Sup. Ct. Rep. 123.

The second of the asserted Federal questions relates to the action of the courts below in respect to a certain letter claimed to constitute a confession of guilt and written by the accused to a private person before this prosecution was commenced. It is insisted that by the actions of the trial court on the subject the plaintiff in error was deprived of rights guaranteed by the 5th Amendment to the Constitution of the United States. Conceding, *arguendo*, the applicability of the constitutional provision relied upon to the subject and that it was operative in the island of Porto Rico, we think the record demonstrates that the claim here made was not raised below, is a mere afterthought, and is established by the record to be without color of merit.

When the document was offered in evidence the record recites that "the defendant

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†Sec. 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit.

Sec. 33. That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of general orders numbered one hundred and eighteen, as promulgated by Brigadier General Davis, United States Volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts established by general orders numbered one hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of pro-objected on the ground that its competency [118]*had not been established in accordance with the custom in law, inasmuch as it had not been shown to have been free and voluntary and given without promise of reward or without promise of freedom from prosecution."

It is next stated that "the accused requested that the jury withdraw while the question of the competency of the evidence should be decided by the court." The request was acceded to and evidence was introduced on the subject of the voluntary nature of the alleged confession. The court decided to admit the document and overruled "an extensive oral argument, requesting the court to reconsider its decision to admit the document in evidence." After such admission in evidence it is stated merely that "the defendant duly excepted to the admission."

Again, after the close of all the evidence, the record recites:

"Counsel for the defense asked that that part of the record in which appeared the testimony of the witnesses Dix, Kent, and Dexter concerning the so-called confession which the fiscal had offered in evidence be transcribed by the stenographer and given to the jury so that the jury might have full knowledge of all of the circumstances connected with the so-called confession, which motion was denied by the court, in accordance with the law and especially § 274 of the Code of Criminal Procedure, and the accused duly excepted.

"Whereupon, the defendant moved through his attorneys, that Messrs. Dexter and Kent be allowed to testify as to the circumstances surrounding the alleged confession before the jury, which motion was granted by the court, and the witnesses testified."

Further, after thus, at the request of the counsel for the accused, allowing testimony as to the voluntary nature of the confession to go to the jury, the court, in instructing them, after calling their attention to the proceedings had at the trial in respect to the circumstances surrounding the making of the confession which had been given before the jury, submitted the matter to the jury and no exception was noted. That this [119]action *of the court was proper, if there was conflict of testimony, is not open to controversy. Wilson v. United States, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895.

Nor does the record disclose that the errors assigned in the supreme court of Porto Rico involved any contention that rights under the Constitution of the United States had been denied. The supreme court, in approaching the consideration of an assigned error which complained of the action of the trial court in admitting the confession in evidence, made an elaborate statement of what it deemed to be the rules applicable to the admissibility of confessions, and in so doing referred to the 5th Amendment and to a multitude of cases in this and other courts concerning the principle to be applied in determining such admissibility. It is a matter of no concern, however, in ascertaining whether rights under the Federal Constitution were asserted and denied, to consider the accuracy of all the statements made by the appellate court in its elaborate review of the subject, since the conclusion which it reached was that, as a general principle of law, confessions, in order to be admissible, "must have been made without compulsion or undue promise or inducement, and be entirely voluntary." Besides, the ultimate and decisive ruling of the supreme court of Porto Rico was that the trial court had not erred in acceding to the request of the accused in allowing the evidence concerning the voluntary nature of the confession to be heard by the jury, and leaving that subject to its determination. True it is that the opinion indicates that the court deemed that the proof as to the voluntary nature of the confession was of such a preponderating character that the court would have been authorized in not submitting it to the jury. But the correctness of that conclusion is not a matter of concern in view of the fact that the question of the voluntary nature of the confession was submitted to the jury at the request of the accused. As from no possible view of the action of the courts below concerning the confession can we discover even the semblance of the assertion or denial of a right under the Constitution, it follows *that the errors[120]

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cedure in them, and the various officials and *attachés* thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said general orders numbered one hundred and eighteen and one hundred and ninety-five, until otherwise provided by law: Provided, however, that the chief justice and associate justices of the supreme court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent of the executive council, and all other officials and *attachés* of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and *attachés* for each, their jurisdiction, their procedure, and all other matters affecting them.

assigned on that subject furnish no basis for the exercise of our jurisdiction.

As the matters which we have considered dispose of all the alleged Federal questions asserted to come within the second clause of § 35 of the act of April 12, 1900, the conclusion follows that we are without jurisdiction, and the writ of error is therefore dismissed for want of jurisdiction.

WILLIAM F. D. TAYLOR, Petitioner,
v.
UNITED STATES. (No. 238.)

UNITED STATES, Plff. in Err.,
v.
NEIL MACDONALD. (No. 404.)

(See S. C. Reporter's ed. 120-127.)

Aliens — wrongfully permitting landing.

1. The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of the immigration act of March 3, 1903 (32 Stat. at L. 1213, 1217, chap. 1012), § 18, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place, notwithstanding the omission from this section of the word "immigrant" which had followed the word "alien" in the earlier acts.

Error to circuit court — criminal case.

2. The United States may bring error under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment of a Federal circuit court, quashing an indictment for violating the immigration act of March 3, 1903, § 18, by wilfully permitting an alien to land at another place than that designated by the immigration officers, because the indictment disclosed that the alien in question was a seaman.

Aliens — wrongfully permitting landing.

3. The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within the provisions of the immigration act of March 3, 1903, § 18, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place.

[Nos. 238, 404.]

Argued October 24, 25, 1907. Decided November 18, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment affirming a conviction in the Circuit Court for the Southern District of New York of wilfully permitting an alien to land at another place than that designated by the immigration officer. Reversed. Also

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment quashing an indictment for permitting an alien to land at a place other than that designated by the immigration officer. Affirmed.

See same case below, No. 238, 81 C. C. A. 197, 152 Fed. 1.

The facts are stated in the opinion.

Messrs. **Lucius H. Beers** and **William G. Choate** argued the cause and filed a brief for petitioner in No. 238:

This statute is a penal statute, and is therefore to be strictly construed.

H. Hackfeld & Co. v. United States, 197 U. S. 442, 450, 49 L. ed. 826, 829, 25 Sup. Ct. Rep. 456.

The rule which requires a strict construction of a penal statute requires a certain and definite construction of the words used in their plain sense, and it requires the same construction as to all persons subject to its provisions. Its meaning is not to be strained to bring any person within its effect whom its terms do not obviously cover.

Bishop, Statutory Crimes, § 190e; United States v. Wiltberger, 5 Wheat. 76, 95, 3 L. ed. 37, 42; H. Hackfeld & Co. v. United States, supra; United States v. Sheldon, 2 Wheat. 119, 4 L. ed. 199; Sarlls v. United States, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720.

A thing may be within the letter of a statute, yet not within the statute, because not within its spirit, nor within the intention of its makers.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

United States v. Kirby, 7 Wall. 486, 19 L. ed. 280.

NOTE.—On the right of a state to appeal in a criminal case—see note to People ex rel. Hodson v. Miner, 19 L.R.A. 342.

This court has frequently resorted to the title of an act to aid in construing a doubtful provision.

United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; Myer v. Western Car Co. 102 U. S. 1, 12, 26 L. ed. 59, 60; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689.

One of the leading cases on immigration law in this country (Church of the Holy Trinity v. United States, supra) established the precise principle on the basis of which the petitioner now contends,—that the desertion of a bona fide seaman is not within § 18, because it is not within its spirit, nor within the intention of its makers.

The words of statutes are not to be considered only, but rather the intent of the matter is to be weighed; for many times things which are within the words of statutes are not within the purview of them, which extends no further than the intent of the makers, which is the principal thing to be considered.

19 Vin. Abr. p. 518.

It is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.

Co. Litt. 381 a, b; 19 Vin. Abr. p. 526.

Immigration statutes should be construed as a whole, and not by selecting particular words or sentences, and interpreting them according to their strict letter.

United States ex rel. Anderson v. Burke, 99 Fed. 895; Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375; 23 Ops. Atty. Gen. 521.

The use of the word "alien" throughout the immigration act of 1903 indicates that, as it is used in § 18, it is not intended to include bona fide seamen.

Re Buchsbaum, 141 Fed. 221; Affirmed in 81 C. C. A. 454, 152 Fed. 346.

An examination of the act of 1903 will also show that it was intended to be a codification of the immigration laws which had previously existed, and the congressional history of the act shows that those who framed it distinctly asserted this to be its purpose.

The codification of statutes differs radically from the amendment of statutes, for one is a collecting while the other is a changing. In making any codification, minor changes of phraseology ordinarily occur in the interest of brevity and consistency, but a codification ought not to be construed as a radical change from previous law unless the intention to make the change clearly appears.

Taylor v. Delaney, 2 Cai. Cas. 151; Goodell v. Jackson, 20 Johns. 722, 11 Am. Dec. 351; United States v. Dauphin, 20 Fed. 628.

The early immigration statutes did not apply to seamen.

United States v. Sandrey, 48 Fed. 550; United States v. Burke, and Moffitt v. United States, supra.

If the words used in a statute leave the mind in uncertainty as to the intention of Congress, then it is proper and usual for courts to look at the congressional history of the statute to see what intention was expressed when the statute was being framed and discussed.

The Collector v. Richards (Arthur v. Richards) 23 Wall. 246, 258, 23 L. ed. 95, 96; Blake v. National City Bank, 23 Wall. 307, 316, 23 L. ed. 119, 120; Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240; The Delaware, 161 U. S. 459, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516.

It has been the uniform practice of this court, in interpreting the ambiguous expressions of a statute, to examine into and give weight to the construction actually put upon the statutes in question by the executive department and officers actually enforcing it.

Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; United States v. Gilmore, 8 Wall. 330, 19 L. ed. 396; Smythe v. Fiske, 23 Wall. 374, 382, 23 L. ed. 47, 49; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Brown v. United States, 113 U. S. 568, 571, 28 L. ed. 1079, 1080, 5 Sup. Ct. Rep. 648; United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; United States v. Hill, 120 U. S. 169, 183, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; Schell v. Fauché, 138 U. S. 562, 34 L. ed. 1040, 11 Sup. Ct. Rep. 376; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306.

Assistant Attorney General **Cooley** argued the cause and filed a brief for the United States:

The construction of § 18 of the act of March 3, 1903, asked for by the respondent, has been directly upheld and not only by the courts below in this case, but in the following similar cases:

United States v. Schulz, Sept. 23, 1904; United States v. Kreeh, Feb. 3, 1905; United States v. Cuppers, May 11, 1906; United States v. Brandt, May 15, 1906; United States v. Frank Waterhouse Co. Jan. 19, 1907; and United States v. Hill, Sept. 18, 1907 (Unreported).

When we come to labor done entirely apart from the ship, an alien seaman is as much within the prohibition of the statute as any other alien.

Re Moncan, 14 Fed. 47; Re Ah Kee, 22 Blatchf. 520, 22 Fed. 520.

The office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtile inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.

Heydon's Case, 3 Coke, 7a. See also Leversee v. Reynolds, 13 Iowa, 310; Torreyson v. Board of Examiners, 7 Nev. 22.

Even if the title of the act be deemed inconsistent with our construction, the title must yield to the plain and unambiguous language of the text.

United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; United States v. McCrory, 56 C. C. A. 373, 119 Fed. 861; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 18 L. ed. 518; The New York, 47 C. C. A. 232, 108 Fed. 109; United States v. Briggs, 9 How. 351, 13 L. ed. 170; United States v. McArdle, 2 Sawy. 367, Fed. Cas. No. 15,653.

The interpretation of "landing" as meaning a permanent separation from the ship is justified, both on principle and on authority.

Re Moncan, 14 Fed. 44; Re Ah Kee, supra; Re Jam, 101 Fed. 989.

Assistant Attorney General **Cooley** argued the cause, and, with Attorney General Bonaparte, filed a brief for plaintiff in error in No. 404:

Where a person indicted for any offense is not put upon his trial before a jury, but the case is disposed of by a decision on some preliminary question, there has been no jeopardy.

Cooley, Const. Lim. 7th ed. 467; Vaux's Case, 4 Coke, 44a; State v. Nelson, 26 Ind. 368; White v. State, 49 Ala. 347; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Bishop, Crim. Law, 7th ed. § 1014; United States v. Gibert, 2 Sumn. 39, Fed. Cas. No. 15,204. See also People v. Webb, 38 Cal. 477; Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118; Ex parte Fenton, 77 Cal. 183, 19 Pac. 267; Re McClaskey, 2 Okla. 568, 37 Pac. 854; Lovett v. State, 33 Fla. 392, 14 So. 837.

Mr. **Harrington Putnam** argued the cause, and, with Messrs. Rouse, Grant, & Grant, filed a brief for defendant in error in No. 404:

A writ of error does not lie in behalf of the United States, from the judgment of the circuit court, in favor of the defendant in error.

United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609.

The word "alien" cannot be interpreted in its unrestricted sense.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 375.

In Cunard S. S. Co. v. Stranahan, 134 Fed. 318, it was sought to impose a fine on the shipowner under § 9 of the act of 1903, with respect to certain stowaways. Judge Wallace, in sustaining a demurrer, held that the section is intended to apply only to a case where a diseased person is brought in by the vessel as a passenger, or voluntarily, and the word "bring" is used in the sense of import.

Mr. Justice **Holmes** delivered the opinion of the court:

The first of these cases comes up on certiorari to review a judgment of the circuit court of appeals for the second circuit, affirming a conviction of the petitioner under the immigration act of March 3, 1903, chap. 1012, § 18, 32 Stat. at L. 1213, 1217.† That section makes it the duty of any officer in charge of any *vessel bringing an alien to [124] the United States to adopt due precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishes him if he lands or permits to land any alien at any other time or place. The indictment was for wilfully permitting an alien to land at another place. The evidence was that the defendant was master of the Cunard Steamship Slavonia, that the alien was an Austrian sailor who shipped as a cook at Fiume, Hungary, for the round trip, not to be paid off until he returned, and that on the evening of the day of arrival at New York, after he had reported his work finished, he went ashore intending to come back, but changed his mind. He did not formally ask leave to go, but leave habitually was given and no additional precautions were taken when leave was asked. The judge was requested to direct a verdict for the defendant and to instruct the jury that, if the sailor intended to return when he left the ship, they must acquit, etc.; but he left it to the jury to say whether the defendant had used reasonable precautions, adverting to the fact that there were other desertions, and emphasizing the failure to enforce a rule requiring the men to ask leave to go ashore. Exceptions were taken, but the circuit court of appeals sustained the judgment, as we have said. 152 Fed. 1.

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†Sec. 18. That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel, who shall land or permit to land, any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law.

We assume for purposes of decision that one who makes it possible for an alien to land, by omitting due precautions to prevent it, permits him to land within the meaning of the penal clause in § 18. But we are of opinion that the section does not apply to the ordinary case of a sailor deserting while on shore leave, and that therefore the judgment must be reversed. We are led to this opinion by what seems to us the literal meaning of the section and also by the construction that would be almost necessary if the literal meaning seemed to us less plain.

The reasoning is not long. The phrase which qualifies the whole section is, "bringing an alien to the United States." It is only "such" officers of "such" vessels that are punished. "Bringing to the United [125]States." taken literally and nicely, *means, as a similar phrase in § 8 plainly means, transporting with intent to leave in the United States and for the sake of transport, —not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words "to land" mean to go ashore. To avoid certain inconveniences the government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. "Landing from such vessel" takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of "to land," as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words "bringing an alien to the United States," that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, does not matter for this case. We think it superfluous to go through all the sections of the act for confirmation of our opinion. *It is enough to say that we feel[**126**] no doubt when we read the act as a whole.

A reason for the construction adopted below was found in the omission of the word "immigrant" which had followed "alien" in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is "An Act to Regulate the Immigration of Aliens into the United States."

Upon our construction of the statute we need not go further into the particular circumstances. But we may add that even on a different reading the jury was permitted to establish a questionably high standard of conduct, if it be admitted, as it was, that shore leave might be granted. No practicable method of preventing sailors from occasionally yielding to the seductions of an unduly prolonged stay on land was suggested or occurs to our mind.

In the second case the district judge declined to follow the decision in Taylor v. The United States, 152 Fed. 1, which we have been considering, and quashed an indictment which disclosed that the alien alleged to have been permitted unlawfully to land was a seaman. The United States brings a writ of error under the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209, on the ground, it must be presumed, that the judgment was based upon the construction of the statute. There are other technical questions apparent on the record, but, if they are open, the government very properly has not pressed them, but has confined itself to the question of law with which we have dealt. There is an allegation in the indictment that the alien was a stowaway under order of deportation, and there is a suggestion that this raises a doubt if he was a bona fide seaman. This is the only additional point raised.

But we perceive nothing in the fact that an alien has been refused leave to land from [127]a British ship and has been ordered *to be deported, to make it impossible, as matter of law, for the British master subsequently to accept him as a sailor on the high seas, even if bound for an American port. If the government had wished to try the good faith of this particular transaction, and not simply to get a construction of the act, there was no need to rely on the allegation mentioned alone. Of course it is possible for a master unlawfully to permit an alien to land, even if the alien is a sailor, and it was alleged that the master did so. But we take the government at its word.

The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this. We do not perceive the difficulty. No doubt of the power of Congress is intimated in United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609. If the 5th Amendment has any bearing, the act of 1907 is directed to judgments rendered before the moment of jeopardy is reached. Kepner v. United States, 195 U. S. 100, 128, 49 L. ed. 114, 124, 24 Sup. Ct. Rep. 797. We think it unnecessary to discuss the question at length.

Judgment in No. 238 reversed.

Judgment in No. 404 affirmed.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plff. in Err.,
v.
WILLIAM A. WRIGHT, Comptroller General of Georgia, and John W. Nelms, Sheriff of Fulton County. (No. 85.)

GEORGIA RAILROAD & BANKING COMPANY, Plff. in Err.,
v.
WILLIAM A. WRIGHT, Comptroller General of Georgia, and John W. Nelms, Sheriff of Fulton County. (No. 39.)

(See S. C. Reporter's ed. 127–142.)

Constitutional law — due process of law in tax proceedings.

Due process of law is not afforded by the system of taxation prescribed by the Georgia Political Code, under which, as construed by the highest state court, the valuation of property not returned for taxation, made by the assessing officer without notice or opportunity for hearing, concludes the taxpayer, both in the tax proceedings and in the courts, unless he can show bad faith, even where he may have withheld the property from return upon reasonable grounds, and in the honest belief that it is not taxable.

[Nos. 85, 89.]

No. 85 argued October 22, 23, 1907. Decided November 18, 1907.
No. 89 argued October 21, 22, 1907. Decided November 18, 1907.

TWO WRITS of error to the Supreme Court of the State of Georgia to review decrees affirming decrees of the Superior Court of Fulton County in that state, denying injunctive relief against the collection of certain taxes. Reversed and remanded for further proceedings.

See same case below in No. 89, 125 Ga. 589, 54 S. E. 52; on prior writ of error, 124 Ga. 596, 53 S. E. 251. No. 85, 125 Ga. 617, 54 S. E. 64; on prior writ of error, 124 Ga. 630, 53 S. E. 207.

The facts are stated in the opinion.

Mr. **T. M. Cunningham, Jr.**, argued the cause, and, with Messrs. Henry C. Cunningham, A. R. Lawton, and Alexander C. King, filed a brief for plaintiff in error the Central of Georgia Railway Company:

The back-tax assessments issued without due process of law.

Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; Cooley, Const. Lim. 518; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 235, 238, 41 L. ed. 984, 985, 17 Sup. Ct. Rep. 581; Galpin v. Page, 18 Wall. 350, 368, 21 L. ed. 959, 963; Glidden v. Harrington, 189 U. S. 258, 47 L. ed. 801, 23 Sup. Ct. Rep. 574.

The right to be heard extends to the assessment of taxes.

Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 752; 1 Cooley, Taxn. 3d ed. 626; Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 710, 28 L. ed. 572, 573, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 105, 24 L. ed. 620;

NOTE.—On due process of law in tax matters—see notes to Kuntz v. Sumption, 2 L.R. A. 656, and Read v. Dingess, 8 C. C. A. 398.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

Glidden v. Harrington, 189 U. S. 259, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 318, 43 L. ed. 461, 19 Sup. Ct. Rep. 205.

The right to be heard applies to changes in assessments by adding omitted property.

Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; Walsh v. State, 142 Ind. 357, 33 L.R.A. 392, 41 N. E. 65; Cleghorn v. Postelwaite, 43 Ill. 431; Tolman v. Salomon, 191 Ill. 204, 60 N. E. 809; Gray, Limitation of Taxing Powers, § 1295, p. 639, 27 Am. & Eng. Enc. Law, p. 705; Meyers v. Shields, 61 Fed. 713; Redwood County v. Winona & St. P. Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 475, Affirmed in 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Overing v. Foote, 65 N. Y. 277; Douglas v. Westchester County, 172 N. Y. 309, 65 N. E. 162; State Revenue Agent v. Tonella (Adams v. Tonella) 70 Miss. 701, 22 L.R.A. 350, 14 So. 17; D'Antignac v. Augusta, 31 Ga. 715; Moors v. Street Comrs. 134 Mass. 432; Gibbons v. Adamson, 44 Kan. 203, 24 Pac. 51.

A back-tax assessment is either a new judgment or an amendment to an old judgment. In either event, notice is necessary, acording to all of the analogies of the law; for, after final judgment, whether by a court or tax assessor, on the adjournment of the term, the party is discharged; the question is no longer *sub judice;* jurisdiction is lost; the original process is a spent force; and a new process and opportunity to be heard is needed to support an amended or a new judgment.

Phillips v. Negley, 117 U. S. 678, 29 L. ed. 1016, 6 Sup. Ct. Rep. 901; Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26 L. ed. 91.

During the term the judgment is *in fieri,* and may be subject to change without notice.

But even where there is a judgment by default, the court cannot, on motion, vacate the judgment at a subsequent term, allow an amendment increasing the *ad damnum,* and enter a new judgment for a larger sum.

Radclyffe v. Barton, 154 Mass. 157, 28 N. E. 148.

And a statute that authorized a judgment to be set aside on an affidavit, without notice, was held to be unconstitutional for want of due process of law.

Peerce v. Kitzmiller, 19 W. Va. 564.

And in Porter v. Orient Ins. Co. 72 Conn. 519, 45 Atl. 7, the supreme court of Connecticut recognized that, under some of the old decisions in that state, changes could be made in a judgment without notice, but showed that, since the adoption of the 14th Amendment, a notice was necessary in order to afford due process.

Here the omission of the amount of taxes was not a clerical error which could be corrected by an examination of the record, but an error of substance, the correction of which required notice to the opposite party, and which could not be corrected on motion.

Bullard v. Sherwood, 85 N. Y. 254.

The property having been omitted, not by accident or fraud, but under a construction of the law, the remedy of the state was by submission to arbitration, and not by a second assessment.

Moneypenny's Estate, 181 Pa. 309, 37 Atl. 589.

The constitutional guaranty of due process cannot be circumvented by giving notice in the first instance, and then changing the assessment by adding property without notice.

Phillips v. New Buffalo Twp. 64 Mich. 685, 31 N. W. 582.

This court has recognized repeatedly the necessity for notice and opportunity to be heard in the assessment of back taxes.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Gallup v. Schmidt, 183 U. S. 305, 46 L. ed. 212, 22 Sup. Ct. Rep. 162; Bristol v. Washington County, 177 U. S. 147, 44 L. ed. 707, 20 Sup. Ct. Rep. 585.

Since the argument in the court below, this court has rendered a decision exactly in point, and rules that the statute must provide a right and opportunity to be heard in order to support back-tax assessments.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87.

Mr. **John C. Hart** argued the cause and filed a brief for defendants in error:

The Georgia law affords to every citizen, individual or corporation, ample facilities for the preservation of his rights as against the tax gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property. The requirement of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity to dispute with the state the question of the value of his property, and the amount of tax to be levied thereon. In other words, ample machinery is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection.

Georgia R. & Bkg. Co. v. Wright, 124 Ga. 617, 53 S. E. 251; Cooley, Taxn. 619–624; Custer County v. Anderson, 15 C. C. A. 471, 29 U. S. App. 639, 68 Fed. 341; Lott v. Hubbard, 44 Ala. 593; McMillan v. Carter. 6 Mont. 215, 9 Pac. 906; Oreña v. Sherman, 61 Cal. 101; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; DuBignon v. Brunswick, 106 Ga. 317, 32 S. E. 102.

The 14th Amendment engrafts no new principle in the Constitution relative to taxation.

Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574.

Messrs. **Joseph R. Lamar** and **Joseph B. Cumming** argued the cause, and, with Mr. Alex. C. King, filed a brief for plaintiff in error the Georgia Railroad and Banking Company:

The right to be heard is indefeasible, and plaintiff could not be deprived of this right, under the form of a penalty.

Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; Cooley, Const. Lim. 7th ed. 518; Galpin v. Page, 18 Wall. 368, 21 L. ed. 963.

The plaintiff cannot be confronted first and last with a conclusive assessment, but the law must provide a mode of contesting the charge imposed, whether it be the original assessment, a re-assessment, or by way of addition of omitted property.

Gray, Limitations of Taxing Powers, § 1295, p. 639; Palmer v. McMahon, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 318, 43 L. ed. 461, 19 Sup. Ct. Rep. 205; Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 710, 28 L. ed. 572, 573, 4 Sup. Ct. Rep. 663.

The right to be heard applies to changes in assessments by adding omitted property.

Gray, Limitations of Taxing Powers, § 1295, p. 639; Bellingham Bay & B. C. R. Co. v. New Whatcom, supra; Tolman v. Salomon, 191 Ill. 204, 60 N. E. 809; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; Walsh v. State, 142 Ind. 357, 33 L.R.A. 392, 41 N. E. 65; Cleghorn v. Postlewaite, 43 Ill. 431.

The assessment of back taxes on omitted property involves the determination of value, is judicial in its nature, and notice and a statutory right to be heard in back-tax assessments are essential to the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Gallup v. Schmidt, 183 U. S. 305, 46 L. ed. 212, 22 Sup. Ct. Rep. 162; Bristol v. Washington County, 177 U. S. 146, 44 L. ed. 707, 20 Sup. Ct. Rep. 585; Gray, Limitations of Taxing Powers, § 1295, p. 639; Meyers v. Shields, 61 Fed. 713; Redwood County v. Winona & St. P. Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 475, Affirmed in 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Overing v. Foote, 65 N. Y. 277; State Revenue Agent v. Tonella (Adams v. Tonella), 70 Miss. 701, 22 L.R.A. 350, 14 So. 17; Moors v. Street Comrs. 134 Mass. 432; Gibbins v. Adamson, 44 Kan. 203, 24 Pac. 51; D'Antignac v. Augusta, 31 Ga. 715.

This right to a new hearing is in accord with all the analogies of the law; for, after final judgment, whether by a court or a tax assessor, on the adjournment of the term, the process is "a spent force," the party is discharged from attendance, the question is no longer *sub judice*, and jurisdiction is lost.

Phillips v. Negley, 117 U. S. 678, 29 L. ed. 1016, 6 Sup. Ct. Rep. 901; Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26 L. ed. 91; Griswold v. Union School Dist. 24 Mich. 262.

There must be a period when, for obvious reasons of policy, the assessment roll for any given year must be regarded as completed.

Overing v. Foote, 65 N. Y. 276; Sudderth v. Brittain, 76 N. C. 461.

Its tax return having been made and accepted, the plaintiff was authorized to depart thence "without a day," with the assurance of the law that no change could be made years afterwards without a new hearing. For the constitutional provision for due process cannot be circumvented by giving notice in the first instance, and then adding property and assessing a tax thereon without a new hearing.

Hovey v. Elliott, 167 U. S. 415, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; Phillips v. New Buffalo Twp. 64 Mich. 683, 31 N. W. 582; Griswold v. Union School Dist. 24 Mich. 262.

The statute provided for no notice, and deprived the plaintiff of a right to be heard as a penalty. This being true, neither a letter nor any other form of notice could be process. For that must not be of favor or by accident, but the statute itself must provide for notice, and fix the time and place where the hearing can be had under the imperative obligation of the sense of judicial responsibility by an impartial and right decision.

Kentucky Railroad Tax Cases, 115 U. S. 334, 29 L. ed. 417, 6 Sup. Ct. Rep. 57; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 538, 40 L. ed. 251, 16 Sup. Ct. Rep. 83; Spencer v. Merchant, 125 U. S. 356, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; Palmer v. McMahon, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324; Glidden v. Harrington, 189 U. S. 258, 47 L. ed. 801, 23 Sup. Ct. Rep. 574; Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289.

There are cases in which it was held that a party was afforded due process if he was given the right to contest the charge after the assessment was made. The court held that the assessment in this case was conclusive under the statute; that the plaintiff was not entitled to be heard, either before or after it issued; nor did he have the right to be heard in the pending cause. There was therefore, an absolute denial of the right to be heard as to the justice or validity of the tax, the taxability or value of the stock, and every other matter affecting the legality of the assessment. On the authority of the cases above cited, the assessments were void.

Gray, Limitations of Taxing Powers, § 1295, p. 639; Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 710, 28 L. ed. 572, 573, 4 Sup. Ct. Rep. 663.

The statutory scheme did not afford due process of law in the assessment of back taxes.

Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; Hagar v. Reclamation Dist. No. 108, supra; Gray, Limitations of Taxing Powers, § 1295, p. 639.

Nor did the court, in the pending case, have jurisdiction to afford the plaintiff a hearing as to the value of the stock, holding, as it did, that it could not hear evidence for the purpose of determining at what sum the stock should have been assessed for taxation. And the contention of the defendant that the hearing was useless is no reply to plaintiff's demand for the constitutional right of a hearing, since, whether "the individual has a defense, or, by way of exemption, or is without defense, is not important. To assume that he has none, and therefore is entitled to no day in court, is to assume against him the very point he may wish to contest."

Rees v. Watertown, 19 Wall. 123, 22 L. ed. 77; 1 Cooley, Taxn. 3d ed. 632.

Since the decision was rendered this court has affirmatively declared that, in the assessment of back taxes, the citizen must be afforded an opportunity to be heard, either when the assessment issued, or in the equity cause brought for cancelation thereof.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87.

The universal understanding of citizens and tax officers that foreign stock was not taxable was equivalent to a judicial determination, and will be applied in analogy to the principle of *res judicata.*

Bruce v. Schuyler, 4 Gilman, 221, 46 Am. Dec. 447; Cook County v. Healy, 222 Ill. 310, 78 N. E. 625; Herndon v. Moore, 18 S. C. 339; Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008.

The decision in the test case of Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16, reversing the former universal practice and contemporaneous construction, will be given a prospective, and not a retrospective, effect. The courts will not allow it to have a greater effect than a simple repeal.

Herndon v. Moore and Taylor v. Ypsilanti, supra; Sutherland, Stat. Constr. 307–312.

The doctrine of contemporaneous construction has been applied in tax cases.

Franklin County Court v. Louisville & N. R. Co. 84 Ky. 59; Rattermann v. Phipps, 3 Ohio N. P. 69; Macon v. Jones, 67 Ga. 489; Staten v. Savannah, F. & W. R. Co. 111 Ga. 803, 36 S. E. 938.

Messrs. **Boykin Wright** and **John C. Hart** argued the cause and filed a brief for defendants in error:

Due process in tax procedure is very different from judicial process.

Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574.

There should be the utmost liberality in applying the doctrine of due process to tax proceedings.

Glidden v. Harrington, supra; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.

The general system for collecting taxes in this country is sufficient for due process.

Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Turpin v. Lemon, 187 U. S. 51, 58, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20.

The essential elements of due process are notice and opportunity to defend.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

The 14th Amendment has to do solely with the fundamental rights, and is not concerned with the mode of procedure or remedy by which such rights are asserted.

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

State taxation, to be wanting in due process, must be spoliation under the guise of taxation.

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

Due process in matters of taxation means notice of suitable character, and an opportunity to be heard at some stage of the proceedings.

Taylor v. Secor, 92 U. S. 575, 23 L. ed. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The notice need not be personal or individual. In fact, the usual and proper notice is statutory and collective.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, supra; Judson, Taxn. §§ 321, 329; Kentucky Railroad Tax Cases and Taylor v. Secor, supra; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Opportunity to be heard at some stage of the proceedings is all that is requisite. It may be either before or after the assessment, or at any time before final judgment is entered.

Gallup v. Schmidt, 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

It is no denial of due process to withdraw the opportunity to be heard as a penalty for the taxpayer's failure or refusal to make a proper return of his property to a designated officer, in the manner and at the time required by law.

Glidden v. Harrington, 189 U. S. 255, 259, 260, 47 L. ed. 798, 801, 802, 23 Sup. Ct. Rep. 574.

The right to discriminate in some manner against those who fail to hand in lists has often been judicially recognized. When the discrimination consists in merely submitting the party to the "doom" of the assessor, and depriving him of any appeal, it would seem that there could be no valid objection to it.

Cooley, Taxn. 3d ed. 619-624 and notes; Custer County v. Anderson, 15 C. C. A. 471, 29 U. S. App. 639, 68 Fed. 341; Lott v. Hubbard, 44 Ala. 593; State v. Louisiana Mut. Ins. Co. 19 La. Ann. 474; Wabash, St. L. & P. R. Co. v. Johnson, 108 Ill. 11; Morris v. Jones, 150 Ill. 542, 37 N. E. 929; McMillan v. Carter, 6 Mont. 215, 9 Pac. 906; Valencia County v. Atchison, T. & S. F. R. Co. 3 N. M. 677, 10 Pac. 294; Oreña v. Sherman, 61 Cal. 101; Tucker v. Aiken, 7 N. H. 113; Hartford v. Champion, 58 Conn. 268, 20 Atl. 471; State v. Washoe County, 5 Nev. 317; McTwiggan v. Hunter, 19 R. I. 265, 29 L.R.A. 526, 33 Atl. 5; Tripp v. Torrey, 17 R. I. 359, 22 Atl. 278; Griggsby Constr. Co. v. Freeman, 108 La. 435, 58 L.R.A. 349, 32 So. 399; Georgia R. & Bkg. Co. v. Wright, 124 Ga. 617, 53 S. E. 251.

This is no violation of due process.

27 Am. & Eng. Ency. Law, 2d ed. p. 669; Board of Revenue v. Montgomery Gaslight Co. 64 Ala. 269; Siegfried v. Raymond, 190 Ill. 424, 60 N. E. 868; State ex rel. Goodman v. Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; Marion County v. Kruidenier, 72 Iowa, 92, 33 N. W. 378; Peacock Distilling Co. v. Com. 110 Ky. 597, 62 S. W. 272; National Bank v. New Bedford, 155 Mass. 313, 29 N. E. 532.

The construction placed by the Georgia supreme court upon the Georgia statutes and Constitution is binding on the United States Supreme Court.

Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Post v. Kendall County, 105 U. S. 669, 26 L. ed. 1205; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Elmwood Twp. v. Marcy, 92 U. S. 289, 23 L. ed. 710; Taylor v. Secor, 92 U. S. 575, 23 L. ed. 663; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825.

Where a state court declares its statutes are not in conflict with the Federal Constitution, this is binding, in all but exceptional cases, upon the United States Supreme Court.

Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Gallup v. Schmidt, supra; Hodge v. Muscatine County, 196 U. S. 276, 279, 49 L. ed. 477, 480, 25 Sup. Ct. Rep. 237; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88.

Mr. Justice **Day** delivered the opinion of the court:

These cases are writs of error to the supreme court of the state of Georgia, in suits brought to enjoin the collection of certain taxes. In the view we take of them they may be considered together.

Actions were begun by the plaintiffs in error, in the superior court of Fulton county, to enjoin the enforcement of executions in the hands of the sheriff, issued for taxes assessed by the comptroller general on shares of the corporate stock of the Western Railway of Alabama, an Alabama corporation, which stock was alleged to be held and owned by the plaintiffs in error.

The superior court refused to award an injunction.

Upon writs of error the supreme court affirmed the judgments of the court below. 124 Ga. 596, 630, 53 S. E. 251, 207. The cases were remitted to the superior court of Fulton county and that court rendered final decrees in favor of the defendants below, holding the tax executions to be lawful. The cases were again taken to the supreme court of Georgia and there affirmed. 125 Ga. 589, 617, 54 S. E. 52, 64.

The question of the taxability of these shares was a matter of litigation in the Federal courts of the Georgia district, and it was held such shares were not taxable. [132]116 Fed. 669, *Affirmed in the court of appeals, 54 C. C. A. 672, 117 Fed. 1007. The latter case was reversed and the stock held taxable in the case of Wright v. Louisville & N. R. Co. decided by this court at the October term, 1904. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16.

Thereupon says the supreme court of Georgia:

"On January 27, 1905, the comptroller general wrote to the president of the Georgia Railroad & Banking Company the following letter: 'The Supreme Court of the United States having recently held, as you doubtless are aware, that the shares of stock of the Western Railway of Alabama owned by the Georgia Railroad & Banking Company are taxable in Georgia, it becomes my duty to assess these shares of stock for taxation for each of the years in which they are in default for their taxes. This assessment is required to be made by the comptroller general from "the best information obtainable." I desire to proceed to the discharge of this duty intelligently, and therefore respectfully request you to furnish me any *data* in your possession which will enable me to make perfectly fair, just, and legal assessments of this property. From your long connection with the property as president of the Georgia Railroad & Banking Company, and your familiarity with its value, you doubtless are in possession of information which will very greatly aid me in making an equitable assessment of the property. I trust, therefore, you will submit at your earliest possible convenience any facts or suggestions bearing upon this line which you may deem proper. I would be glad to have any *data* which you may submit with reference to its value for each year, beginning with the year 1883, the year I am informed your corporation became the owner of these shares of stock. I expect to proceed with this matter some time the early part of next week, if possible.' Other correspondence took place between the comptroller general and various officers of the Georgia railroad, including the general counsel, who eventually submitted to the comptroller general a statement regarding what he considered the value of the railroad property in question, *together with a tabulated statement of the [133] dividends which the Georgia railroad had received from the stock, at the same time protesting that the stock was not liable for taxation, and refusing to make any return of it for that purpose. The comptroller general thereupon, according to his affidavit, 'assessed the same from the best information obtainable.' It is insisted with great earnestness and ability that the levy of executions under these circumstances, without giving notice to the railroad company or allowing it any opportunity to be heard as to the basis of valuation upon which the assessment was made, amounted to a seizure of its property without due process of law. It is not claimed that the comptroller general has violated the provisions of any existing statute, but that the laws of Georgia do not provide for the collection of taxes on omitted property after a return has been made by the taxpayer and accepted by the comptroller general." [124 Ga. 612.]

The first and perhaps principal question argued in the case arises upon the contention of the plaintiffs in error that the method of assessment provided for the taxation of property in such cases as the present, as laid down in the statutes of the state of Georgia, as construed by the supreme court of the state, do not afford the taxpayer due process of law. The pertinent sections of the Political Code of Georgia are copied in the margin.†

*Of the system of taxation thus provided[134]

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†Section 804. Returns to Comptroller, How Made. The returns of all companies or persons required to be made to the comptroller general must be in writing and sworn to by the presiding officer, etc.

Section 805. Returns and Taxes, etc. The returns of all railroad and insurance and express companies, and agents of foreign companies, authorized in this state, shall be made to the comptroller general by the first day of May in each year, and the taxes thereof paid to the state treasurer by the

the supreme court of Georgia, in a summary of its provisions, says:

"The Political Code, § 812, prescribes the method by which 'corporations, companies, persons, agencies, or institutions,' shall make returns of their property to the comptroller general for taxation, and provides that 'such returns shall be carefully scrutinized by the comptroller general, and if, in his judgment, the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of . . . matters required to be returned as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such *returns shall receive [135] notice and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators, . . . and their award shall be final.' Section 813 is as follows: 'In cases of failure to make return, the comptroller general shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions.' By § 814 it is provided that 'in all cases of default of payment of taxes upon returns or assessments, the comptroller general shall enforce collections in the manner now provided by law.' 'If any corporation, company, person, agency, or institution, who are required to make their returns to the comptroller general, shall fail to return the

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first day of October, and not later than December twentieth of each year.

Section 812. Returns to Comptroller Must be Itemized. Whenever corporations, companies, persons, agencies, or institutions are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the comptroller general, for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the comptroller general, and if, in his judgment, the property embraced therein is returned below its value, he shall assess the value, within sixty day thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment or of correction of returns, as herein provided, the officer or person making such returns shall receive notice and shall have the privilege within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators,—one chosen by himself and one chosen by the comptroller general —with power to choose an umpire in case of disagreement, and their award shall be final.

Section 813. When No Return, Comptroller to Assess. In cases of failure to make return the comptroller general shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions.

Section 814. Collection of Tax, How Enforced. In all cases of default of payment of taxes upon returns or assessments, the comptroller general shall enforce collections in the manner now provided by law.

Section 847. Defaulters to be Doubly Taxed. If a person fails to make a return, in whole or in part, or fails to affix a value to his property, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain, and, having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made.

Section 855. Taxes for Former Years, How Returned and Collected. Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest.

Section 874. Defaulting Corporations. If any corporations, company, person, agency, or institution, who are required to make their returns to the comptroller general, shall fail to return the taxable property, or specifics, or pay annually the taxes for which they are liable to the state treasury, the comptroller general shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties.

Section 879. When There is No Return. When there is no return by which to assess the tax the comptroller general shall, from the best information he can procure, assess in his discretion.

taxable property or specifics, or pay annually the taxes for which they are liable to the state treasury, the comptroller general shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties.' Sec-[136]tion 874. 'When there is no return *by which to assess the tax, the comptroller general shall, from the best information he can procure, assess in his discretion.' Section 879. These sections of the Political Code are thus set out in order that we may have before us at the outset the various statutes bearing on the power of the comptroller general to collect taxes on property which has not been returned. And at this point we will take occasion to say that, in our opinion, all considerations of the good faith of the railroad company should be eliminated from this discussion. It may be conceded that the officials of the company honestly believe that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia railroad's ownership of it, or to deceive the comptroller general in any way. In no jurisdiction has the maxim '*Ignorantia legis neminem excusat*' been more rigidly applied than in Georgia. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary, furnishes no excuse for nonpayment."

In view of this statute as thus construed the question made is whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward upon a suit to collect taxes, or by independent suit to enjoin their collection.

Considerable discussion was had in the oral argument of the case concerning the effect of the rulings of the supreme court of Georgia in construing the sections of the Political Code governing this subject. A perusal of the opinions delivered in these cases leaves no doubt in our minds that the supreme court of Georgia has held the taxing scheme of the state of Georgia, as laid down in its statutes, to be that, while it provides for a method of valuation in case of the return of property for tax-[137]ation, it does not intend *to give to the taxpayer who fails to return property legally liable to be assessed any opportunity to be heard as to the value of the property or the amount of the assessment. But the failure to return places it within the power and duty of the collector to make an assessment final and conclusive upon the taxpayer without hearing, for, in its latest utterance upon the subject (124 Ga. 617), that learned court said:

"The Georgia law affords to every citizen, individual or corporate, ample facilities for the preservation of his rights as against the tax gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property, and it requires him to know whether his property is taxable or not. The requirement of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity to dispute with the state the question of the value of his property and the amount of tax to be levied thereon. When he fails to return, in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have the mutual rights between himself and the taxing power adjusted by arbitration is concerned. In other words, ample 'machinery' is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection. This, it seems to us, is the scheme of taxation contemplated by the laws of this state. Whether or not it is consistent with a wise public policy we do not undertake to determine. That it is not unconstitutional we are fully satisfied."

It would be impossible to reconcile the different holdings in the state courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right *to be heard, having by [138] his failure to return submitted himself to "the doom of the assessor." Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be thus assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many state Constitutions as well as the 14th Amendment of the Constitution of the United States.

Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself.

Former adjudications in this court have

settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

In the late case of Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87, decided at the last term of this court, the subject underwent consideration, and it was there held that, before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the state court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied.

Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?

Under the scheme provided for, if the [139] property is withheld *from return, the comptroller, without notice or opportunity for hearing, must proceed to value the property, and his valuation is final and conclusive, unless the taxpayer can show—a very unlikely contingency—that the taxing officer has acted in bad faith in making the assessment. Against the assessment thus made there is no relief in the courts of the state upon proceedings brought to collect the taxes or by bill to enjoin their collection. The penalty of failure to return, no matter how honest or well grounded the taxpayer may have been in his belief that the property was not subject to taxation, compels him to submit to the final and conclusive assessment made by the taxing officer.

It may be conceded that, under the provisions of § 855, the duty to return property omitted in former years is a continuing one, and that, under § 812 of the Political Code, upon such return the system of arbitration of value may be open to the taxpayer; but if, for good reason, the taxpayer contests the taxability of his property, and does not return it, the door of opportunity is closed upon him.

As in the present case, courts may differ as to the taxable character of the property, but the taxpayer must concede its taxability, or be forever concluded by a determination of its value judicial in its nature (Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663), in a proceeding where he has no legal right to a hearing.

But it is contended that plaintiffs in error had an opportunity to be heard, and were in fact heard, upon the question of the value of their property upon an issue made by an amendment to the answer in the superior court, after the case went back from the supreme court, tendering an issue and asking the court to pass upon the value of the property.

Upon this subject we think the decision of the supreme court does not leave in doubt the effect of such hearing upon this issue. For it is said (125 Ga. 605):

"As to those years in which the plaintiff had an opportunity to return its property for taxation and failed to do so, and for *which the property has been assessed by [140] the comptroller general, whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither averment nor proof that the assessment was the result of fraud or corruption on the part of the comptroller general. If there had been, a different question would have been presented."

And further, in the same opinion (125 Ga. 616):

"The plaintiffs contend that the valuation placed by the comptroller general upon the stock was excessive. The defendant contended that, as the plaintiff was a defaulter, the valuation of the comptroller general was conclusive under the law. In an amendment to the answer, the defendant alleged that the valuation placed upon the stock by the plaintiff was not its true market value, 'but, on the contrary, the true market value is as assessed by the comptroller general,' and concluded the amendment with a prayer 'that the court may so find and decree.' The plaintiff objected to the allowance of this amendment on the ground that the court was without jurisdiction to assess or revalue the same for the purpose of taxation. and that the prayer was vague and indefinite. The court ruled that it could not in this case decide or fix the value of the stock for the purpose of determining the amount for which the execution should proceed, but that it would hear evidence with a view of determining whether the assessment was excessive, and refused to strike the prayer. Evidence was heard in reference to the method adopted by the comptroller general in reaching the valuation placed by him upon the stock, and there was a finding in the final decree that the valuation was not excessive. As has been said, there was evidence justifying this finding of fact. Under the circumstances, even if there was any error in refusing to strike the prayer of the amendment to the answer, the error was not of such a character as to require a reversal of the judgment."

[141] *That is to say, the supreme court had already decided that the taxpayer, being in default of return, was not entitled to be heard upon the valuation of his property, except for the purpose of attacking the assessment for "fraud or corruption" in the assessing officer, and the testimony did not show such excessive valuation as, within the rule laid down in both decisions, would avoid the action of the comptroller general.

The record discloses that for many years this class of property was not regarded as taxable in Georgia, and was not returned for taxation in the state. But it is contended that the taxpayer here stands in the attitude of one acting contumaciously, and denying the validity of the tax after this court had practically decided its validity against the plaintiffs in error in Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16. But, as we have seen, the supreme court of Georgia has expressly eliminated the element of bad faith in the taxpayer from the findings upon which its decision rests. The Wright Case was held not to have concluded the contention that plaintiffs were denied the equal protection of the laws, in that no other person or corporation in Georgia was assessed upon stock in a foreign corporation, nor the validity of the claim that the stock was not held in Georgia, nor other grounds alleged in the petitions, except so far as the Georgia railroad was concerned for the year 1900. 124 Ga. 607, 53 S. E. 251. We must decide the case in view of its relations to a taxpayer not fraudulently concealing his property, and honestly contending, with reasonable grounds for the contention, that it is not taxable under the laws of the state.

As we have seen, the system provided in Georgia by the statutes of the state as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of an *ex parte* valuation, against which there is no relief in the tax proceedings or in the courts, except in those cases where fraud or corruption can be shown in the action of the assessing officer.

Reluctant as we are to interfere with the enforcement of *the tax laws of a state, [142] we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the 14th Amendment to protect against impairment by state action.

The judgments of the Supreme Court of Georgia are reversed and the cases remanded for further proceedings not inconsistent with this opinion.

ELIZABETH M. CHAMBERS, Plff. in Err.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 142-160.)

Error to state court — Federal question — how raised.

1. The objection that the Federal question was not properly and seasonably raised in the state courts is not available to defeat the jurisdiction of the Supreme Court of the United States of a writ of error to the highest court of a state, where it clearly and unmistakably appears from the opinion of that court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered.

Constitutional law — privileges and immunities.

2. The privileges and immunities of citizens in the several states, secured, by U. S.

NOTE.—As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to the validity of class legislation, see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On comity as to taking jurisdiction of cause of action for death arising outside of state—see note to Boston & M. R. Co. v. Hurd, 56 L.R.A. 195.

Const. art. 4, § 2, ¶ 1, to the citizens of each state, are not denied by the provision of an Ohio statute under which, as construed by the highest court of that state, the right of action created by Pa. act of April 15, 1851, p. 674, § 19, in favor of the widow or personal representatives of one whose death is caused by negligence, can be maintained in the Ohio courts only when the deceased was an Ohio citizen.

[No. 22.]

Argued October 17, 18, 1907. Decided November 18, 1907.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment for defendant in an action to recover damages for the wrongful death of a nonresident, entered upon reversing judgments for plaintiff in the Circuit and Common Pleas Courts of Mahoning County, in that state. Affirmed.

See same case below, 73 Ohio St. 16, 11 L.R.A. (N.S.) 1012, 76 N. E. 91.

The facts are stated in the opinion.

Mr. **Charles Koonce, Jr.**, argued the cause, and, with Messrs. R. B. Murray and W. S. Anderson, filed a brief for plaintiff in error:

The right to maintain a transitory action by a citizen of one of the states of the United States, in the courts of a sister state, is one of the privileges and immunities comprehended by § 2 of article 4 of the Constitution of the United States.

Ward v. Maryland, 12 Wall. 418-430, 20 L. ed. 449-453; Cole v. Cunningham, 133 U. S. 107-114, 33 L. ed. 538-542, 10 Sup. Ct. Rep. 269; Blake v. McClung, 172 U. S. 239-256, 43 L. ed. 432-439, 19 Sup. Ct. Rep. 165; Moredock v. Kirby, 118 Fed. 182; Paul v. Virginia, 8 Wall. 168-180, 19 L. ed. 357-360; Eingartner v. Illinois Steel Co. 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Cofrode v. Gartner, 79 Mich. 343, 7 L.R.A. 511, 44 N. W. 623; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Schell v. Youngstown Sheet Iron & Tube Co. 26 Ohio C. C. 209; State v. Cadigan, 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 33 L.R.A. 288, 20 So. 772; Roby v. Smith, 131 Ind. 342, 15 L.R.A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093; Shirk v. La Fayette, 52 Fed. 857; Farmers' Loan & T. Co. Chicago & A. R. Co. 27 Fed. 146; State v. Duckworth, 5 Idaho, 642, 39 L.R.A. 365, 95 Am. St. Rep. 199, 51 Pac. 456; Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230.

The real purpose and effect of the act as construed was, and is, to discriminate in favor of citizens of Ohio and against citizens of other states. Theoretical exceptions cannot save it from the ban of the constitutional provision herein in question.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Henderson v. New York, 92 U. S. 259-268, 23 L. ed. 543-548; Reid v. Colorado, 187 U. S. 137-153, 47 L. ed. 108-116, 23 Sup. Ct. Rep. 92; Moredock v. Kirby, supra.

The statute, as construed, is a denial of the right of the citizen of a sister state to have the cause of action resulting from the wrongful act enforced in favor of his wife and children.

Helman v. Pittsburgh, C. C. & St. L. R. Co. 58 Ohio St. 408, 41 L.R.A. 860, 50 N. E. 986.

The state of Ohio cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people.

Eingartner v. Illinois Steel Co. 94 Wis. 78, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; Blake v. McClung, supra.

In order that the statement that it is against the public policy of the state of Ohio to enforce in its courts a cause of action in favor of a citizen of another state can avail, it must first appear that it would be against the public policy of a state to enforce a like cause of action in favor of a citizen of its own state, or a like cause of action arising in its own state.

Huntington v. Attrill, 146 U. S. 657-670, 36 L. ed. 1123-1129, 13 Sup. Ct. Rep. 224; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Law v. Western R. Co. 91 Fed. 817; Davidow v. Pennsylvania R. Co. 85 Fed. 943; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 260; Wilson v. Tootle, 55 Fed. 211; Walsh v. New York & N. E. R. Co. 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584; Burns v. Grand Rapids & I. R. Co. 113 Ind. 169, 15 N. E. 230; Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48, 38 Am. Rep. 481; East Tennessee, V. & G. R. Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; McLeod v. Connecticut & P. Rivers R. Co. 58 Vt. 726, 6 Atl. 648; Boyce v. Wabash R. Co. 63 Iowa, 70, 50 Am. Rep. 730, 18 N. W. 673; Bruce v. Cincinnati R. Co. 83 Ky. 174; Missouri P. R. Co. v. Lewis, 24 Neb. 848, 2 L.R.A. 67, 40 N. W. 401; Knight v. West Jersey R. Co. 108 Pa. 250, 56 Am. Rep. 200; O'Reilly v. New York & N. E. R. Co. 16 R. I. 388, 5 L.R.A. 364, 6 L.R.A. 719, 17 Atl. 171, 906, 19 Atl. 244; Nelson v. Chesapeake & O. R. Co. 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838.

The fact that litigation may congest the court dockets is not the kind of reason which will permit it to escape the charge of unconstitutionality on the ground of public policy.

Cofrode v. Gartner, 79 Mich. 332, 7 L.R. A. 511, 44 N. W. 623.

This court has jurisdiction to review this case.

Capital City Dairy Co. v. Ohio, 183 U. S. 238–242, 46 L. ed. 171–174, 22 Sup. Ct. Rep. 120; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530–534, 46 L. ed. 673–677, 22 Sup. Ct. Rep. 446; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295–299, 50 L. ed. 1036–1040, 26 Sup. Ct. Rep. 613; Rector v. City Deposit Bank, 200 U. S. 405–412, 50 L. ed. 527–530, 26 Sup. Ct. Rep. 289; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179–182, 50 L. ed. 428–432, 26 Sup. Ct. Rep. 208.

Mr. **George F. Arrel** argued the cause, and, with Messrs. James P. Wilson and Arrel, Wilson, & Harrington, filed a brief for defendant in error:

The Federal right, title, privilege, or immunity must be specially set up or claimed, in order to give this court jurisdiction to review the final judgment of the state supreme court.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Sayward v. Denny, 158 U. S. 180, 183, 184, 186, 39 L. ed. 941–943, 15 Sup. Ct. Rep. 777; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

Outside of what is said in the opinion, it could not be discovered, except by inference, that any right under the Federal Constitution had been set up or claimed in that court; and in Ohio, the syllabus, and not the opinion, contains the law of the case, as settled and determined by the court.

The certificate of the chief justice of the supreme court of Ohio, certifying that this right, privilege, or immunity was specially set up or claimed, is not sufficient alone to give this court jurisdiction.

Home for Incurables v. New York, supra.

The statute does not discriminate between citizens of Ohio and of other states.

Paul v. Virginia, 8 Wall. 180, 19 L. ed. 360.

The constitutional provision does not create, but only secures, privileges and immunities of citizens of the various states.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

A state may establish and enforce its own public policy.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error directed to the supreme court of the state of Ohio. The plaintiff in error is the widow of Henry E. Chambers, who, while in the employ of the defendant in error as a locomotive engineer, and engaged in the performance of his duty, received injuries from which he shortly afterwards died. Both husband and wife were, at the time of the injuries and death, citizens of Pennsylvania, and the wife has since continued to be such. The injuries and death occurred in Pennsylvania. The widow brought an action in the court of common pleas of the state of Ohio against the defendant railroad, alleging that the injuries were caused by its negligence. In that action she sought to recover damages under certain parts of the Constitution and laws of Pennsylvania printed in the margin,† which provided for the recovery of

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†Sections 18 and 19 of the act of April 15, 1851, are as follows: "Sec. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction." "Sec. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Sections 1 and 2 of the act of April 26, 1855, are as follows: "Sec. 1. The persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." "Sec. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter." By § 21, article 3, of the Constitution of the state of Pennsylvania of 1874, it is provided as follows, to wit: "Sec. 21. No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted."

[147]damages *for death. The plaintiff had a verdict and judgment in the court of common pleas, from which, by petition in error, the case was removed first to an intermediate court and then to the supreme court of the state. There it was insisted by the defendant that the action could not be maintained in the courts of Ohio. The supreme court sustained this contention, reversed the judgments of the court below, and entered judgment for the defendant. A statute of Ohio provided that "whenever *the death of a citizen of this state* has been or may be caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country." [Bates, Anno. Stat. § 6134a.] There was no other statutory provision on the subject. The supreme court held that the action authorized by this statute for a death occurring in another state was only when the death was that of a citizen of Ohio; that the common law of the state forbade such action; and that, as the person for whose death damages were demanded in this case was not a citizen of Ohio, the action would not lie. The plaintiff brings the case here on writ of error, alleging that the statute thus construed and [148]the judgment *based upon that construction violate article 4, § 2, paragraph 1, of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This allegation presents the only question for our consideration.

The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the supreme court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error. San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, per Washington, J.; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452, per Clifford, J.; Cole v. Cunningham, 133 U. S. 107, 114, 33 L. ed. 538, 542, 10 Sup. Ct. Rep. 269, per Fuller, Ch. J.; Blake v. McClung, 172 U. S. 239, 252, 43 L. ed. 432, 437, 19 Sup. Ct. Rep. 165, per Harlan, J.

But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what *extent the state will entertain in its courts[149] transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.

The law of Ohio must be brought to the test of these fundamental principles. It appears from the decision under review (and we need no other authority) that, by the common law of the state, the courts had no jurisdiction to entertain actions to recover damages for death where the cause of action arose under the laws of other states or countries. This rule was universal in its application. The citizenship of the persons who brought action or of the person for whose death a remedy was sought was immaterial. If the death was caused outside the state and the right of action arose under laws foreign to the state, its courts were impartially closed to all persons seeking a remedy, entirely irrespective of their citizenship. The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the state. The discrimination was based solely on the citizenship of the deceased. The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely [150] the same privileges to citizens of *other states which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution.

But it may be urged, on the other hand, that the conformity is only superficial; that the death action may be given by the foreign law to the person killed, at the instant when he was *vivus et mortuus*, and made to survive and pass to his representatives (Higgins v. Central New England & W. R. Co. 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534); that in such cases it is the right of action of the deceased which is brought into court by those who have it by survivorship; and that, as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another state, there is, in a real and substantial sense, a discrimination forbidden by the Constitution. If such a case should arise, and be denied hearing in the Ohio courts by the Ohio law, then, as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not, in substance, grant privileges to Ohio citizens which it withheld from citizens of other states. But no such case is before us. The Pennsylvania statute which created the right of action sought to be enforced in the Ohio courts has been construed by the courts of Pennsylvania. The applicable section is § 19 of the act of 1851. Of it the Pennsylvania court said in Fink v. Garman, 40 Pa. 95:

"The 18th section was apparently intended to regulate a common-law right of action by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representatives. It was not survivorship of the cause of action which the legislature meant to provide for by this section, but *the creation of [151] an original cause of action in favor of a surviving widow or personal representative."

This is the settled interpretation of the act. Mann v. Weiand, 81* Pa. 243; Pennsylvania R. Co. v. Bock, 93 Pa. 427; Engles's Estate, 21 Pa. Co. Ct. 299; McCafferty v. Pennsylvania R. Co. 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435. It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that state, but because the cause of action which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is affirmed.

Mr. Justice **Holmes**, concurring:

Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law.

Mr. Justice **Harlan** (with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**), dissenting:

The plaintiff in error, Elizabeth M. Chambers, a citizen of Pennsylvania, sought by this action against the Baltimore & *Ohio Railroad Company, in the common [152] pleas court of Mahoning county, Ohio, to recover damages on account of her husband's death in Pennsylvania in 1902,—his death having been caused, it was alleged, by the negligence of the defendant railroad company while operating a part of its line in Pennsylvania. The railroad company was brought into court by due service of summons, and there was a trial resulting in a verdict and judgment in favor of the plaintiff for $3,000. The case was carried upon writ of error to the circuit court of Mahoning county and the judgment was there affirmed. That judgment of affirmance was reversed by the supreme court of Ohio, with directions to enter judgment for the railroad company.

That the laws of Pennsylvania give a right of action in favor of the widow of a deceased whose death is "occasioned by unlawful violence or negligence" is not disputed. It is equally clear that the present plaintiff's cause of action is not local, but is transitory, in its nature, and, speaking generally, can be maintained in any jurisdiction where the wrongdoer may be found and be brought before the court. Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

By a statute of Ohio (1902) in force when this action was brought, it was provided that "whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country." 95 Ohio Laws, 401. By a previous statute (1894) suits of that kind were allowed in Ohio when death was caused by a wrongful act, negligence, or default in another state if such suits were allowed in the state where the death occurred. But that statute, as stated by the court in this case, was repealed by the above act of 1902.
[153]So that the *court, in the present case, held that the act of 1902 changed the former law in two essential particulars: "1. It dispenses with the condition that the state in which the wrongful death occurs shall enforce in its courts the statute of this state of like character. 2. It in terms limits the right therein given to maintain an action in this state for wrongful death occurring in another state, to actions for causing the death of *citizens* of Ohio, whereas original § 6134a gave such right without limitation or restriction as to citizenship." Again, the court said: "Having regard, then, to the scope and effect of the provisions of the section amended, and to the special character of the amendments made, we think it clear that the legislature, by the adoption of amended § 6134a [the act of 1902], undertook and intended thereby to limit and restrict the right to recover in the courts of this state for a wrongful death occurring in another state, to those cases where the person killed was, at the time of his death, a citizen of Ohio." That there may be no mistake as to the decision, I quote the official syllabus of the present case, which, by the law of Ohio, is to be taken as indicating the point actually in judgment: "No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, *except* where the person wrongfully killed was a *citizen of the state of Ohio.*" 73 Ohio St. 16, 76 N. E. 91.

It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that state, take cognizance of an action for damages on account of death occurring in another state and caused by wrongful act, neglect, or default, *except* where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed by its statute against any suit *for damages[154] brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the state where the death occurred the widow or estate of each decedent would have, in the latter state, a valid cause of action.

Is a state enactment having such effect repugnant to the clause of the Federal Constitution, art. 4, § 2, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states?" Will not that constitutional guaranty be shorn of much of its value if any state can reserve, either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other states?

It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. . . . The privileges which it [the state] affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from [155]the citizens of other *states is void, because in conflict with the supreme law of the land."

These views are supported by the former decisions of this and other courts. In the leading case of Corfield v. Coryell, 4 Wash. C. C. 371-380, Fed. Cas. No. 3,230, Mr. Justice Washington said: "The inquiry is, What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate." Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right *"to institute and maintain actions of any kind in the courts of the state."*

In Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360, the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question [Const. art. 4, § 2] to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of *those states, the Republic would[156] have constituted little more than a league of states; it would not have constituted the Union which now exists."

So, in Ward v. Maryland, 12 Wall. 418-430, 20 L. ed. 449-452, the court, after referring to Corfield v. Coryell, above cited, and speaking by Mr. Justice Clifford, stated that the right "to maintain actions in the courts of the state" was fundamental, and was protected by the constitutional clause in question against state enactments that discriminated against citizens of other states.

Referring to the cases just cited, and to the constitutional clause in question, Mr. Justice Miller, speaking for the court in the Slaughter-House Cases, 16 Wall. 36, 77, 21 L. ed. 394, 409, said: "Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In Cole v. Cunningham, 133 U. S. 107-114, 33 L. ed. 538-542, 10 Sup. Ct. Rep. 269-271, the present Chief Justice, speaking for the court, said: "The intention of § 2 of article 4 was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, *and this includes the right to institute actions.*"

In the more recent case of Blake v. McClung, 172 U. S. 239-256, 43 L. ed. 432-438, 19 Sup. Ct. Rep. 165-172, the court said: "We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. *For instance, a state cannot forbid citizens of other states from suing in its* *courts, that right being enjoyed by its own people;* but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not [157]required of a resident. Such *a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when, asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United States, by and for whom the government of the Union was ordained and established."

These cases, I think, require the reversal of the judgment of the supreme court upon the ground that it denies to the plaintiff a right secured by the Constitution of the United States. The statute of Ohio, we have seen, closes the doors of the courts of that state against the present plaintiff alone because her deceased husband was not, at the time of his death, a citizen of Ohio. Thus, every citizen of Ohio, when in another state, for whatever purpose, is accompanied by the assurance on the part of his state that its courts will be open for suit by his widow or representative if his death, while in another state, is caused by the negligence or default of another person or company. But that privilege is denied by the Ohio statute to the representative of citizens of other states meeting death under like circumstances. Indeed, if a citizen of Ohio should go into another state, and, while there, *wilfully*, or by some wrongful act, neglect, or default on his part, cause the death of someone, although he might be liable to a suit for damages in the state where death occurred, yet, if sued for damages in the courts of his own state, he need only plead in bar of the action in Ohio that the decedent was not, at the time of his death a citizen of Ohio. Such, it seems to me, is the operation of the statute of Ohio as it is interpreted by the court below.

The supreme court of Ohio, it will be observed, does not base its judgment upon any common law of the state apart from its statutes. It says: "From a consideration [158]of the statutes *hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this state, that an action for wrongful death occurring in another state will not be enforced in the courts of this state, *except* where the person killed was, at the time of his death, a citizen of Ohio." It places its judgment on its statutes and judicial decisions, which it regards as together indicating the policy and law of the state to be such as to preclude an action for damages, except where the deceased was a citizen of Ohio. That exception, upon whatever basis it may be rested, must fall before the Constitution of the United States and be treated as a nullity. The denial to the widow or representative of Chambers of the right to sue in Ohio, upon the ground that he was not a citizen of Ohio when killed, was the denial, in every essential sense, of a fundamental privilege belonging to him under the Constitution, in virtue of his being a citizen of one of the states of the Union,—the right to sue and defend in the courts of justice, which right this court concedes to be "one of the highest and most essential privileges of citizenship." While in life Chambers enjoyed the right—and it was a most valuable right—of such protection as came from the rule established in Pennsylvania, that, in case of his death in consequence of the negligence of others, the wrong done to the deceased in his lifetime could be remedied by means of suit brought in the name and for the benefit of his widow or personal representative. But Ohio takes this right of protection from him; for the Ohio court would have taken cognizance of this action if the decedent, Chambers, had been, when killed, a citizen of Ohio, while it denies relief to his widow, and puts her out of court solely because her husband was, when killed, a citizen of another state. It thus accords to the Ohio widow of a deceased Ohio citizen a privilege which it withholds from the Pennsylvania widow of a deceased Pennsylvania citizen. If the statutes of Ohio had excluded from the jurisdiction of the courts of that state *all* actions for damages on account of death, a different question would be presented. But that is *not what Ohio has assumed to do. As al-[159] ready shown, it allows suits for damages like the present one, where the death occurred in another state, *provided the deceased was a citizen of Ohio, but prohibits them where he was a citizen of some other state.* The final judgment in this case therefore denies a fundamental right inhering in citizenship, and protected by § 2 of article 4 of the Constitution. The Constitution is the supreme law of the land. But it would not be supreme if any right given by it could be overridden either by state enactment or by judicial decision. In Higgins v. Central New England & W. R. Co. 155 Mass. 176, 180, 31 Am. St. Rep. 544, 547, 29 N. E. 534, 535, the supreme judicial court of Massachusetts, after referring to transitory causes of action which did not exist at common law, but were created by the statute of another state and passed to the administrator of the deceased, said: "When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties." The statute of Pennsylvania which gave the plaintiff, as widow of the deceased, a right to sue for damages, does not offend natural justice or good morals, nor is it calculated to injure the citizens of any state, not even those of Ohio, nor can it be said to offend any policy of that state which has been made applicable equally to its own citizens and citizens of other states. The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every state of the Union, including Ohio, to give to its own citizens privileges which it [160]denies, under like circumstances, *to citizens of other states. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed while there, in consequence of the negligence or default of someone, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that state by reason of the negligence or default of someone, *even if the wrongdoer be a citizen of Ohio,* your widow shall not sue the Ohio wrongdoer in an Ohio court for damages, because, and only because, you are a citizen of another state." This is an illegal discrimination against living citizens of other states, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of *her* citizenship in another state. The statute of Pennsylvania in question had in view the protection of persons, while alive, against negligence or default causing death. It must have had that object in view. I submit that no state can authorize its courts to deny or disregard the constitutional guaranty that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

With entire respect for the views of others, I am constrained to say that, in my opinion, so much of the local law, whether statutory or otherwise, as permits suits of this kind for damages where the deceased was a citizen of Ohio, but forbids such suits where the deceased was not a citizen of Ohio, is unconstitutional. The judgment under review should be reversed.

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*D. HUNTER, JR., Robert K. Cochrane,[161]
John A. Sauer, Herman W. Heckleman,
and the City of Allegheny, Plffs. in Err.,
v.
CITY OF PITTSBURGH.

(See S. C. Reporter's ed. 161-181.)

Error to state court — Federal question — color of merit.

1. Questions respecting the impairment of contract obligations and the denial of

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NOTE.—On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

As to what constitutes due process of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On the power of the legislature to annex territory to municipality—see note to State ex rel. Richards v. Cincinnati, 27 L.R.A. 737.

due process of law because of the additional burden of taxation to which the citizens and taxpayers of a lesser city annexed under the authority of Pa. act of February 7, 1906, to an adjoining and larger city, will be subjected, are not so unsubstantial and devoid of all color of merit as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court.

Courts — relation to legislative department.

2. The policy, wisdom, justice, and fairness of a state statute is not subject to review or criticism by the Federal Supreme Court.

Courts — Federal courts following decisions of state courts.

3. The interpretation of a state Constitution and the conformity of an enactment of the state legislature to that Constitution are questions solely for the consideration of the state courts, whose decision thereon concludes the Federal Supreme Court.

Constitutional law — application of Federal Constitution to states.

4. The 5th Amendment to the Constitution of the United States is not restrictive of state, but only of national, action.

Constitutional law — impairing contract obligations.

5. There is no contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the former shall be taxed only for the uses of that corporation, which is impaired by subjecting them to taxation for the uses of the enlarged municipality formed by annexation, under the authority of Pa. act of February 7, 1906, to an adjoining and larger municipality.

Constitutional law — due process of law.

6. Citizens and taxpayers of a lesser municipality annexed under the authority of Pa. act of February 7, 1906, to an adjoining and larger municipality, are not deprived of their property without due process of law by reason of the burden of additional taxation resulting from the consolidation, although the method of voting prescribed by the statute has permitted the voters of the larger city to overpower the voters of the smaller one, and compel the union without their consent and against their protest.

Error to state court — questions reviewable.

7. A Federal question entirely outside the record, and having no connection with any Federal question which is raised in the record, cannot be considered by the Supreme Court of the United States on writ of error to a state court.

[No. 264.]

Argued October 25, 28, 1907. Decided November 18, 1907.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a decree which affirmed a decree of the Superior Court of that state, which had in turn affirmed a decree of the Court of Quarter Sessions of Allegheny County, directing the consolidation of the cities of Pittsburgh and Allegheny. Affirmed.

See same case below, 217 Pa. 227, 66 Atl. 348.

Statement by Mr. Justice **Moody**:

A law of the state of Pennsylvania provides for the union of cities which are contiguous or in close proximity, by the annexation of the lesser to the larger. The parts of that law material to this decision follow:

"Sec. 1. Be it enacted, etc., that wherever in this commonwealth, *now or hereafter, [162] two cities shall be contiguous or in close proximity to each other, the two, with any intervening land other than boroughs, may be united and become one by annexing and consolidating the lesser city and the intervening land other than boroughs, if any, with the greater city, and thus making one consolidated city, if, at an election, to be held as hereinafter provided, there shall be a majority of all the votes cast in favor of such union.

"Sec. 2. The councils of either of said cities may, by ordinance, direct that a petition be filed in the court of quarter sessions of the county in which such cities are situate, or 2 per centum of the registered voters of either of said cities may present their petition to said court, praying that the two cities and any intervening land other than boroughs shall be united and become one city. Thereupon the said petition shall be filed; and the court shall fix a time for the hearing thereof, not more than twenty days thereafter, and direct that notice be given to the mayor or chief executive officer of each of the said cities, and the clerk of the councils of each of said cities, and by publication in one or more newspapers published in either of said cities, and such other notice as the court may deem proper, including notice to one or more of the officers of whatever may be the municipal subdivision of the state in which any intervening land other than boroughs may lie.

. . . . .

"Sec. 4. Any person interested may file exceptions to said petition prior to the day fixed for hearing. At such hearing any person in interest shall be heard; but if the court shall find that the petition and proceedings are regular and in conformity with this act, it shall order an election to be held in the said cities, to vote for or against the proposed consolidation, at which all the legal voters of either of said cities, and of the said intervening land, if any, shall be qualified to vote.

. . . . . .

"Sec. 7. If it shall appear by the vote, when computed and certified as aforesaid, that a majority of all the lawful voters of the two cities and the intervening land, vot-[163]ing *upon such question, have voted in favor of the annexation or consolidation, the said court of quarter sessions shall enter a decree annexing and consolidating the lesser city, and any intervening land other than boroughs, with the greater city, so that they form but one city, and in the name of the greater or larger city.

"Sec. 8. Each of the constituent cities, and the intervening land, if any, so consolidated, shall pay its own floating and bonded indebtedness and liabilities of every kind, and the interest thereon, as the same existed at the time of annexation; and the councils of the consolidated city shall levy, respectively, on the properties in each of the said cities and intervening land so consolidated, and as they existed at the time of annexation, a tax sufficient to provide funds for each to pay its own floating and bonded indebtedness and liabilities and interest, as the same may accrue. The court of quarter sessions is given jurisdiction to ascertain what the bonded and floating indebtedness, and liabilities, and properties, and assets of each of the said cities and the said intervening land may be; due notice being given and an opportunity to be heard being allowed to all parties in interest.

"Sec. 9. All the citizens of each of the united cities and of the intervening land shall be entitled to, and shall enjoy and exercise, full rights of citizenship in the said enlarged and consolidated city. All the rights of creditors and all liens and all the rights of the constituent cities and the government of the intervening land, to enforce the payment of moneys due either, or of contract liabilities, or of other claims or rights of property, existing in either city or in the government of the intervening land at the time of the annexation, shall be preserved unimpaired to each; and each of the said cities and the government of the intervening land, for the purpose of enforcing its rights and claims in the premises, and also of having prior rights and claims enforced against it, shall be deemed in law to continue in existence.

[164] *"Except as herein otherwise provided, all the property, real, personal, and mixed, and rights and privileges of every kind, vested in or belonging to either of said cities or to the intervening land prior to and at the time of the annexation, shall be vested in and owned by the consolidated or united city.

. . . . . .

"All moneys accruing from time to time from delinquent taxes prior to the annexation, and all assessments against private property for public improvements for which the contractors shall have been paid, shall be applied to the indebtedness of the city to which the same shall belong. In case of annexation, the court may appoint commissioners to ascertain the floating and bonded indebtedness of each of the said municipal subdivisions, at the time of annexation, including the share of the municipal indebtedness for which any intervening land may be liable, and also an account of all property, of every kind, owned or claimed by the cities, or the share of the intervening land to any property owned by the municipal subdivision of the state of which it is a part, prior to and at the time of annexation. The court may also order an account to be taken by the said commissioners of all moneys on hand or receivable, applicable to the payment of the floating or bonded indebtedness of the respective municipalities or of the intervening land, at the date of annexation. Such money shall be, respectively, applied in payment of the floating or bonded indebtedness of the respective municipalities or of the intervening land.

. . . . . .

"After the commissioners have made report, the court shall, by its decree, fix the said indebtedness and liabilities, and also the properties and assets, of all kinds, at the time of the annexation, belonging to each territory, united in the consolidation."

The city of Pittsburgh, under the provision of this act, filed in the court of quarter sessions of Allegheny county a petition asking for the union of the city of Allegheny with the city of *Pittsburgh. The [165] plaintiffs in error (except the city of Allegheny) seasonably filed exceptions to the petition under § 4 of the act. The parts of the exceptions material here are as follows:

"1st. That they are residents and citizens, voters, taxpayers, and owners of real estate and personal property within the city of Allegheny, county of Allegheny, and state of Pennsylvania.

"4th. That the population of the city of Pittsburgh by the census of 1900 was 321,616 and that it has now a population of at least 350,000. That there were polled at the last mayoralty election in the said city, on February 20th, 1906, about 62,000 votes in round numbers.

"That the population of the city of Allegheny, by the census of 1900, was 129,896, and that it is probably about 150,000 at the present time; that there were polled at the last mayoralty election in the said city, on February 20th, 1906, about 24,000 votes in round numbers.

"6th. The city of Allegheny has improved its streets, established its own system of electric lighting; and has established a satisfactory water supply. The city of Pittsburgh is largely in debt; has established large and extensive parks in the eastern part of the city; built expensive and costly boulevards; extensive and costly reservoirs for the supply of water; and is contemplating still greater expenditures of money in the cutting down and grading of the elevation of Fifth avenue, known as the hump; and the construction of an extensive filtration plant; and a large expenditure of money in the purchase of the Monongahela Water Company plant,—a plant owned by a private corporation; and the further expensive construction of an electric light plant to be owned by the city of Pittsburgh, the said city owning at the present time no light plant, it being supplied with light from a private corporation; and the further expenditure of various sums of money for the acquirement of advantages and property which the citizens of Allegheny now practi-[166]cally own and enjoy but which the *citizens of Pittsburgh do not, and to acquire which would largely increase the indebtedness of the city of Pittsburgh, and if the city of Allegheny should be annexed to the city of Pittsburgh, the taxpayers of Allegheny, including your respondents, will, in addition to the payment of the taxes necessary to pay and liquidate their own indebtedness, have to bear and pay their proportion of the new indebtedness that must necessarily be created to acquire the facilities, properties, and improvements, herein stated, in Pittsburgh; all of which would be of no benefit to the citizens and taxpayers of Allegheny, including your respondents, who now own and possess these advantages and privileges; and which will largely and unnecessarily increase the taxes of your respondents, as well as the taxes of the other citizens of Allegheny, without any material benefit to them whatever.

"12th. The act of assembly under which this petition is filed for the annexation of the city of Allegheny to the city of Pittsburgh is in conflict with article 1, § 9, ¶ 10, of the Constitution of the United States, in that it impairs the obligations of the contract existing between the city of Allegheny and your respondents, by which they are to be taxed only for the government of the city of Allegheny, and for improvements, repairs, and expenditures incidental to the government of the said city of Allegheny, and the attempt to subject them to the increased taxes and burdens of an additional or enlarged city government, by legislation, is in violation of said article 1, § 9, ¶ 10, of the Constitution of the United States, and therefore is unconstitutional.

"13th. The act of general assembly under which this petition is filed is in conflict with article 5 of the Amendments of the Constitution of the United States, because if the city of Allegheny shall be annexed in pursuance of the petition filed in this case, it will be depriving your respondents of their property without due process of law, and is therefore unconstitutional. Said annexation of the city of Allegheny to the city of Pittsburgh will add additional taxes to the property *of your respondents, and create ad-[167]ditional burdens without compensation, and will depreciate the value of the property of your respondents, and they, therefore, will be deprived of their property, in violation of said article 5 of the Amendments to the Constitution of the United States.

"14th. The act of assembly under which this petition is filed is in conflict with article 14 of the Amendments to the Constitution of the United States, because the said annexation of the city of Allegheny to the city of Pittsburgh deprives your respondents of their property without due process of law. The additional taxes and burdens which the property of your respondents will have to bear in case the annexation takes place will cause a large depreciation in the value of the property of your respondents.

"22d. The act of the general assembly under which these proceedings are had is in violation of the law of the land, it being unfair, unjust, and unequal; and is in conflict with the rights and privileges reserved by the people to themselves, in that it permits the qualified electors of the larger city to overpower or outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city."

The city of Pittsburgh filed an answer to the exceptions, admitting some of the allegations contained therein and denying others. As nothing turns here upon the answer, it need not be set forth. Thereupon there was a hearing in the case. No evidence on the issues of fact raised by the exceptions and the answer thereto was introduced, and no decision upon those issues was made. The court "dismissed" the exceptions, and ordered an election to be held as prayed for in the petition. At the election a majority of all the voters of the two cities voted in favor of the consolidation. It is agreed that the majority of the voters of the city of Allegheny voted against the consolidation, but that majority was overcome by a larger majority of the voters of city of Pittsburgh in favor of the consolidation. The result of the election duly ap-[168]pearing to the *court of quarter sessions, that court thereupon decreed that the two cities should be consolidated. The case was then taken by writ of error to the superior court of Pennsylvania, and the error assigned was the dismissal of the exceptions. In that court the city of Allegheny, on its petition, was permitted "to intervene and become one of the appellants in said proceedings." The superior court overruled the assignments of error and affirmed the decree. Thereupon the same assignments of error were made in the supreme court of Pennsylvania, where the case was taken by writ of error. That court dismissed the assignments of error, affirmed the decree, and refused a motion for rehearing. A writ of error was then allowed by a justice of this court. The assignments in this court are as follows:

"First. The supreme court of the state of Pennsylvania erred in dismissing the fourth assignment of error of the plaintiffs in error, which is as follows:

" 'The act of the general assembly under which these proceedings are had is in violation of the law of the land, it being unfair, unjust, and unequal; and is in conflict with the rights and privileges reserved by the people to themselves, in that it permits the qualified electors of the larger city to overpower and outnumber those of the lesser city, and to annex the lesser city without the vote or consent of a majority of the qualified electors of the lesser city.'

"Second. The supreme court of the state of Pennsylvania erred in dismissing the fifth assignment of error of the plaintiffs in error, which is as follows:

" 'The act of assembly under which this petition is filed for annexing of the city of Allegheny to the city of Pittsburgh is in conflict with article 1, § 9, ¶ 10, of the Constitution of the United States, in that it impairs the obligations of the contract existing between the city of Allegheny and your respondents, by which they are to be taxed only for the government of the city of Allegheny and for improvements, repairs, and expenditures incidental to the govern-[169]ment of said *city of Allegheny, and the attempt to subject them to the increased taxes and burdens of an additional or enlarged city government, by legislation, is in violation of article 1, § 9, ¶ 10, of the Constitution of the United States, and therefore is unconstitutional.'

"Third. The supreme court of the state of Pennsylvania erred in dismissing the sixth assignment of error of the plaintiffs in error, which is as follows:

" 'The act of general assembly under which this petition is filed is in conflict with article 5 of the Amendments of the Constitution of the United States, because, if the city of Allegheny shall be annexed in pursuance of the petition filed in this case, it will be depriving your respondents of their property without due process of law, and is therefore unconstitutional. Said annexation of the city of Allegheny to the city of Pittsburgh will add additional taxes to the property of your respondents, and create additional burdens without compensation, and will depreciate the sale of the property, in violation of said article 5 of the Amendments to the Constitution of the United States, and they, therefore, will be deprived of their property.'

"Fourth. The supreme court of the state of Pennsylvania erred in dismissing the seventh assignment of error of the plaintiffs in error, which is as follows:

" 'The act of assembly under which this petition is filed is in conflict with article 14 of the Amendments to the Constitution of the United States, because the said annexation of the city of Allegheny to the city of Pittsburgh deprives your respondents of their property without due process of law. The additional taxes and burdens which the property of your respondents will have to bear in case the annexation takes place will cause a large depreciation in value of the property of your respondents.'

"Fifth. The supreme court of the state of Pennsylvania erred in not holding that the act of the general assembly of Pennsylvania, approved February 7, A. D. 1906, entitled 'An *Act to Enable Cities That Are Now, [170] or May Hereafter Be, Contiguous or in Close Proximity, to be United, with Any Intervening Land Other Than Boroughs, in One Municipality; Providing for the Consequences of Such Consolidation, the Temporary Government of the Consolidated City, Payment of the Indebtedness of Each of the United Territories, and the Enforcement of Debts and Claims Due to or from Each,' was special or local legislation, and in conflict with article 3, § 7, subd. 2, of the Constitution of the state of Pennsylvania, which constitutional provision provides that 'the general assembly shall not pass any local or special law . . . regulating the affairs of counties, cities, townships, wards, boroughs, or school districts,' and the said act of assembly, being in conflict with said provision of the Constitution of the state of Pennsylvania, is not due process of law, and therefore is in conflict with the 14th Amendment to the Constitution of the United States.

"Sixth. The supreme court of the state of Pennsylvania erred in not holding that the said act of assembly, entitled as aforesaid, was passed at an extraordinary or special session of the legislature, convened by the governor of Pennsylvania under article 4, § 12, of the Constitution of Pennsylvania, which provides that the governor may, on extraordinary occasions, convene the general assembly; and that the subject of the said legislation or act of assembly, aforesaid, was not designated in the proclamation of the governor calling such a session, or in the paper or proclamation issued by him dated January 9, 1906, and is therefore in conflict with article 3, § 25, of the Constitution of Pennsylvania, which provides that 'when the general assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session,' and that the said act of assembly is, by reason thereof, not due process of law, and is in conflict with the 14th Amendment of the Constitution of the United States.

"Seventh. The supreme court of Pennsyl-[171]vania erred in *dismissing the exceptions filed by the plaintiffs in error, thereby confirming the judgment of the court below.

"Eighth. The supreme court of Pennsylvania erred in not entering judgment in favor of the plaintiffs in error, and not reversing the judgment of the court below."

Messrs. **William A. Stone** and **John G. Johnson** argued the cause and filed a brief for plaintiffs in error:

The courts, and not the legislature, must determine whether the law is reasonable; and, if it be unreasonable, it is not due process of law.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard), 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Capen v. Foster, 12 Pick. 488, 23 Am. Dec. 632.

A local burden cannot be imposed upon an unwilling people without first obtaining the consent of the people to its imposition.

People ex rel. Wilson v. Salomon, 51 Ill. 37; People ex rel. McCagg v. Chicago, 51 Ill. 17, 2 Am. Rep. 278.

One of the tests to apply, to determine whether the law is, or is not, due process of law, is to inquire whether the method prescribed therein is the usual and customary method.

Fallbrook Irrig. District v. Bradley, 164 U. S. 168, 41 L. ed. 392, 17 Sup. Ct. Rep. 56; Turpin v. Lemon, 187 U. S. 57-59, 47 L. ed. 73, 74, 23 Sup. Ct. Rep. 20; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

The converse must be true; that where the proceedings pursued are not those customarily followed in the state, the law authorizing the proceedings is not due process of law.

It is not only the right, but the duty, of this court, regardless of the judicial interpretation of local courts, to determine for itself whether the law before it, alleged to be constitutional, is or is not in violation of the Constitution of the United States,—to determine whether it is due process of law.

Newport Light Co. v. Newport, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

The law in controversy is in conflict with the 14th Amendment of the Constitution of the United States because it denies the Allegheny and its citizens the equal protection of the laws.

Cotting v. Kansas City Stock Yards Co. supra.

It is for this court to say whether a contract does exist, and whether that contract is impaired by this act of assembly.

Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957.

Messrs. **D. T. Watson** and **W. B. Rodgers** argued the cause, and, with Messrs. J. Rodgers McCreery and John M. Freeman, filed a brief for defendant in error:

That the state has the power to deprive a municipal corporation of its charter, or merge a municipal corporation with another corporation, or add to or restrict its boundaries, is shown by the cases, infra; and, when it does this, all these cases hold that it does not deprive anyone of life, liberty, or property. The question of how and under what circumstances a merger of two or more municipalities shall take place is for the state, and the state alone, to determine; and the question is purely legislative, and not judicial; and, before any claim can be made that the legislation is not due process of law, the facts must be shown to demonstrate that it deprives someone of life, liberty, or property. This legislation can, by no possibility, deprive any of the exceptants of life, liberty, or property, and therefore there can be no question of due process of law.

No one of the exceptants, under the facts as the record shows them, is deprived, or will be deprived, of his property or his liberty or life by this legislation or the consolidation to take place thereunder.

State ex rel. Richards v. Cincinnati, 52 Ohio St. 419, 27 L.R.A. 737, 40 N. E. 508; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Kelly v. Pittsburgh, 104 U. S. 78, 81, 26 L. ed. 658, 659; Wilson v. North Carolina, 169 U. S. 586, 593, 42 L. ed. 865, 870, 18 Sup. Ct. Rep. 435; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; United States v. Baltimore & O. R. Co. 17 Wall. 322, 329, 21 L. ed. 597, 600; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Com. ex rel. Elkin v. Moir, 199 Pa. 541, 53 L.R.A. 837, 85 Am. St. Rep. 801, 49 Atl. 351; Laramie County v. Albany County, 92 U. S. 312, 23 L. ed. 554; Pittsburg's Petition, 217 Pa. 227, 66 Atl. 348; 1 Dill. Mun. Corp. 4th ed., § 185; Cooley, Const. Lim. 7th ed., 266, et seq.; Sutherland, Notes on U. S. Const. 309.

Due process of law in the 14th Amendment means a proceeding in accordance with the law of the state; and, if a party is given notice and an opportunity to be heard in a regular judicial proceeding in the courts of the state, he is not denied due process of law.

Re McCusker, 23 Misc. 450, 51 N. Y. Supp. 281; Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; Williams v. Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Hurtado v. California, 110 U. S. 534, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 171, 172, 36 L. ed. 825, 930, 13 Sup. Ct. Rep. 54; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Re Converse, 137 U. S. 624, 632, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 168, 41 L. ed. 369, 392, 17 Sup. Ct. Rep. 56.

As the questions raised are solely state questions, requiring the construction of the state Constitution as to the forms to be followed in state legislation, and neither of these questions requires the construction of the Federal Constitution, it necessarily follows that the decision of the state court is conclusive, and will be followed in this court.

Miller v. Cornwall R. Co. 168 U. S. 131, 134, 42 L. ed. 409, 410, 18 Sup. Ct. Rep. 34; Leeper v. Texas, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 579; Williams v. Eggleston, supra.

The sole question that was raised in the state court was as to the private property of Hunter, et al., the individuals, being burdened with new taxation; and, as no question whatever was raised as to the title of any kind of property, this court will not consider it.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Hoyt v. Shelden (Hoyt v. Thompson), 1 Black, 518, 521, 17 L. ed. 65, 66; Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; Sully v. American Nat. Bank, 178 U. S. 289, 297, 44 L. ed. 1072, 1075, 20 Sup. Ct. Rep. 935; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 87, 88, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142.

Mr. Justice **Moody**, after making the foregoing statement of the case, delivered the opinion of the court:

The plaintiffs in error seek a reversal of the judgment of the supreme court of Pennsylvania, which affirmed a decree of a lower court, directing the consolidation of the cities of Pittsburgh and Allegheny. This decree was entered by authority of an act of the general assembly of that state, after proceedings taken in conformity with its requirements. The act authorized the consolidation of two cities, situated with reference to each other as Pittsburgh and Allegheny are, if, upon an election, the majority of the votes cast in the territory comprised within the limits of both cities favor the consolidation, even though, as happened in this instance, a majority *of the votes [175] cast in one of the cities oppose it. The procedure prescribed by the act is that after a petition filed by one of the cities in the court of quarter sessions, and a hearing upon that petition, that court, if the petition and proceedings are found to be regular and in conformity with the act, shall order an election. If the election shows a majority of the votes cast to be in favor of the consolidation, the court "shall enter a decree annexing and consolidating the lesser city . . . with the greater city." The act provides, in considerable detail, for the effect of the consolidation upon the debts, obligations, claims, and property of the constituent cities; grants rights of citizenship to the citizens of those cities in the consolidated city; enacts that "except as herein otherwise provided, all the property . . . and rights and privileges . . . vested in or belonging to either of said cities . . . prior to and at the time of the annexation shall be vested in and owned by the consolidated or united city," and establishes the form of government of the new city. This procedure was followed by the filing of a petition by the city of Pittsburgh; by an election, in which the majority of all the votes cast were in the affirmative, although the majority of all the votes cast by the voters of Allegheny were in the negative; and by a decree of the court, uniting the two cities.

Prior to the hearing upon the petition the plaintiffs in error, who were citizens, voters, owners of property, and taxpayers in Allegheny, filed twenty-two exceptions to the petition. These exceptions were disposed of adversely to the exceptants by the court of quarter sessions, and the action of that court was successively affirmed by the superior and supreme courts of the state. The case is here upon writ of error, and the assignment of errors alleges that eight errors were committed by the supreme court of the state. This assignment of errors is founded upon the dispositions by the state courts of the questions duly raised by the filing of the exceptions under the provisions of the act of the assembly.

The defendant in error moved to dismiss [176] the case because *no Federal question was raised in the court below or by the assignment of errors, or, if any Federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs in error claimed that the act of assembly was in violation of the Constitution of the United States, and specially set up and claimed in the court below rights under several sections of that Constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the Constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits.

Some part of the assignments of error and of the arguments in support of them may be quickly disposed of by the application of well-settled principles. We have nothing to do with the policy, wisdom, justice, or fairness of the act under consideration; those questions are for the consideration of those to whom the state has intrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final. The 5th Amendment to the Constitution of the United States is not restrictive of state, but only of national, action.

After thus eliminating all questions with which we have no lawful concern, there remain two questions which are within our jurisdiction. There were two claims of rights under the Constitution of the United States which were clearly made in the court below and as clearly denied. They appear in the second and fourth assignments of error. Briefly stated, the assertion in the second assignment of error is that the act of assembly impairs the obligation of a contract existing between the city of Allegheny and the plaintiffs in error, that the latter *are to be taxed only for the governmental [177] purposes of that city, and that the legislative attempt to subject them to the taxes of the enlarged city violates article 1, § 9, ¶ 10, of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the state, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the city of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it is not true. No authority or reason in support of it has been offered to us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

Briefly stated, the assertion in the fourth assignment of error is that the act of assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process of law has been violated, as set forth in the first assignment of error and insisted upon in argument, is that the method of voting on the consolidation prescribed in the act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest. The precise question thus presented has not been determined by this court. It is important, and, as we have said, not so devoid of merit as to be denied consideration, although its solution by principles long settled and constantly acted upon is not diffi- [178] cult. This court *has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties, and the rights of their citizens and creditors. Maryland use of Washington County v. Baltimore & O. R. Co. 3 How. 534, 550, 11 L. ed. 714, 721; East Hartford v. Hartford Bridge Co. 10 How. 511, 533, 534, 536, 13 L. ed. 518, 527-529; United States v. Baltimore & O. R. Co. 17 Wall. 322, 329, 21 L. ed. 597, 600; Laramie County v. Albany County, 92 U. S. 307, 308, 310-312, 23 L. ed. 552-555; Tippecanoe County v. Lucas, 93 U. S. 108, 114, 23 L. ed. 822, 824; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 654, 24 L. ed. 521, 522; Mt. Pleasant v. Beckwith, 100 U. S. 514, 524, 525, 531, 532, 25 L. ed. 699, 701, 703, 704; Meriwether v. Garrett, 102 U. S. 472, 511, 26 L. ed. 197, 204; Kelly v. Pittsburgh, 104 U. S. 78, 80, 26 L. ed. 658, 659; Forsyth v. Hammond, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Williams v. Eggleston, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Covington v. Kentucky, 173 U. S. 231, 241, 43 L. ed. 679, 683, 19 Sup. Ct. Rep. 383; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 549, 49 L. ed. 591, 595, 25 Sup. Ct. Rep. 327; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27. It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part *of it with another municipality, re- [179] peal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

Applying these principles to the case at bar, it follows irresistibly that this assignment of error, so far as it relates to the citizens who are plaintiffs in error, must be overruled.

It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (Dill. Mun. Corp. 4th ed. §§ 66 to 66a inclusive, cases cited in note to State ex rel. Bulkeley v. Williams, 48 L.R.A. 465), and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. [180]Mr. Dillon *says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based have several times been noticed. Tippecanoe County v. Lucas, 93 U. S. 108, 115, 23 L. ed. 822, 824; Meriwether v. Garrett, 102 U. S. 472, 518, 530, 26 L. ed. 197, 206, 210; Essex Public Road Board v. Skinkle, 140 U. S. 334, 342, 35 L. ed. 446, 449, 11 Sup. Ct. Rep. 790; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 91, 35 L. ed. 943, 947, 12 Sup. Ct. Rep. 142; Covington v. Kentucky, 173 U. S. 231, 240, 43 L. ed. 679, 682, 19 Sup. Ct. Rep. 383; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 551, 49 L. ed. 591, 596, 25 Sup. Ct. Rep. 327; Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245. Counsel for plaintiffs in error assert that the city of Allegheny was the owner of property held in its private and proprietary capacity, and insist that the effect of the proceedings under this act was to take its property without compensation and vest it in another corporation, and that thereby the city was deprived of its property without due process of law, in violation of the 14th Amendment. But no such question is presented by the record, and there is but a vague suggestion of facts upon which it might have been founded. In the sixth exception there is a recital of facts with a purpose of showing how the taxes of the citizens of Allegheny would be increased by annexation to Pittsburgh. In that connection it is alleged that while Pittsburgh intends to spend large sums of money in the purchase of the water plant of a private company and for the construction of an electric light plant, Allegheny "has improved its streets, established its own system of electric lighting, and established a satisfactory water supply." This is the only reference in the record to the property rights of Allegheny, and it falls far short of a statement that that city holds any property in its private and proprietary capacity. Nor was there any allegation that Allegheny had been deprived of its property without due process of law. The only allegation of this kind is that the taxpayers, plaintiffs in error, were deprived of their property without due process of law because of the increased taxation which would result from the annexation,—an entirely different proposition. Nor is the situation varied by the fact that, in the superior court, Allegheny was "permitted to intervene and become one [181]of the appellants." *The city made no new allegations and raised no new questions, but was content to rest upon the record as it was made up. Moreover, no question of the effect of the act upon private property rights of the city of Allegheny was considered in the opinions in the state courts or suggested by assignment of errors in this court.* The question is entirely outside of the record and has no connection with any question which is raised in the record. For these reasons we are without jurisdiction to consider it (Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176), and neither express nor intimate any opinion upon it.

The judgment is affirmed.

WEBSTER COAL & COKE COMPANY, Petitioner,
v.
A. J. CASSATT, John B. Thayer, Charles E. Pugh, et al.

(See S. C. Reporter's ed. 181-187.)

Appeal and error — finality of judgment.

An order entered in an action to recover damages from a carrier for violations of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), requiring certain specified officers and employees who are not parties to produce relevant books and papers, is not, as to those persons, a final decree within the meaning of the provision of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, governing writs of error from circuit courts of appeals to the circuit courts, and hence will not sustain a writ of error sued out by them.

[No. 283.]

Argued October 28, 29, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment reversing an order of the Circuit Court for the Eastern District of Pennsylvania, requiring certain officers and employees of a carrier charged with violations of the interstate commerce act to produce certain relevant books and papers. Reversed and remanded with directions to dismiss the writ of error to the Circuit Court.

NOTE.—As to finality of decree for purpose of review—see notes to Schlosser v. Hemphill, 49 L. ed. U. S. 1001; Apex Transp. Co. v. Garbade, 62 L.R.A. 515; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; and Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A 482.

See same case below 81 C. C. A. 97, 150 Fed. 48.

Statement by Mr. Chief Justice **Fuller**:

The Webster Coal & Coke Company commenced an action at law in the circuit court of the United States for the eastern district of Pennsylvania against the Pennsylvania Railroad Company, defendant, to recover damages for its alleged violation of the interstate commerce act of February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], by discriminating against plaintiff in the allowance of freight rates on coal and coke. The defendant pleaded not guilty.

[182] *In the opinion below it is stated:

"After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the circuit court a petition in which, after setting forth the nature of the action at law, and declaring that the defendant and Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and ten other specifically named officers and employees of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant and its said officers and employees to produce said books and papers at the trial, and also for inspection by the plaintiff's representatives before trial. The application for the order was based on § 724 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 583), which is as follows:

"'In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and, if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.'

"On presentation of the petition to the circuit court, a rule was allowed requiring the defendant and its officers and employees named in the petition to show cause before the court on a certain day why they 'should not produce on the trial of this cause' the books and writings above referred to; and also why they should not produce them at a certain time and place before trial 'and permit the plaintiff, its counsel and accountants, to inspect the same and take such copies as they may deem proper.' The defendant answered the petition, setting forth (1) that the action was for the recovery of damages in the nature of penalties, and therefore that the defendant *was [183] not obliged to produce its books and papers, either before or at the trial; (2) that even if the action were one in which the defendant could be required to produce its books and papers at the trial, it could not be required to do so before the trial; (3) that the petition did not describe with sufficient particularity the books and papers the production of which was desired, or state the facts which the books and papers would tend to prove; and (4) that the defendant could not produce any books which would show the rebates and drawbacks alleged to have been allowed to other companies, because they had not been so kept as to show any such allowances. With the petition and answer before it, the circuit court, on the return of the rule to show cause, 'adjudged, ordered, and decreed' that Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and the ten other officers and employees of the defendant, 'produce on the trial of this cause' the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff, with leave to the plaintiff to make copies thereof."

To review this order, Cassatt and the other officers and agents of the Pennsylvania company sued out, as individuals, a writ of error from the circuit court of appeals for the third circuit, assigning as error (1) that the circuit court erred in entering the order requiring plaintiffs in error to submit to the inspection of the plaintiff below and its counsel, prior to the trial of the cause, the books, records, and papers referred to therein; and (2) requiring the production at the trial of said books, records, and papers. The case was heard, together with two similar cases, one of which was entitled Pennsylvania Coal & Coke Co. v. Cassatt, and is numbered 284 on the present docket. [207 U. S. 187, post, 163, 28 Sup. Ct. Rep. 110.]

The circuit court of appeals gave an opinion in one case applicable to the three, and reversed the judgments of the circuit court with costs. 10 L.R.A.(N.S.) 99, 150 Fed. 32, 48. That court held that the order in question was a "final decision" within § 6 *of the judiciary act of March 3, 1891 [184] [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549]; that the proceeding which resulted in the order was independent of and collateral to the main action, and the order therefore reviewable on a writ of error; that the corporation's officers and agents were not "parties" within Revised Statutes, § 724; that that section did not authorize an order requiring a party to produce books and papers before trial, but, if such relief was desired, it must be obtained by a bill of discovery. The present cause was then brought to this court on certiorari, and is numbered 283 on its docket. It was advanced for hearing and heard October 28, 29, together with No. 284, also brought up on certiorari.

Mr. **John W. Griggs** argued the cause, and, with Messrs. Benjamin S. Harmon, David L. Krebs, and George S. Graham, filed a brief for petitioner.

Mr. **John G. Johnson** argued the cause, and, with Mr. Francis I. Gowen, filed a brief for respondents:

Whenever in a cause there is a determination of some question of right, a decision is final, in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the court, so that to bring the cause again before the court for decision will not be necessary.

Butler v. Fayerweather, 33 C. C. A. 625, 63 U. S. App. 120, 91 Fed. 458.

Tested by this definition, the order involved in the present proceeding was certainly final, for beyond all controversy it did finally and completely dispose of the question of the right of the petitioner to have the defendant's papers submitted to its inspection in advance of trial, and left open no question or matter for further consideration or action by the court; and it was final, therefore, both as to the defendant and those to whom it was directed.

When an order upon a witness to answer questions or produce documents is made in a proceeding against the witness, which amounts to a case or controversy within the generally accepted meaning of those terms, an appeal from such order will be sustained if the order is a final one; where, however, the order upon the witness is made when he is upon the stand or before an examiner, such order cannot be appealed from, because no case or controversy to which the witness is a party has arisen; but an appeal will lie at the instance of the witness when an order punishing him for refusing to answer or produce the documents has been made, because then an order has been made in a case or controversy to which the witness is a party.

Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 45, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Pennsylvania Railroad Company did not except to the order, nor attempt to prosecute a writ of error therefrom, if that were possible; the plaintiffs in error, who were officers of the company, excepted and carried the case up on this writ of error. They were not parties to the case between the coal company and the railroad company, had no property in the books and papers referred to, were mere custodians as officers, and any rights of theirs were not made to appear to be involved in the disclosures sought. The order as to them was purely interlocutory, not imposing penalty or liability, and not finally disposing of an independent proceeding.

What Mr. Justice Bradley said in Williams v. Morgan, 111 U. S. 684, 698, 28 L. ed. 559, 564, 4 Sup. Ct. Rep. 638, in holding a decree on intervention appealable, and citing many cases, was that the order appealed from there "was final in its nature, and was made in a matter distinct from the general subject of litigation,—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented."

This order affected the plaintiff and defendant in the case itself, and not respondents as individuals at all, and, if the court had power to punish disobedience or enforce compliance, *then the order prior to such **[187]** action on the part of the court was clearly interlocutory in the suit. Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356. If the provision of § 724 in respect of disobedience of such an order was exclusive, then, of course, respondents were in no way aggrieved. Doyle v. London Guarantee & Acci. Co. 204 U. S. 599, 51 L. ed. 641, 27 Sup. Ct. Rep. 313.

Whether the order to produce was valid, and whether it warranted judgment by default against the defendant company, were matters in which plaintiffs in error had no concern. There was here no attachment for contempt, no judgment on default, and no independent and collateral proceeding, the order disposing of which could be considered as a final decree.

Judgment reversed and cause remanded with a direction to dismiss the writ of error.

PENNSYLVANIA COAL & COKE COMPANY, Petitioner,

v.

A. J. CASSATT, John B. Thayer, Charles E. Pugh, et al.

(See S. C. Reporter's ed. 187.)

This case is governed by the decision in Webster Coal & Coke Co. v. Cassatt, ante, 160.

[No. 284.]

Argued October 28, 29, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment reversing an order of the Circuit Court for the Eastern District of Pennsylvania, requiring certain officers and employees of a carrier charged with violations of the interstate commerce act to produce certain relevant books and papers. Reversed and remanded with directions to dismiss the writ of error to the Circuit Court.

See same case below, 81 C. C. A. 97, 150 Fed. 48.

Mr. **John W. Griggs** argued the cause, and with Messrs. Benjamin S. Harmon, David L. Krebs, and George S. Graham, filed a brief for petitioner.

Mr. **John G. Johnson** argued the cause, and, with Mr. Francis I. Gowen, filed a brief for respondents.

Mr. Chief Justice **Fuller:**

For the reasons given in the preceding case the judgment is reversed, and the cause remanded with a direction to dismiss the writ of error.

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[188] ## *JOHN T. SHOENER, Plff. in Err.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 188–196.)

Error to state court — Federal question — former jeopardy.

The contention that a second conviction of a public officer for failing, on demand, to pay over certain public moneys, deprives him of his liberty without due process of law, in violation of U. S. Const., 14th Amend., by twice subjecting him to jeopardy for the same offense, presents no Federal question which will sustain a writ of error from the Federal Supreme Court to the highest court of a state, where the latter court decides that the accused was not put in jeopardy by his prior conviction, because such conviction was reversed on the ground that there had then been no legal demand.

[No. 161.]

Argued October 28, 1907. Decided December 2, 1907.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Superior Court of that state, which had in turn affirmed a conviction in the Court of Quarter Sessions of Schuylkill County, in that state, of embezzlement, over a plea of former jeopardy. Dismissed for want of jurisdiction.

See same case below, 216 Pa. 71, 64 Atl. 890.

The facts are stated in the opinion.

Messrs. **E. B. Sherrill** and **William Wilhelm** argued the cause, and, with Mr. Charles A. Douglas, filed a brief for plaintiff in error:

Acquittal may, in ordinary language, be used to express either the verdict of a jury or the formal judgment of the court that the prisoner go thereof without day.

1 Am. & Eng. Enc. Law, 2d ed. p. 572.

A defendant placed on trial on a defective indictment and acquitted cannot be tried again.

United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192.

The rule announced by some of the courts that where a wrong verdict is found against a defendant, because of misdirection by the court, he cannot have it corrected without relinquishing his immunity from a second jeopardy, is severely criticized.

1 Bishop, Crim. Law, §§ 1042 et seq.

A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subjected to another trial.

Shepherd v. People, 25 N. Y. 406.

By being twice placed in jeopardy for the same offense, plaintiff in error is deprived of his liberty without due process of law.

Brown v. Levee Comrs. 50 Miss. 468; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; Black, Const. Law, p. 586; United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; United States v. Keen, 1 McLean, 429, Fed. Cas. No. 15,510; Ex parte Snyder, 29 Mo. App. 261; Ex parte Lange, 18 Wall. 163, 21 L.

NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

ed. 872; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Ex parte Ulrich, 42 Fed. 587; Re Bennett, 84 Fed. 324.

In criminal trials, certain matters pertaining to procedure have been declared by this court to involve fundamental rights, of which the person accused of crime may not be deprived without the denial of due process of law. It may be said generally that whatever matters are jurisdictional or essential are protected by the Constitution.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; Lewis v. United States, 146 U. S. 372, 36 L. ed. 1012, 13 Sup. Ct. Rep. 136; Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; Murphy v. Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639.

Messrs. **Guy E. Farquhar** and **C. E. Berger** argued the cause, and, with Mr. Irvin A. Reed, filed a brief for defendant in error:

No Federal question was raised by the record.

Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner), 11 Wall. 204, 20 L. ed. 112; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742.

The defendant was not twice put in jeopardy for the same offense:

Hilands v. Com. 111 Pa. 1, 56 Am. Rep. 235, 2 Atl. 70; Com. v. Fitzpatrick, 121 Pa. 117, 1 L.R.A. 451, 6 Am. St. Rep. 757, 15 Atl. 466; United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192; Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121.

The defendant has been denied no right, privilege, or immunity guaranteed to him by the provisions of the 14th Amendment to the Constitution of the United States.

Howard v. Kentucky, 200 U. S. 173, 50 L. ed. 425, 26 Sup. Ct. Rep. 189.

Mr. Justice **Harlan** delivered the opinion of the court:

In a civil action brought by the county of Schuylkill, Pennsylvania, in 1901, against Shoener, the present plaintiff, for the amount of certain fees alleged to have been collected by him, as the clerk of a quarter sessions court, but withheld by him from the county treasurer, a judgment was rendered in favor of the*county for $18,245. That judgment was affirmed upon appeal by the supreme court of Pennsylvania on May 4th, 1903. Schuylkill County v. Shoener, 205 Pa. 592, 55 Atl. 791.

Shoener was then proceeded against by indictment under § 65 of the Penal Code of Pennsylvania of 1860, which section is in these words: "If any state, county, township, or municipal officer of this commonwealth, charged with the collection, safekeeping, transfer, or disbursement of public money, shall convert to his own use, in any way whatsoever, or shall use by way of investment in any kind of property or merchandise, any portion of the public money intrusted to him for *collection, safekeeping, [189] transfer, or disbursement, or shall prove a defaulter, or fail to pay over the same when thereunto legally required by the state, county, or township treasurer, or other proper official or person authorized to demand and receive the same, every such act shall be deemed and adjudged to be an embezzlement of so much of said money as shall be thus taken, converted, invested, used, or unaccounted for, which is hereby declared a misdemeanor; and every such officer, and every person or persons whomsoever aiding or abetting, or being in any way accessory to said act, and being thereof convicted, shall be sentenced to an imprisonment, by separate or solitary confinement at labor, not exceeding five years, and to pay a fine equal to the amount of money embezzled." Pa. Laws 1860, p. 385.

This section was construed by the supreme court of Pennsylvania in Com. v. Mentzer, 162 Pa. 646, 29 Atl. 720, the court holding that each of the acts enumerated in the statute was a distinct and separate offense, although they might be so entirely parts of the same transaction as to constitute but one offense; that whether particular acts were so combined as to make one offense depended upon the facts in each case, and raised a question of fact for the jury.

The indictment was returned November 14th, 1903,—the date is important,—and contained thirteen counts, those other than the fourth, eighth, and twelfth counts in substance charging the accused with converting public funds to his own use, and the fourth, eighth, and twelfth counts charging him only *with failing to pay over the public moneys that came into his hands,* when thereunto legally required by the county. The accused was acquitted January 6th, 1904, on all the counts except the fourth, eighth, and twelfth, and on those counts he was convicted. On appeal to the superior court the conviction was sustained (25 Pa. Super. Ct. 526), but, on appeal from the court to the supreme court of Pennsylvania, the judgments of conviction in both the lower courts were reversed June 22d, 1905, and the accused was discharged from the recognizance *which he had executed. Com. v. [190] Shoener, 212 Pa. 527, 61 Atl. 1093.

In the opinion of the supreme court it

was stated that the only demand ever made on the accused was in a letter to him from the county comptroller, under date of December 30th, 1902. But that demand, the court said, was made at a time when the question of the right of the accused to retain the moneys he had retained was, by agreement of the county, pending and undecided in the civil court. The court, after observing that it was competent for the county to have entered into such an agreement, said: "How could any demand have been made at that time that the defendant was bound to heed? . . . The failure to pay on demand, as contemplated by the statute under which he is indicted, is a failure to pay that which, at the time the demand is made, clearly belongs to the county making the demand, and does not apply to a case where demand is made to pay during the pendency of a dispute as to who is entitled to the money, and which dispute, by agreement of both parties to it, is pending determination in the courts. . . . In refusing to pay over at the time the alleged demand was made he did just what any other man similarly situated and with due regard to his rights would have done; and it is a perversion of the 65th section of the act of March 31, 1860, to attempt to apply it to a case like this. The only evidence of a demand to pay over was the [comptroller's] letter. This was written and received by the appellant at a time when the county, by its own agreement, could not have enforced any civil liability against him, and in refusing to comply with the notice to pay he was standing on his right not to do so until it was determined that the county was entitled to receive the money. The learned trial judge charged the jury that the institution of the suit in the common pleas of the county was a legal demand for the payment of the money, and should be regarded as such a demand in the prosecution of the appellant on the counts charging him to pay over on demand. In the civil **[191]** courts constructive demands *may be and are recognized, but not so in a criminal court, in the prosecution for an offense having as one of its statutory ingredients a refusal to pay on demand. A demand there means actual demand. The only actual demand that the commonwealth pretends was made was the comptroller's letter. It was written after the institution of the civil suit, and after the distinct agreement by the county that the question of the defendant's liability should be judicially determined. Before being so determined there was no liability to be enforced against him civilly, and, therefore, no demand could be made upon him that he was bound to recognize. He has been acquitted on the counts charging him with a conversion of the public funds to his own use, and there was *no evidence to sustain the conviction on the charge that he had failed to pay over after having been legally thereunto required on demand made.* The 11th assignment . . . complains of the error of the court below in instructing the jury that there had been legal demand made upon the defendant to pay over the fees. This assignment should have been sustained. If there had been proper instructions as to a legal demand, the defendant would have been acquitted on the counts on which he was convicted. The remaining assignments need not be considered. The judgment of the superior court is reversed, as is that of the court below, and the defendant is discharged from his recognizance."

Subsequently, on June 30th, 1905, the county made another and formal demand upon Shoener to pay over $7,243.28, that being the balance of the fees or moneys then retained by him, and ascertained, on auditing of his accounts, to belong to the county. This demand was disregarded, and, on September 4th, 1905, the present new indictment was found, charging only one of the offenses specified in the statute, namely, that the accused had failed, on demand, to pay into the county treasury the above sum of $7,243.28.

The defendant pleaded, among other things, that the present indictment was for the same offense as that specified in the first indictment; that his acquittal on the first nine counts of the *former indictment was **[192]** an acquittal of the charge contained in the present indictment; and that after the reversal of the judgment of conviction on the fourth, eighth, and twelfth counts he could not be again prosecuted for the same offense.

Referring to the opinion of the supreme court in the former prosecution, the trial court, in its charge to the jury, said: "When that opinion was filed in the supreme court of Pennsylvania, and subsequently here, and the proceedings of the previous trial were reversed, there was no crime that this defendant was called upon to answer for, because the supreme court declared that the demand that had been made upon him was illegal, had no right to be made, and he was not bound to obey it, and therefore not bound to pay over the money when they called on him in December, 1902, because the county had no right to call on him then for this money, but they were bound to wait until after the supreme court as well as this court decided the question of whether or not he had any claim or right to that money. . . . Now, gentlemen of the jury, under this state of facts, I come to the conclusion that there was no crime to try when he was tried before; that the crime that is now tried in this indictment exists only since the actual demand was made, which the language of that supreme court opinion requires to be made before he is required to pay over."

The defendant was convicted and sentenced to imprisonment for two and a half years.

The judgment of conviction was affirmed, the supreme court saying: "In support of his plea of *autrefois acquit,* the appellant relies upon our reversal of the former judgment against him. The jury, on the trial of the first indictment, found him guilty of having failed to pay over the license fees in his hands after demand had been made upon him to do so. Our reversal of the judgment on that verdict did not acquit him of the offense charged against him in the present indictment. All that we decided was that, as the county of Schuylkill could not, at the time the prosecution was in-[193]stituted, *have made a legal demand upon the appellant for the payment of the fees in his hands, the statutory offense of failing to pay over *had not been committed.* He was discharged from his recognizance simply because the prosecution against him had been instituted before the offense charged against him *was or could have been committed under the admitted facts in the case.* He was therefore never in jeopardy. If, after his conviction, the court below had arrested judgment on the verdict, he would have been in the same situation in which our reversal of it placed him, but he could not have pleaded the arrest of the judgment as a bar to a new indictment against him for an offense subsequently committed, for he never was in peril." [216 Pa. 80, 64 Atl. 894.]

The plaintiff insists that his trial and conviction on the present indictment would subject him to jeopardy a second time for the offense of having failed to pay over on proper demand, thereby depriving him of his liberty without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

The contention that, by the judgment of the supreme court of Pennsylvania, the plaintiff in error has been deprived of a [195]*right secured to him by the Constitution of the United States, must be overruled. He has not been twice placed in jeopardy for the same offense. Upon the hearing of the case arising out of the first indictment, the supreme court of Pennsylvania, construing the statute under which the defendant was prosecuted, and looking at the undisputed facts appearing of record, adjudged that he had not then committed any criminal offense; that he had not failed to pay over moneys belonging to the county upon any demand, disregard of which subjected him to criminal liability; consequently, it was held that no valid judgment of conviction could have been rendered against him in the first prosecution for failing to pay over the moneys in question, or any part thereof, on the particular demand shown in the record of that prosecution. These were questions of local and general law which it was the province of the supreme court of Pennsylvania to determine conclusively for the parties. They presented no question of a Federal nature.

Assuming then, that no valid judgment could have been rendered against the accused upon the first indictment for disregarding the demand upon which that indictment was based, it necessarily follows, as held by the supreme court of Pennsylvania, that that prosecution did not put the accused in jeopardy in respect to the particular offense specified in the last indictment. That offense was never committed until the demand of June 30th, 1905, was disregarded. The defense of double jeopardy could not be sustained unless we should hold that the charge against Shoener in the first indictment could be sustained under the statute. But we cannot so adjudge without disregarding altogether the decision of the supreme court of Pennsylvania, and without holding that an accused is put in peril by a prosecution which could not legally result in a conviction for crime. It is an established rule that one is not put in jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and that a judgment thereon would be arrested on motion. So, where the defense is that the accused was put *in jeopardy for the same offense by his [196] trial under a former indictment, if it appears from the record of that trial that the accused had not then or previously committed, and could not possibly have committed, any such crime as the one charged, and therefore that the court was without jurisdiction to have rendered any valid judgment against him,—and such is the case now before us,—then the accused was not, by such trial, put in jeopardy for the offense specified in the last or new indictment.

As it was thus correctly decided that the accused was not, by the present indictment, put in jeopardy for the second time for the same offense, we need not go further or consider any question of a Federal nature, and the writ of error must be dismissed.

It is so ordered.

MARY V. CORTELYOU and James G. Cortelyou, Administrators of the Estate of John G. Cortelyou, Deceased; Neostyle Company and Brodrick Copygraph Company of New Jersey, Petitioners,

v.

CHARLES ENEU JOHNSON & COMPANY.

(See S. C. Reporter's ed. 196–201.)

Evidence — sufficiency — notice of license restriction of use of patented article.

Evidence of notice of a license restriction as to the use of ink on a patented stencil duplicating machine, disclosed on the baseboard of each machine, is not sufficient to charge a corporation with infringement because of a sale of its own ink for use on such a machine, where it does not appear that it ever solicited an order for ink to be so used, although it may have filled a few such orders, or that it was ever notified by the manufacturers of the rights which they claimed, or that anything which it did was considered an infringement, and where none of the chief executive officers of the corporation had knowledge of this restriction.

[No. 32.]

Argued October 31 and November 1, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the Southern District of New York for an injunction and an accounting in a patent infringement suit, and remanded the case to the Circuit Court with instructions to dismiss the bill. Affirmed.

See same case below, 76 C. C. A. 455, 145 Fed. 933.

The facts are stated in the opinion.

Messrs. **Edmund Wetmore** and **Samuel Owen Edmonds** argued the cause and filed a brief for petitioners:

He who makes the ink and sells it with intent that it shall be put to the infringing use, and in fact procures it to be so used, is a party to the infringement and liable as a contributor thereto.

Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L.R.A 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 297; Wilkins Shoe-Button Fastener Co. v. Webb, 89 Fed. 996; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 40 Fed. 581, Affirmed in 152 U. S. 433, 38 L. ed. 503, 14 Sup. Ct. Rep. 627; American Cotton Tie Supply Co. v. McCready, 17 Blatchf. 291, Fed. Cas. No. 295; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 732; Travers v. Beyer, 23 Blatchf. 423, 26 Fed. 450; Celluloid Mfg. Co. v. American Zylonite Co. 30 Fed. 437; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100; Renwick v. Pond, 10 Blatchf. 39, Fed. Cas. No. 11,702; Richardson v. Noyes, 2 Bann. & Ard. 398, 10 Off. Gaz. 507, Fed. Cas. No. 11,792; Bowker v. Dows, 3 Bann. & Ard. 518, Fed. Cas. No. 1,734.

Where the contributor not only supplies the ink with which the licensees infringe, but deliberately induces and procures such infringement, in the face of the restriction by which the licensees are bound, the contribution is manifestly wilful, and performed under such circumstances as to establish the wrongful intent of the contributor.

Rupp & W. Co. v. Elliott, supra; Thomson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 723.

Defendant had notice of the license restriction.

Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co. 118 Fed. 852; Badische Anilin & Soda Fabrik v. A. Klipstein & Co. 125 Fed. 556; Lever Bros. v. Pasfield, 88 Fed. 485; Samuel Bros. v. Hostetter Co. (C. C. App. 9th C.) 55 C. C. A. 111, 118 Fed. 258; Knowles v. Peck, 42 Conn. 395, 19 Am. Rep. 542; A. B. Dick Co. v. Henry, 149 Fed. 429; James E. Tompkins Co. v. New York Woven Wire Mattress Co. 154 Fed. 670; People v. Mills, 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786; Board of Excise v. Backus, 29 How. Pr. 33; Priestley v. Adams, 59 Hun, 381, 13 N. Y. Supp. 41; People v. Du Veau, 105 App. Div. 381, 94 N. Y. Supp. 225; People v. Conrad, 102 App. Div. 566, 92 N. Y. Supp. 606.

This question of notice to the defendant sifts down, in the last analysis, to the inquiry as to whether or not, under the proofs before the court, the defendant sold its ink with guilty intent; *i. e.*, with intent that it be unlawfully used upon the licensed machines in question. If the proofs warrant a finding of such guilty intent, then complainants must prevail. And this regardless of whether or not, after discovery of the fact, the complainants gave formal notice to the defendant that its sale of ink for the unlawful use in question constituted a violation of their rights. Indeed, under the authorities, to be guilty of such a violation, defendant need not even be shown to have actually made such a sale. The intent to do so is what governs.

German-American Filter Co. v. Loew Filter Co. 103 Fed. 306, Affirmed in 47 C. C. A. 94, 107 Fed. 950; Stearns v. Phillips, 43 Fed. 795; Thomson-Houston Electric Co. v. Ohio Brass Co. and Rupp & W. Co. v.

Elliott, supra; Canda v. Michigan Malleable Iron Co. (C. C. App. 6th C.) 61 C. C. A. 194, 124 Fed. 489; Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co. supra; Goodyear Shoe Machinery Co. v. Jackson (C. C. App. 1st C.) 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 148; Tubular Rivet & Stud Co. v. O'Brien, 93 Fed. 201; Celluloid Mfg. Co. v. American Zylonite Co. 30 Fed. 440; Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co. 72 Fed. 1017; Willis v. McCullen, 29 Fed. 641; Schneider v. Pountney, 21 Fed. 399; Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co. 147 Fed. 275; New York Filter Mfg. Co. v. Jackson, 91 Fed. 426; Coolidge v. McCone, 2 Sawy. 571, 1 Bann. & Ard. 83, Fed. Cas. No. 3,186.

Solicitation of purchasers by advertisements, circulars, etc., is a form of adequate proof of such intent.

Willis v. McCullen, supra; Municipal Signal Co. v. National Electrical Mfg. Co. 46 C. C. A. 270, 107 Fed. 289.

The sales complained of were made by its salesman. And if he did not make the sale, after direct notice was given him, with guilty intent, it was the duty of the defendant to offer him as a witness to prove the fact. The full proof was in defendant's own hands.

Peifer v. Brown & Co. 85 Fed. 782; Municipal Signal Co. v. National Electrical Mfg. Co. 97 Fed. 813.

Mr. **Francis T. Chambers** argued the cause and filed a brief for respondent.

Mr. Justice **Brewer** delivered the opinion of the court:

This is a suit to restrain an alleged infringement of a patent granted June 22, 1897, for the stencil duplicating machine known as the rotary Neostyle. The plaintiffs below, petitioners here, represent the entire interest in the patent. There is no claim of any infringement by using or selling the patented machines, but of an indirect infringement in the following manner: For the last few years the rotary Neostyle has been sold subject to this license, which was plainly disclosed on the baseboard of the machine: "License agreement. This machine is sold by the Neostyle Company with the license restriction that it can be used only with stencil paper, ink, and other supplies made by the Neostyle Company, New York city."

[199] *The defendant company (which is engaged in the manufacture and sale of ink) is, it is contended, engaged in selling ink to the purchasers of these machines for use thereon; that it is thus inducing a breach of the license contracts, and is responsible as indirectly infringing the patent rights of plaintiffs. The circuit court sustained the contention and entered an interlocutory decree for an injunction and an accounting. 138 Fed. 110. On appeal the circuit court of appeals for the second circuit reversed this decree and remanded the case to the circuit court, with instructions to dismiss the bill (76 C. C. A. 455, 145 Fed. 933), whereupon the case was brought here on certiorari.

The three judges of the circuit court of appeals concurred in reversing the decree of the circuit court on the ground that the evidence was not sufficient to show that the defendant had notice that the machines for which the ink was ordered had been sold under any restrictions, but they differed upon the question whether there was any liability in case sufficient notice of the license agreement had been brought home to the defendant. The majority were of the opinion that the doctrine of contributory infringement, which they conceded to exist, should not be extended beyond those articles which are either parts of a patented combination or device, or which are produced for the sole purpose of being so used, and should not be applied to the staple articles of commerce. In that view of the case, the article supplied being ink, a thing of common use, its sale to a purchaser of the Neostyle machine would be no infringement.

While in E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, this court held, in respect to patent rights, that, with few exceptions, "any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts," it is unnecessary to consider how far a stipulation in a contract between the owner of a patent right and the purchaser from him of a machine manufactured under that right, that it should *be used only in a cer- [200] tain way, will sustain an action in favor of the vendor against the purchaser in case of a breach of that stipulation. So, although "if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer" (Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240), it is also unnecessary to determine whether this states the full measure of liability resting upon a party interfering and inducing the breaking of a contract, for we concur in the views expressed by all the judges of the court of appeals, that there is no sufficient evidence

of notice. True, the defendant filled a few orders for ink to be used on a rotary Neostyle, but it does not appear that it ever solicited an order for ink to be so used, that it was ever notified by the plaintiffs of the rights which they claimed, or that anything which it did was considered by them an infringement upon those rights. Further, none of the chief executive officers of the company had knowledge of the special character of the rotary Neostyle machine or the restrictions on the purchase of supplies. The case of the plaintiffs in this respect rests mainly on the testimony of the witness Gerber, who testified that, at the instance of the manager of the Neostyle Company, he wrote to the defendant for a one-pound can of black ink for use on the rotary Neostyle, saying: "I will be at my office Friday afternoon, between 1:30 and 3:30, and, if convenient, have your representative call at that time." A salesman of the defendant, named Randall, did call. The witness directed Randall's attention to the restrictions on the single machine he had in his office, and asked if he would have any trouble with the Neostyle Company if he used the defendant's ink; Randall replied in the negative, and added that "the ink in question was not patented, that anybody could make or use it; that no trouble would come to me from the use of the ink which he sold." The restriction on the machine shown to Randall was one formerly used by plaintiffs, but which had been discarded prior to this transaction, and for it
[201] the present license agreement *had been substituted. The restriction shown to Randall stated that the machine was sold "with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented) made by the Neostyle Company of New York city." Evidently from his reply Randall's attention was not drawn to the question of a patent on the ink. Further, he was not an officer or general agent of the defendant company, but simply a salesman, and it cannot be that this talk with him is notice to and binding on his principal in respect to all future transactions.

After reviewing all the minor considerations to which our attention has been called by the plaintiffs, we see no sufficient reason for disagreeing with the unanimous opinion of the Circuit Court of Appeals in respect to the matter of notice, and its decree is affirmed.

E. L. VAIL, Phil S. Hughes, and C. F. Richardson, as Supervisors of Pima County, Arizona, Appts.,
v.
TERRITORY OF ARIZONA.

(See S. C. Reporter's ed. 201–205.)

Courts — stare decisis.

Decisions affirming the validity of legislation under which territorial bonds are issued in exchange for county bonds, and which provides for the payment of the principal and interest thereof by the county, even if not binding on such county, which was not nominally a party, should be upheld as against it on the doctrine of *stare decisis* after such bonds have gone into the channels of trade.

[No. 67.]

Argued November 15, 1907. Decided December 2, 1907.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment awarding mandamus to compel the supervisors of Pima county, in that territory, to levy a tax to pay the interest due on certain bonds. Affirmed.

See same case below (Ariz.) 85 Pac. 652.

The facts are stated in the opinion.

Mr. **Samuel L. Kingan** argued the cause, and, with Mr. William Herring, filed a brief for appellants:

The rule of *stare decisis* has here no application.

Hart v. Burnett, 15 Cal. 598; Foxcroft v. Mallett, 4 How. 355, 11 L. ed. 1008; Boyd v. Alabama, 94 U. S. 648, 24 L. ed. 303; Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 60 L.R.A. 33; 24 So. 200, 24 So. 317; Water Comrs. v. Cramer, 61 N. J. L. 270, 68 Am. St. Rep. 705, 39 Atl. 671; Webb v. Lafayette County, 67 Mo. 369.

Nor is the doctrine of *res judicata*, as distinguished from *stare decisis*, applicable.

Outram v. Morewood, 3 East, 346; Carter v. James, 13 Mees. & W. 147; Cromwell v. Sac County, 94 U. S. 351, 352, 353, 356, 361, 363, 24 L. ed. 195, 197–201; Nesbit v. Independent District, 144 U. S. 610, 617, 36 L. ed. 562, 564, 12 Sup. Ct. Rep. 746; Davis v. Brown, 94 U. S. 423, 428, 24 L. ed. 204, 206; Craft v. Perkins, 83 Ga. 760, 10 S. E. 357; Howard v. Kimball, 65 Me. 308; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Watts v. Watts, 160 Mass. 464, 23 L.R.A. 187, 39 Am. St. Rep. 509, 36 N. E. 479; Jacobs v. Miller, 41 Mich. 90, 1 N. W. 1013; McComb v. Frink, 149 U. S. 641, 37 L. ed. 881, 13 Sup. Ct. Rep. 993; Finley v. Cathcart, 149 Ind. 478, 63 Am. St. Rep. 292, 48

N. E. 586, 49 N. E. 381; Pioneer Sav. & L. Co. v. Bartsch, 51 Minn. 479, 38 Am. St. Rep. 511, 53 N. W. 764; Gardner v. Raisbeck, 28 N. J. Eq. 75; Koelsch v. Mixer, 52 Ohio St. 213, 39 N. E. 417; Bulkeley v. House, 62 Conn. 474, 21 L.R.A. 247, 26 Atl. 352.

A judgment for or against a state, in regard to property, franchises, or privileges, is ordinarily binding upon all the integral parts of the state; but where a subdivision has a private and peculiar interest in the subject-matter, a judgment against the whole will not conclude the part, as to that particular and peculiar right or interest. The same rule prevails in a judgment for or against a municipality in regard to property in which a citizen claims a private individual right, and the citizen cannot be concluded as to that right by a judgment against the municipality.

24 Am. & Eng. Enc. Law, 2d ed. p. 755; Helphrey v. Redick, 21 Neb. 83, 31 N. W. 256; James v. Louisville, 19 Ky. L. Rep. 447, 40 S. W. 912; State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S. W. 399; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785; Kane v. Independent School District, 82 Iowa, 5, 47 N. W. 1076; Northern Bank v. Stone, 88 Fed. 413; Price v. Gwin, 144 Ind. 105, 43 N. E. 5; State ex rel. Bradford v. Stock, 38 Kan. 154, 16 Pac. 106; State ex rel. Sears v. Burton, 47 Kan. 44, 27 Pac. 141.

Mr. **William C. Prentiss** argued the cause, and, with Messrs. Horace F. Clark and E. S. Clark, filed a brief for appellee:

The loan commissioners, for the purpose of the proceedings in the Utter Case, were officers of Pima county as well as of the territory.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

The defense in the Utter Case was, in fact, undertaken and conducted by Pima county.

Even if the doctrine of *res judicata* or estoppel does not apply, the present contention is *stare decisis.*

Mr. Justice **Brewer** delivered the opinion of the court:

This was an application by the appellee, the territory of Arizona, for a mandamus to compel the appellants, the supervisors of Pima county, to levy a tax to pay the interest due on certain bonds. The facts are these: In 1883 an act was passed by the territorial legislature (Ariz. Laws 1883, p. 61), directing Pima county to exchange its bonds for those of the Arizona Narrow Gauge Railroad Company. The amount of the bonds and the conditions of exchange were specified in the act. One hundred and fifty thousand dollars of bonds were so exchanged. Pima county denied its liability on the bonds, refused to pay the interest coupons, and an action was brought thereon, which finally reached this court. Lewis v. Pima County, 155 U. S. 54, 39 L. ed. 67, 15 Sup. Ct. Rep. 22. The act was held to be in violation of the restrictions imposed upon territorial legislatures by U. S. Rev. Stat. § 1889, as amended by the act of Congress of June 8, 1878, chap. 168 (20 Stat. at L. 101), and the bonds were adjudged void. Subsequently, by acts of Congress and the territorial legislature, provision was made for the issue of territorial in exchange for these bonds and for the payment of the principal and interest thereof by the county. The validity of this legislation came before us in Utter v. Franklin. 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183, where the different acts are fully stated. We sustained it, and adjudged that it was the duty of the loan commissioners to refund *the[204] bonds. In Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776, the ruling was reaffirmed, and it was held that neither a change in the personnel of the loan commission nor an act of the legislature of Arizona, abolishing the commission, put an end to the duty of refunding.

The refunding having been made, the territory thereafter called upon Pima county to pay the interest which the territory had paid on the funded bonds. Upon its refusal to pay this, application was made to the supreme court of the territory and it granted a mandamus, and from that decision the appellants have brought the case here. They challenge the validity of the refunding legislation, while the appellee contends that the matter is *res judicata*, or, if not, should, upon the doctrine of *stare decisis*, be regarded as foreclosed. In the two cases, 172 and 186 U. S., in which the validity of the refunding legislation was considered, Pima county was not nominally a party. The actions were brought by the holders of the bonds against the loan commission. Whether the county was technically bound by the decisions may be a question. It was heard by its attorney in the litigation, and was the party ultimately to be affected by the refunding. Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252. But, if it be not so bound, still, under the doctrine of *stare decisis*, the question should no longer be considered an open one. The county had full knowledge of the entire litigation, having been a party in the first action and been represented by its attorney in the last two. Any defense which could be made to the refunding of the bonds and the validity of the refunding legislation could have been raised in the last cases. This court considered every question that was presented, determined that the legislation was valid, and ordered that the bonds should be refunded. They have been refunded. They have gone into the channels of trade, and now, after many years,—for the case of Utter v. Franklin was decided in 1899,—and when it is fair to presume that many have bought, relying upon the conclusiveness of the adjudication by this court, it might work a grievous [205] wrong to overthrow those decision and *hold the bonds void. *Stare decisis* is a wholesome doctrine. It is not of universal application, and there have been cases where a ruling once made was wisely changed; but when the decision is one affirming the validity of bonds, notes, or bills of a limited amount, the issue of which had been in terms authorized by statute, such decision should generally be held conclusive, even as to those not strictly parties to the litigation; for otherwise, as we have said, much wrong might be done to innocent holders who bought in reliance upon the decision. We are of the opinion that the Supreme Court of Arizona was right, and its judgment is affirmed.

MARCUS K. BITTERMAN, Julius Mehlig, and Charles T. Kelsko, Petitioners,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 205-229.)

Carriers — excursion or round-trip tickets.

1. A carrier may sell nontransferable round-trip, reduced-rate excursion tickets, and the condition of nontransferability and forfeiture embodied therein is not only binding upon the original purchaser, but upon anyone who acquires such a ticket and attempts to use the same in violation of its terms.

Interstate carriers — excursion or round-trip tickets.

2. The express recognition in the act to regulate commerce of the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets, when considered with the restrictions embodied in the act concerning equality of rates, and with the prohibition against preferences, must be regarded as charging the carrier with the duty of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and hence causes the nontransferable clause to be operative and effective against anyone who wrongfully attempts to use such tickets.

Case — inducing breach of contract — ticket brokerage.

3. Carrying on the business of purchasing and selling nontransferable reduced-rate excursion railroad tickets for profit, to the injury of the railroad company issuing such tickets, is an actionable wrong, although actual malice in the sense of personal ill will may not exist.

Pleading — admission by failure to plead to jurisdiction.

4. Proof in support of an averment that the requisite jurisdictional amount is involved need not be offered where the defendant does not formally plead to the jurisdiction.

Courts — jurisdictional amount — when not colorable or fictitious.

5. The jurisdictional amount averred in a bill filed in a Federal circuit court to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets cannot be deemed colorable and fictitious when considered with the averments as to the large number of such tickets issued, the recurring occasions for their issuance, the magnitude of the wrong dealings by the defendants, the cost and risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the rev-

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NOTE.—As to multifariousness in bill—see note to Gains v. Chew, 11 L. ed. U. S. 402.

Injunction against dealing in nontransferable railroad tickets.

The decided weight of authority supports the proposition that an injunction will lie to restrain the dealing in nontransferable railroad tickets, at least, so far as the issuance of the tickets has been announced and they have been offered for sale. Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Lytle v. Galveston, H. & S. A. R. Co. (Tex.) 10 L.R.A.(N.S.) 437, 99 S. W. 396; Nashville, C. & St. L. R. Co. v. McConnell (C. C.) 82 Fed. 65; Illinois C. R. Co. v. Caffrey (C. C.) 128 Fed. 770; Pennsylvania Co. v. Bay, 150 Fed. 770, Affirming 138 Fed. 203.

And several of the foregoing cases go so far as to hold that such injunctive relief may extend to the restraint of dealings in tickets to be issued in the future. See Pennsylvania Co. v. Bay, 150 Fed. 770, in which it was said that equity "has full jurisdiction at this time to restrain defendants from dealing in complainant's nontransferable tickets, issued and to be issued, upon the broad propositions (1), that complainant has a present property interest in the right to issue such evidences of transportation, whether already issued or to be issued from time to time in the future, and to have the same maintained as nontransferable; and (2), that defendants are threatening to seize upon and deal in, for their own advantage, such nontransferable tickets, to the wrong and in fraud of complainant's present business rights, contrary to law."

enue of the complaining railroad company, and the operation of the illegal dealing in such tickets upon the company's right to issue them in the future, coupled with the admissions in the answer that defendants had not only in the past dealt in such tickets, but intended to carry on the business as to all future issues.

Injunction — adequate remedy at law.
6. Injunctive relief against ticket brokers dealing in nontransferable reduced-rate excursion tickets will not be denied on the ground that an adequate remedy at law exists, where such brokers admit past dealings, and avow their purpose to continue the practice, and where the number of such tickets issued is large, the risk to be incurred by the steps necessary to prevent their wrongful use is considerable, and numerous suits will be necessitated if redress is sought at law.

Pleading — multifariousness.
7. An objection of multifariousness based on misjoinder of parties and causes of action does not lie against a bill to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets, where the acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complaining carrier were identical, the relief sought against each defendant being the same, and the defenses which might be interposed being common to each defendant, and involving like legal questions.

Injunction — extent of relief — future acts.
8. Injunctive relief against ticket brokers unlawfully dealing in nontransferable reduced-rate excursion tickets may extend to the restraining of like dealings as to similar tickets which may be issued in the future.

[No. 34.]

Argued November 4, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree remanding to the Circuit Court for the Eastern District of Louisiana a suit to restrain ticket brokers from dealing in nontransferable reduced-rate excursion tickets, with directions to enter a decree enjoining the defendants generally from dealing in such tickets, whether already issued or thereafter to be issued. Affirmed.

See same case below, 75 C. C. A. 192, 144 Fed. 34.

Statement by Mr. Justice White:

Upon a bill filed on behalf of the Louisville & Nashville Railroad Company, the circuit court of the United States for the eastern district of Louisiana entered a decree perpetually enjoining the petitioners herein and four other ticket brokers, engaged in business in the city of New Orleans, from dealing in nontransferable round-trip tickets issued at reduced rates for passage over the lines of railway of the complainant on account of the United Con-

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On the other hand, it is said in Lytle v. Galveston, H. & S. A. R. Co. supra, that, "when a railroad company has determined upon selling tickets at a reduced rate for a particular occasion, good for a return trip, but nontransferable, and have so advised the public, and placed such tickets upon sale, then, in our opinion, the company has the right to enjoin dealing in the return tickets. In such a case there is a live issue and a threatened injury which is imminent. But, when tickets of the character designated are not upon sale, to enjoin dealing in such as may thereafter be issued as occasions may arise savors of action appropriate to the legislative branch, rather than to the judicial department, of the state government. It seems to us that the railroad companies have an adequate and complete remedy by enjoining dealing in tickets which are on the market for sale, without interference as to those that have not been, but may thereafter be, offered for sale."

The preponderance of authority as above set forth is opposed only by a trial-term decision (New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28), where it is said, in substance, that the whole case rests upon assumptions that persons will act unlawfully, while all the presumptions of law are in favor of innocence, honesty, and the discharge of the duties of citizenship; and that where the plaintiff has reserved to itself the power of regulating the method of authenticating the ticket, and of taking it up and collecting full fare where it is presented by a person other than the original purchaser, it takes a good deal of presumption against the current of law to make out irreparable injury.

As to whether the right to relief is affected by the fact that the tickets in question were issued under an unlawful arrangement with other railroad companies, fixing the rate to be charged, there is a difference of opinion, it having been held in Kinner v. Lake Shore & M. S. R. Co. supra, that the maxim of equity that "he who comes into equity must come with clean hands" did not apply, even though the arrangement fixing the rate was unlawful, because the action was not to enforce such arrangement or any rights thereunder, but related entirely to a contract for transportation between a railroad company and a servant of its patrons; while a contrary conclusion was reached in Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689, where it is said that the aid of equity may not be invoked to protect tickets representing rates unlawfully fixed.

federate Veterans' Reunion and the Mardi Gras celebration held in the city of New [207]Orleans in the *years 1903 and 1904, respectively. On an appeal prosecuted by the railroad company, complaining of the limited relief awarded, the circuit court of appeals held that the defendants should also be enjoined generally from dealing in nontransferable round-trip reduced-rate tickets whenever issued by the complainant, and ordered the cause to be remanded to the circuit court with directions to enter a decree in accordance with the views expressed in the opinion. (75 C. C. A. 192, 144 Fed. 34.) A writ of certiorari was thereupon allowed.

We summarize the averments of the complaint and answer. It was averred in the bill that complainant was a Kentucky corporation, operating about 3,000 miles of railway for the carriage of passengers, baggage, mail, express, and freight, its lines of road extending from New Orleans through various states, and making connections by which it reached all railroad stations in the United States, Canada, and Mexico. The seven persons named as defendants were averred to be citizens and residents of Louisiana, each engaged in the city of New Orleans as a ticket broker or scalper in the business of buying and selling the unused return portions of railroad passenger tickets, especially excursion or special-rate tickets issued on occasions of fairs, expositions, conventions, and the like. It was further averred that the defendants were joined in the bill, "because their business and transactions complained of are in act, purpose, and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them."

Six articles or paragraphs of the bill related to an approaching reunion of United Confederate Veterans to be held in the city of New Orleans, which it was expected would necessitate the transportation by the railroads entering New Orleans of 100,000 visitors, one fourth of which number would pass over the lines of railway of the complainant. A necessity was alleged to exist for special reduced rates of fare to secure a large attendance at such reunion, and it was averred that a rate of 1 cent a mile, [208]one third the regular rate, had *been agreed upon for nontransferable round-trip, reduced-rate tickets which were to be issued for the occasion, and it was stated "that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company, is one that said ticket is nontransferable, and, if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored, but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket." And for various alleged reasons, based mainly upon the large number of expected purchasers, it was averred that the return portion of each ticket was not required to be signed by the original purchaser or presented to an agent of the complainant in the city of New Orleans for the purpose of the identification of the holder as the purchaser of the ticket.

It was averred that each defendant was accustomed to buy and sell the return coupons of nontransferable tickets, for the express purpose, and no other, of putting them in the hands of purchasers, to be fraudulently used for passage on the trains of complainant, and it was further averred that the defendants intended in like manner to fraudulently deal in the return portion of the tickets about to be issued for the reunion in question, and that complainant would sustain irreparable injury, for which it would have no adequate remedy at law, unless it was protected from such wrongful acts. It was further averred that unless relief was given the complainant would be compelled to abandon the making of reduced rates for conventions or other assemblies to be held in the city of New Orleans. Averments were also made as to the additional burden which would be cast upon complainant's conductors and train collectors by reason of the practice complained of, the danger which would arise of a multiplicity of suits for damages by reason of errors of such employees in endeavoring to prevent the fraudulent use of such tickets, and it was averred that it would be impossible, in many instances, *to discover the per-[209] sons who were wrongfully traveling upon the tickets and who were bound to pay the lawful and reasonable one-way rate for their transportation. The impossibility of securing evidence establishing the facts as to said fraud, the necessity, if such evidence could be obtained, of bringing a multiplicity of suits if a remedy at law was availed of, and the impracticability of estimating in dollars and cents the injury to its business, was set forth as making the remedy at law inadequate, and in addition it was charged that the defendants were financially irresponsible. The existence was also averred of various ticket brokers' associations, the members of which acted in concert. It was averred that a large part of the stock in trade of all ticket brokers and scalpers was the disposal of nontransferable railroad tickets, and it was further averred that ticket brokers and scalpers usually sought to avoid injunctions prohibiting the dealing in such tickets by assigning their business to some other ticket broker not named in the order, and it was averred that, in order to afford complete and effective relief, "the restraining injunctive orders should be broad enough to include all who knowingly do what the order of court prohibits defendants from doing, or who aid or abet defendants in violating the injunction or in defeating the objects and purposes thereof." Finally, it was alleged that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of $5,000, and that the value of the business which was sought to be protected, and the rights which the complainant asked to have recognized and enforced, exceeded, in the case of each defendant, the sum of $5,000, exclusive of interest and costs.

In addition to asking a temporary restraining order the bill prayed that defendants, their agents, etc., "and all other persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein," should be perpetually en-
[210]joined "from buying, selling, dealing *in, or soliciting the purchase or sale of, any ticket or tickets or the return coupons or unused portions thereof issued by orator or by any other railroad company for use over orator's lines of railway or any part of them, which, by the terms thereof, are nontransferable, or from soliciting, advertising, encouraging, or procuring any person other than the original purchaser of such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the nontransferable round-trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903."

Of the seven persons made defendants, three only appeared and answered, *viz.*, Marcus K. Bitterman, Julius Mehlig, and Charles T. Kelsko, the petitioners in this court, on whose behalf a joint and several answer was filed.

The averments of the bill in respect to the citizenship of the complainant and the character and extent of its railway business was admitted. It was also admitted that the answering defendants were citizens and residents of Louisiana, but it was averred that they were each separately engaged in the ticket brokerage business, duly licensed to conduct such business by the state of Louisiana and the city of New Orleans, and it was expressly denied that the business operations and transactions of all the defendants named in the bill were in act, purpose, and effect identical. So also the answer admitted the averments of the bill in respect to the proposed reunion, the large attendance expected, the issue of reduced-rate, nontransferable tickets, and the necessity therefor, and the impracticability of requiring the signing of the return portion of each ticket by the purchaser.

It was admitted in the answer that the tickets usually issued by complainant and its connections when making reduced rates as to excusion tickets purported to be nontransferable and upon condition that, if presented by other than the original purchaser, who was supposed to sign the same at the date of purchase, it would not be honored, but would be forfeited, and *that[211] any agent or conductor should have the right to take up and cancel such ticket if presented for passage. In various paragraphs these restrictions or conditions were assailed as impracticable, unenforceable, and unlawful, and without consideration, and it was averred that the conditions were never enforced, and that the tickets were issued and bought with that understanding, and that no damage was caused to complainant by a person other than the original purchaser of a nontransferable reduced-rate ticket, traveling upon the return portion of such ticket, and that no loss or damage could be caused complainant by reason of the expected dealing by defendants in the reunion tickets referred to in the bill.

It was not only admitted in the answer that the answering defendants had in the past dealt in nontransferable railroad tickets issued by the complainant, but it was expressly declared to be their intention to continue the practice, particularly in respect to the tickets issued on account of the approaching reunion, and coupled with such averment it was asserted that no fraud would be committed or was intended in respect to the dealing in such tickets. We insert in the margin,† portions of the answer relating to such admissions.

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†9.

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Respondents further admit that, in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets, whether the same are stamped "nontransferable" or not, for the reason that the term "nontransferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers, who, in turn, sell them to other persons desiring to use said tickets for transportation, when genuine and bona fide.

. . . .

Respondents do not deny that the complainant, on occasions of Mardi Gras festivals in the city of New Orleans, have

[212] *It was denied that the answering defendants were insolvent, but, on the contrary, it was averred that each was able to pay any judgment for damages which might be recovered against him. Denial was made of [213] the allegation of the bill that the *willingness or ability of the complainant to continue issuing special-rate tickets would be affected by the failure to obtain the relief sought by the bill, and, in the main, the averments of the article of the bill relating to various ticket brokers' associations were also denied.

As a distinct ground for denying the relief prayed, it was alleged in various forms that the issue of the proposed nontransferable tickets was the result of an unlawful confederation or combination between the various railroads whose roads entered into the city of New Orleans.

Upon the bill and answer a preliminary injunction was issued, restraining the deal-

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joined in the issuing of reduced rates and the putting out of said so-called "nontransferable" tickets, but, as above set out, the general traveling public, the railways, and the ticket brokers, by common consent, by usage, and by understanding, have all treated said tickets as articles of property, and as negotiable and transferable to any person desiring to purchase and travel on the same when genuine and bona fide; and respondents deny that these respondents have ever fraudulently dealt in the return coupons of such tickets, or that complainant has ever been damaged in respect thereto, by any act of respondents.

10.

Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce, or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents.

Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to attend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and will sell such tickets to persons other than the original purchasers, for such price as they are willing to pay, and that it is no concern of complainant or its connections, or other railways, whether respondents make a profit or a loss in the proposed dealing in said U. C. V. reunion tickets.

. . . .

14.

Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be nontransferable and to constitute a so-called "special contract" in express terms between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said ticket shall not be transferred by them to any other persons; but respondents show that said tickets, when issued by complainant and its connecting lines and other railways, on such occasions as expositions, reunions, conventions, Mardi Gras, and the like, are, in practice and general consent and common understanding of the traveling public, the railways, and the ticket brokers, when bona fide and genuine tickets, good for the return passage over the lines of said complainant and its connections and other railways, in the hands of the holders thereof, whether such holders be the original purchasers or not; that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as legitimate business in every large city, to the knowledge of the complainant, and such tickets are and have been for many years sold by complainant with full knowledge of the fact that they are, in practice and general understanding of the traveling public, good in the hands of any holder.

15.

Respondents jointly and severally admit that each of them are, and have been for some time, separately engaged in the lawful business of buying, selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof, but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders is any fraud upon complainant or the railways issuing such tickets when the same are genuine and bona fide; and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form.

ing in nontransferable tickets issued for the approaching United Confederate Veterans' Reunion. Replication was duly filed to the answer. Subsequently, upon depositions taken in the cause, and upon affidavits showing the character of nontransferable [214]tickets proposed to be issued *for an approaching Mardi Gras festival, a further injunction *pendente lite* was granted as to dealings in the nontransferable reduced-rate, round-trip tickets issued for use on the occasion of the aforesaid Mardi Gras festival.

Thereafter a demurrer was filed to the bill for want of equity and because the case made by the bill was a moot, and not a real, controversy, and it was overruled. Then an application was made for leave to file a plea to the jurisdiction, which was refused.

At the hearing the complainant introduced the depositions of two witnesses and no evidence was given on behalf of the defendants. As before stated, the circuit court entered a final decree perpetually enjoining the dealing in nontransferable reduced-rate, round-trip tickets issued for the United Confederate Veterans' Reunion and the Mardi Gras festivals, and denying relief as to future issues of tickets of a like character.

On appeal and cross appeal the circuit court of appeals held that the complainant was entitled to the full relief prayed in the bill, and consequently to an injunction restraining the dealing by the defendants not only in the tickets issued for the United Confederate Veterans' Reunion and the past Mardi Gras festival, but from carrying on the business of like dealing in nontransferable reduced-rate tickets which might be issued in the future by the complainant, and the circuit court was directed to decree accordingly.

Mr. **Louis Marshall** argued the cause, and, with Messrs. Henry L. Lazarus and Moritz Rosenthal, filed a brief for petitioners:

A railroad ticket is property in the constitutional sense of the term.

People ex rel. Fleischman v. Caldwell, 64 App. Div. 46, 71 N. Y. Supp. 654, Affirmed in 168 N. Y. 671, 61 N. E. 1132.

The business of a ticket broker is legitimate, and legislation seeking to prohibit it is a violation of the liberty of a citizen, and violative of both the state and Federal Constitutions.

Ibid.; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006.

There is nothing to indicate malice toward the railway company.

Adler v. Fenton, 24 How. 407, 16 L. ed. 696; Dickerman v. Northern Trust Co. 176 U. S. 190, 44 L. ed. 430, 20 Sup. Ct. Rep. 311; McMullen v. Ritchie, 64 Fed. 253; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 168; Morris v. Tuthill, 72 N. Y. 575; Davis v. Flagg, 35 N. J. Eq. 491; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93.

The theory of the complainant precludes the conception of a privity of contract, since the very foundation of its contention is, that the contract between it and the original purchaser of the ticket was nonassignable.

Spencer's Case, 5 Coke, 16a, 1 Smith, Lead. Cas. 68; Garst v. Hall & L. Co. 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219; Harrison v. Maynard, M. & Co. 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738; Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 18.

The condition of nontransferability which it has sought to impress upon its tickets is unreasonable.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 443, 32 L. ed. 792, 9 Sup. Ct. Rep. 469.

In the law of landlord and tenant, involving a private, and not a public, relation, it is a well-recognized principle that, in the case of a covenant not to assign a lease, without a provision for re-entry or forfeiture, the assignment itself is valid, and the lessee is merely liable for damages for breach of the covenant.

Paul v. Nurse, 8 Barn. & C. 488; Doe ex dem. Wilson v. Phillips, 2 Bing. 13; Den ex dem. Bockover v. Post, 25 N. J. L. 289; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

But assuming that the company had a right to require the original purchaser to identify himself at its office in New Orleans, and to indorse upon the ticket his signature as the means of identification, it by no means follows that the principal acts complained of in the bill constituted such a grievance as would give rise to a cause of action. The purchaser of the ticket had the right to give it away, to destroy it, to use it, and, as we claim, he could dispose of it.

New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28.

He also had the right to authorize another person to indorse his name on the ticket, and, on disposing of his ticket before such indorsement, he necessarily gave implied authority to the purchaser to indorse his name if he desired to make use of the ticket. Certainly, such a signature is not and cannot be a forgery. It was either expressly or impliedly authorized, just as any man may give authority to another to sign or indorse his name to a check, note, or draft. Such signature being authorized, although not the name of the party affixing it, is not a forgery within the purview of any penal law.

People ex rel. Newburn v. Keeper of City Prison (Unreported).

Assuming that the contract of nontransferability was valid, and that the original purchaser of the ticket committed a breach of contract when he disposed of it, that fact would not support an action at law against the ticket broker, under the circumstances of this case.

The broker did not, by fraud, force or coercion, or by malicious act, bring about such breach of contract, and the case does not, therefore, fall within the rule laid down in Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Cooley, Torts, 2d ed. p. 581, *497; Green v. Button, 2 Cromp. M. & R. 707; Benton v. Pratt, 2 Wend. 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; First Nat. Bank v. Whitman, 94 U. S. 345, 24 L. ed. 231; Mobile L. Ins. Co. v. Brame, 95 U. S. 759, 24 L. ed. 583; Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57; Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; Daly v. Cornwell, 34 App. Div. 27, 54 N. Y. Supp. 107; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; McCann v. Wolff, 28 Mo. App. 447; Allen v. Flood [1898] A. C. 1; New York C. & H. R. R. Co. v. Reeves and Adler v. Fenton, supra; Hurwitz v. Hurwitz, 10 Misc. 353, 31 N. Y. Supp. 25.

But even if it should be conceded that the facts just considered constitute an injury, we contend that no cause of action is established, because of the absence of such legal damage as is necessary to be conjoined to a wrong, juridically considered, in order to make out a cause of action.

Bowen v. Hall, L. R. 6 Q. B. Div. 337; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006.

The complainant has shown no sufficient ground of equitable intervention, since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious, or even fraudulent, it has a plain, adequate, and complete remedy at law to redress such wrongs.

Hipp v. Babin, 19 How. 278, 19 L. ed. 635; Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 551, 17 L. ed. 337; Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 621, 20 L. ed. 503; Grand Chute v. Winegar, 15 Wall. 375, 21 L. ed. 175; Root v. Lake Shore & M. S. R. Co. 105 U. S. 212, 26 L. ed. 983; Killian v. Ebbinghaus, 110 U. S. 573, 28 L. ed. 248, 4 Sup. Ct. Rep. 232; Fussell v. Gregg, 113 U. S. 555, 28 L. ed. 995, 5 Sup. Ct. Rep. 631; Buzard v. Houston, 119 U. S. 351, 30 L. ed. 452, 7 Sup. Ct. Rep. 249; Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; 3 Pom. Eq. Jur. § 1338; Jersey City v. Gardner, 33 N. J. Eq. 622; Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; North v. Peters, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. Rep. 346; Davis v. American Soc. 75 N. Y. 362; Life Asso. of America v. Boogher, 3 Mo. App. 173; Raymond v. Russell, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544; Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142; Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310, 64 N. E. 163; Tiede v. Schneidt, 99 Wis. 201, 74 N. W. 798; Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101; Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; People ex rel. L'Abbe v. District Court, 26 Colo. 386, 46 L.R.A. 850, 58 Pac. 604; Ocean City Asso. v. Schurch, 57 N. J. Eq. 268, 41 Atl. 914; O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745; Mt. Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. Supp. 250; Fisher v. Lakeside Park Hotel & Amusement Co. 4 Ohio N. P. 329; York v. Ysaguairre, 31 Tex. Civ. App. 26, 71 S. W. 563; Globe Mut. L. Ins. Co. v. Reals, 79 N. Y. 202; American Waterworks Co v. Venner, 45 N. Y. S. R. 441, 18 N. Y. Supp. 379; Northern P. R. Co. v. Cannon, 49 Fed. 517; Dorsey v. Monnett (Md.) 20 Atl. 196; Erickson v. First Nat. Bank, 44 Neb. 622, 28 L.R.A. 577, 48 Am. St. Rep. 753, 62 N. Y. 1078; Fowler v. Palmer, 62 N. Y. 533; Venice v. Woodruff, 62 N. Y. 467, 20 Am. Rep. 495; Springport v. Teutonia Sav. Bank, 75 N. Y. 401; New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28.

There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits.

Pfohl v. Simpson, 74 N. Y. 142; Bouton v. Brooklyn, 15 Barb. 375; 2 Story, Eq. Jur. §§ 853, 854; Tribette v. Illinois C. R. Co. 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894; O'Brien v. Fitzgerald, 150 N. Y. 572, 44 N. E. 1126; Empire State Sav. Bank v. Beard, 151 N. Y. 638, 45 N. E. 1131; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; Marsh v. Kaye, 168 N. Y. 196, 61 N. E. 177; O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Washington County v. Williams (C. C. App.

8th C.) 49 C. C. A. 621, 111 Fed. 801; Scott v. McFarland (C. C. D. Or.) 70 Fed. 280; New York C. & H. R. R. Co. v. Reeves, supra.

The circuit court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' acts exceeded $2,000, there being no foundation in fact in support of such averment.

Williams v. Nottawa, 104 U. S. 209, 211, 26 L. ed. 719, 720; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; Morris v. Gilmer, 129 U. S. 325, 32 L. ed. 693, 9 Sup. Ct. Rep. 289; King Iron Bridge & Mfg. Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Farmington v. Pillsbury, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 373, 34 L. ed. 367, 10 Sup. Ct. Rep. 1004; Anderson v. Watt, 138 U. S. 701, 34 L. ed. 1080, 11 Sup. Ct. Rep. 449; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 287, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; Bank of Arapahoe v. David Bradley & Co. 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867.

The decree of injunction awarded by the circuit court of appeals, so far as it relates to nontransferable tickets that may be hereafter issued, is in effect the exercise of legislative, as distinguished from judicial, power, since it undertakes to promulgate a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse* and not even in contemplation; and is, therefore, violative of the most fundamental principle of our government.

Davis v. Elmira Sav. Bank, 161 U. S. 290, 40 L. ed. 703, 16 Sup. Ct. Rep. 502; McCray v. United States, 195 U. S. 61, 49 L. ed. 97, 24 Sup. Ct. Rep. 769; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. 171 U. S. 66, 43 L. ed. 77, 18 Sup. Ct. Rep. 895; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 682, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; Reagan v. Farmers' Loan & T. Co. 154 U. S. 400, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 701, 27 L. ed. 588, 2 Sup. Ct. Rep. 732; Burnett v. United States, 116 U. S. 161, 29 L. ed. 587, 6 Sup. Ct. Rep. 327; Gordon v. United States, 117 U. S. 706, Appx.; Interstate Commerce Commission v. Brimson, 155 U. S. 9, 39 L. ed. 51, 15 Sup. Ct. Rep. 19; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 440, 15 L. ed. 441; The Lottawanna (Rodd v. Heartt) 21 Wall. 576, 22 L. ed. 662; Sinking Fund Cases, 99 U. S. 761, 25 L. ed. 516; Calhoun County v. Galbraith, 99 U. S. 219, 25 L. ed. 412; Cary v. Curtis, 3 How. 266, 11 L. ed. 590; United States v. Duell, 172 U. S. 589, 43 L. ed. 564, 19 Sup. Ct. Rep. 286; Schick v. United States, 195 U. S. 99, 49 L. ed. 114, 24 Sup. Ct. Rep. 826; State v. Gaster, 45 La. Ann. 636, 12 So. 740; Montesquieu, Spirit of Laws, p. 174; Cooley, Principles of Const. Law, p. 44; Osborn v. Bank of United States, 9 Wheat. 819, 6 L. ed. 223; Mill, Considerations on Representative Government, p. 326; 13 Law Quarterly Review, p. 362; Dunbar, Government by Injunction; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; Bates v. Kimball, 2 D. Chip. (Vt.) 77; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 47 L.R.A. 393, 54 S. W. 494; Dillon, Law & Jurisprudence of England & America, p. 236; New York & N. H. R. Co. v. Interstate Commerce Commission, 200 U. S. 404, 50 L. ed. 526, 26 Sup. Ct. Rep. 272; Swift & Co. v. United States, 196 U. S. 375, 396, 401, 49 L. ed. 518, 524, 526, 25 Sup. Ct. Rep. 276; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896; Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020, 1028; New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28; Lytle v. Galveston, H. & S. A. R. Co. (Tex.) 10 L.R.A.(N.S.) 437, 99 S. W. 396; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Delaware & R. Canal Co. v. Camden & A. R. Co. 15 N. J. Eq. 13; Thomas v. Musical Mut. Protective Union, 121 N. Y. 45, 8 L.R.A. 175, 24 N. E. 24; Flint v. Hutchinson Smoke Burner Co. 110 Mo. 492, 16 L.R.A. 243, 33 Am. St. Rep. 476, 19 S. W. 804; World's Columbian Exposition v. United States, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654.

Messrs. **Joseph Paxton Blair** and **Brode B. Davis** argued the cause, and, with Mr. George Denegre, filed a brief for respondent:

Defendants filed no formal plea to the jurisdiction, but simply denied, in their answer, the averments of the bill in respect to the amount of damages. Under such circumstances, proof of damages was not necessary to sustain the jurisdiction.

Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 40; 1 Fost. Fed. Pr. § 16, pp. 56, 57; Pine v. New York, 103 Fed. 337; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801; Maffet v. Quine, 95 Fed. 199; Pennsylvania Co. v. Bay, 138 Fed. 203.

It is enough to sustain the jurisdiction—the jurisdictional facts appearing in the complaint—that it does not, at any time thereafter, satisfactorily appear to the court that the suit does not really and substantially involve the jurisdictional amount.

Maffet v. Quine, 95 Fed. 201.

Considering the magnitude of complainant's business, the admissions of the answer, the uncontradicted testimony of complainant's witnesses, the absence of any evidence whatever on the part of defendants, and the well-settled principle of law that a suit cannot properly be dismissed as not involving an amount sufficient to give jurisdiction unless the facts, when made to appear on the record, create a legal certainty of that conclusion (Put-in-Bay Waterworks, Light, & R. Co. v. Ryan, 181 U. S. 431, 45 L. ed. 937, 21 Sup. Ct. Rep. 709), we submit that there in no merit in the contention that the court below was without jurisdiction because the amount in controversy was less than $2,000.

In cases of this character the value of the business to be protected determines the amount involved.

Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 552; Southern Exp. Co. v. Ensley, 116 Fed. 756; Board of Trade v. Cella Commission Co. (C. C. App. 8th C.) 76 C. C. A. 28, 145 Fed. 28; Louisville & N. R. Co. v. Smith, 63 C. C. A. 1, 128 Fed. 5; Riverside & A. R. Co. v. Riverside, 118 Fed. 743; Humes v. Ft. Smith, 93 Fed. 857; Western U. Teleg. Co. v. Charleston, 56 Fed. 420; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; Fost. Fed. Pr. § 16; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

The magnitude of the evil which complainant seeks relief from cannot be exaggerated.

Duncan v. Atchison, T. & S. F. R. Co. 4 Inters. Com. Rep. 390; Nashville, C. & St. L. R. Co. v. McConnell, supra; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A 661, 2 Inters. Com. Rep. 527, 5 So. 833; Samuelson v. State, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1016.

The legislatures of many states have appreciated the unlawful and fraudulent character of the ticket scalpers' business, and statutes have been enacted making their dealing in these tickets a violation of the criminal law. Such laws have been held constitutional by the courts of last resort on the broad question of the right of the scalpers to buy and sell these tickets without the authority of the railroad company issuing them, in all those states in which the question has been raised, with the exception of New York.

Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; State v. Corbett, supra; Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; Com. v. Keary, 198 Pa. 500, 48 Atl. 472; State v. Bernheim, 19 Mont. 512, 49 Pac. 441; Re O'Neill, 41 Wash. 174, 3 L.R.A.(N.S.) 558, 83 Pac. 104; Samuelson v. State, supra; State v. Thompson, 47 Or. 492, 4 L.R.A.(N.S.) 480, 84 Pac. 476; State v. Manford, 97 Minn. 173, 106 N. W. 907.

While this is the first case of the kind to reach a Federal appellate court, it is one of a large number of cases in which railroad companies have obtained from various circuit courts of the United States, and from state courts, injunctive relief against the unlawful interference with their business by so-called ticket brokers or scalpers.

Nashville, C. & St. L. R. Co. v. McConnell, supra; Delaware, L. & W. R. Co. v. Frank, supra; Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Pennsylvania R. Co. v. Beekman, 30 Wash. L. Rep. 715; Illinois C. R. Co. v. Caffrey, 128 Fed. 770; Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; Union P. R. Co. v. Philbin (June 19, 1906); D. & R. G. R. Co. v. Groshell (July 6, 1906); Pennsylvania Co. v. Bay, 138 Fed. 203.

In all these cases it was held that facts similar to those presented in the present record make out a clear case of equitable jurisdiction on the grounds of irreparable injury, inadequacy of the remedy at law, and necessity for avoiding a multiplicity of suits. They all declare the correctness and applicability of the following propositions of law:

The contract evidenced by the nontransferable tickets described in complainant's bill is a legal contract between the railroad company and the original purchaser of such tickets, and it binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only. No one other than such purchaser can become the beneficiary of the contract, and under its terms the railroad company is under no obligation to carry as a passenger any person presenting such ticket unless such person is in fact the original purchaser.

Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; Boylan v. Hot Springs R. Co. 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50; Drummond v. Southern P. Co. 7 Utah, 118, 25 Pac. 733.

Such a ticket is not property in the hands of the purchaser in the sense that it can be transferred or sold by him; and trafficking in such tickets is not, and cannot be made, a legitimate business.

State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Jannin v. State, supra; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; Drummond v. Southern P. Co. supra; Cody v. Central P. R. Co. 4 Sawy. 114, Fed. Cas. No. 2,940; Samuelson v. State and Pennsylvania R. Co. v. Beekman, supra; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 68.

The right of a railroad company to sell its passenger tickets, and its right to receive money or valid tickets for transportation of passengers, and its right to make reasonable charges and regulations for the transportation of passengers, are rights of property, and, as such, are entitled to the protection of the law.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The business of a person or corporation is property which is entitled, under the law, to protection from unlawful interference, and such interference may be prevented by injunction.

National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 80.

By the scalping of its nontransferable tickets, the railroad company sustains a direct pecuniary injury.

There is no process of reasoning, however strained, which can, even as a matter of form, conceal this practical fact, that the company is deliberately cheated out of the regular fare of every mile of its line over which travel is made under color of one of these void papers.

Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240; Flaccus v. Smith, supra; Raymond v. Yarrington, 96 Tex. 443, 62 L.R.A. 962, 97 Am. St. Rep. 914, 72 S. W. 580, 73 S. W. 800; Seelig v. Dumas, 48 La. Ann. 1494, 21 So. 91; Illinois C. R. Co. v. Caffrey, 128 Fed. 773; Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 76 L. T. N. S. 591; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 68.

In addition to the direct pecuniary loss inflicted, the carrier's business is seriously interfered with by the scalping of its nontransferable tickets.

One who maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, commits an actionable wrong. If the wrong is recurrent, inflicting irreparable injury, and the remedy at law is inadequate, a court of equity will afford appropriate relief.

Sperry & H. Co. v. Brady, 134 Fed. 691; Exchange Teleg. Co. v. Howard, 22 Times L. R. 375; American Law Book Co. v. Edward Thompson Co. 41 Misc. 396, 84 N. Y. Supp. 225; Fleckenstein Bros. Co. v. Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025; Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800, 1015; Sperry & H. Co. v. Temple, 137 Fed. 992; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Board of Trade v. McDearmott Commission Co. 143 Fed. 188; Knudsen v. Benn, 123 Fed. 636; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; Wells & R. Co. v. Abraham, 146 Fed. 190.

The railroad company is manifestly without any adequate remedy at law for the violation of its ticket contracts and the interference with its business complained of, so that, for the damages and injury sustained, if there is no remedy in equity, there is none whatever in any just sense. To bring a separate suit for damages in the case of each ticket sold would involve a multitude of suits, excessively burdensome and expensive, and not likely to afford any substantial result to the carrier. It is a case of frequently recurring wrong, calling for injunctive relief.

A bill filed by a railway company making as party defendants all the "scalpers" engaged in the scalping business at a particular place is not multifarious.

Smith v. Bivens, 56 Fed. 352; Barcus v. Gates, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; Hale v. Allinson, 188 U. S. 72, 47 L. ed. 390, 23 Sup. Ct. Rep. 244; Wyman v. Bowman, 62 C. C. A. 189, 127 Fed. 257; Pennsylvania Co. v. Bay, 150 Fed. 770; 2 Pom. Eq. Jur. p. 634; 1 High, Inj. 4th ed. p. 621e.

The original and primary office of a writ of injunction is to prevent a wrong or injury from being done.

16 Am. & Eng. Enc. Law, 2d ed. p. 342; High, Inj. 4th ed. p. 912.

In the case of a trespass or any wrongful interference with a legitimate business, where the acts complained of were of a continuing nature, whose constant recurrence rendered the remedy at law inadequate, unless by a multiplicity of suits, courts of equity have always granted injunctive relief.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Ellis v. Blue Mountain Forest Asso. 69 N. H. 385, 42 L.R.A. 570, 41 Atl. 856; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166; Blondell v. Consolidated Gas. Co. 89 Md. 732, 46 L.R.A. 187, 43 Atl. 817; Krueger v. Wisconsin Teleph. Co. 106 Wis. 96, 50 L.R.A. 298, 81 N. W. 1041; Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; Illinois C. R. Co. v. Caffrey, 128 Fed. 773; Pennsylvania Co. v. Bay, 138 Fed. 203; Hopkins v. Oxley Stave Co. 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 919; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; National Teleg. News Co. v. Western U. Teleg. Co. supra; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The points urged at bar on behalf of the petitioners as establishing that the decrees below should be reversed and the bill of complaint dismissed, and, in any event, the injunction be modified and restricted, are the following:

"1. The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt are in form nontransferable, when the original purchasers disposed of them in breach of their contract with the complainant.

"2. The complainant has shown no sufficient ground for equitable intervention, since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious, or even fraudulent, it has a plain, adequate, and complete remedy at law to redress such wrongs.

[220] *"3. There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits.

"4. The circuit court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' act exceeded $2,000, there being no foundation in fact in support of such averment.

"5. The decree of injunction awarded by the circuit court of appeals, so far as it relates to nontransferable tickets that may be hereafter issued, is in effect the exercise of legislative, as distinct from judicial, power, since it undertakes to promulgate a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse*, and not even in contemplation, and is, therefore, violative of the most fundamental principle of our government."

Stated in logical sequence and reduced to their essence, these propositions assert:

First, want of jurisdiction from the insufficiency of the amount involved, want of power in a court of equity to grant relief because, on the face of the bill, relief at law was adequate, and because equitable relief was improper on account of misjoinder of parties and causes of action.

Second, because the case as made did not entitle to relief, since it did not show the commission of any legal wrong by the defendants.

Third, because, conceding the right to relief, the remedy by injunction which the court accorded was so broad as, in effect, to amount to the exertion of legislative, as distinct from judicial, power, and hence was equivalent to the denial of due process of law.

As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the fundamental *question involved in the [221] second proposition; that is, the absence of averment or proof as to the commission of a legal wrong by the defendants.

That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser, but upon anyone who acquired such a ticket and attempted to use the same in violation of its terms, is also settled. Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324. See also Boylan v. Hot Springs R. Co. 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50.

True, these cases were decided before the passage of the act to regulate commerce, but the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets was expressly recognized by that act, and the operation and binding effect of the nontransferable clause in such tickets upon all third persons acquiring the same and attempting to use them, and the duty of the carrier in such case to use due diligence to enforce a forfeiture, results from the context of the act. Thus, by § 22, it was provided "that nothing in this act shall apply to . . . the issuance of mileage, excursion, or commutation passenger tickets." [24 Stat. at L. 387, chap. 104, U. S. Comp. Stat. 1901, p. 3170.] And it is to be observed that, despite the frequent changes in the act, including the comprehensive amendments embodied in the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), the provision in question remains in force, although the Interstate Commerce Commission, charged with the administrative enforcement of the act, has directed the attention of Congress to the importance of defining the scope of such tickets in view of the abuses which might arise from the exercise of the right to issue them. (2 Inters. Com. Rep. 340.) And, when the restrictions embodied in the act concerning equality of rates and the prohibitions against preferences are borne in mind, the conclusion cannot be escaped that the right to issue tickets of the class referred to carried with it the duty on the [222]*carrier of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and therefore caused the nontransferable clause to be operative and effective against anyone who wrongfully might attempt to use such tickets. Any other view would cause the act to destroy itself; since it would necessarily imply that the recognition of the power to issue reduced-rate excursion tickets conveyed with it the right to disregard the prohibitions against preferences which it was one of the great purposes of the act to render efficacious. This must follow, since, if the return portion of the round-trip ticket be used by one not entitled to the ticket, and who otherwise would have had to pay the full one-way fare, the person so successfully traveling on the ticket would not only defraud the carrier, but effectually enjoy a preference over similar one-way travelers who had paid their full fare, and who were unwilling to be participants in a fraud upon the railroad company.

Any third person acquiring a nontransferable reduced-rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket, amounting to a right of property therein, which a court of equity would protect. Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, and authorities there cited. See also Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, where it was held that an actionable wrong is committed by one "who maliciously *interferes in a contract between two [223] parties and induces one of them to break that contract to the injury of the other." That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced-rate railroad tickets for profit, to the injury of the railroad company issuing such tickets, is, we think, clear. It is not necessary that the ingredient of actual malice, in the sense of personal ill will, should exist to bring this controversy within the doctrine of the Angle Case. The wanton disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling nontransferable reduced-rate tickets of necessity involved, constitute legal malice within the doctrine of the Angle Case. We deem it unnecessary to restate the grounds upon which the ruling in the Angle Case was rested, or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the Angle Case and the full reference to the authorities which was made in the opinion in that case.

Certain is it that the doctrine of the Angle Case has been frequently applied in cases which involved the identical question here at issue,—that is, whether a legal wrong was committed by the dealing in nontransferable reduced-rate railroad excursion tickets. Pennsylvania R. Co. v. Beekman, 30 Wash. L. Rep. 715; Illinois C. R. Co. v. Caffrey, 128 Fed. 770; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65.

Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by the dealing in nontransferable reduced-rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Schubach v. McDonald, 179 Mo. 163, 65 L. R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020, and cases cited; Samuelson v. State, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1012. In the case last referred to, where the subject is elaborately reviewed, the supreme court of Tennessee, in holding that [224] the *prohibitive statute was not unconstitutional as forbidding a lawful business, and in affirming a criminal conviction for violating the statute, observed:

"That the sale as well as the purchase of nontransferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general concensus of opinion among the courts."

Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief. The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of $5,000 as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment. Nevertheless, the complainant introduced testimony tending to show that, on the New Orleans division of its road, a loss of from fifteen to eighteen thousand dollars a year was sustained through the practice by dealers of wrongfully purchasing and selling nontransferable tickets. That hundreds of the tickets annually issued for the Mardi Gras festivals in New Orleans were wrongfully bought and sold; that other nontransferable reduced-rate tickets were, in a like manner, illegally trafficked in to the great damage of the corporation, and that the defendants were the persons principally engaged in conducting such wrongful dealings. But, even if this proof be put out of view, we think the contention that a consideration of the whole bill establishes that the jurisdictional amount alleged was merely colorable and fictitious is without merit. We say this because the averments of the bill as to the number of such tickets issued, the recurring occasions for their issue, the magnitude of the wrongful dealings in the nontransferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complain- [225] ant, the *operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future, coupled with the admissions of the answer, sustain the express averment as to the requisite jurisdictional amount. Besides, the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced. Hunt v. New York Cotton Exchange, 205 U. S. 322, 336, 51 L. ed. 821, 826, 27 Sup. Ct. Rep. 529.

The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant "were wrongful, tortious, or even fraudulent," there was no right to resort to equity, because there was a complete and adequate remedy at law to redress the threatened wrongs when committed, is, we think, also devoid of merit. From the nature and character of the nontransferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision, and the multiplicity of suits necessarily to be engendered if redress was sought at law,—all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed, the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since, in those cases, it was expressly held that the consequences of the legal wrong flowing from the dealing in nontransferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity.

There is an opinion of the supreme court of New York (not the court of last resort) which would seem to express contrary views (New York C. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28), but the reasoning there relied on, in our opinion, is inconclusive.

*The proposition that the bill was multi- [226] farious because of the misjoinder of parties and causes of action was not assigned as error in the circuit court of appeals, and, therefore, might well be held not to be open. But, passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in Hale v. Allinson, 188 U. S. 56, 77, 47 L. ed. 380, 392, 23 Sup. Ct. Rep. 244.

As we have stated, the circuit court granted a preliminary injunction, restraining the defendants from illegally dealing in tickets issued on account of the United Confederate Veterans' Reunion, and, before final hearing, granted a second injunction, restraining such dealing in like tickets issued for the approaching Mardi Gras festival. By the final decree these injunctions were perpetuated, the court declining to grant the relief sought by the complainant in relation to nontransferable tickets to be issued for the future, without prejudice, however, to the right of the complainant to seek relief by independent proceedings on each occasion when it might issue such nontransferable tickets. The circuit court of appeals decided that error had been committed in refusing to grant an injunction against dealing in nontransferable tickets to be issued in the future, and directed that the decree below be enlarged in that particular. It is insisted that the circuit court of appeals erred in awarding an injunction as to dealings "in nontransferable tickets that may be hereafter issued . . . since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* . . . and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered, it but denies that there [227]is power in *a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction, in the nature of things, contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See Slater v. Gunn, 170 Mass. 509, 41 L.R.A. 268, 49 N. E. 1017, and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced-rate, nontransferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such nontransferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the circuit court of appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the circuit court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings, if allowed, would seriously impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made without *prejudice to the [228] right of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever, on other occasions, it was determined to issue nontransferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant.

In Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262, on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained, not only addressed to the seizure in controversy, but which also operated to restrain like seizures of liquors in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, and Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Nor is there merit in the contention that the decision in New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 404, 40 L. ed. 526, 26 Sup. Ct. Rep. 272, supports the view here relied upon as to the limited authority of a court of equity to enjoin the continued commission of the same character of acts as those adjudged to be wrongful. On the contrary, the ruling in that case directly refutes the claim based on it. There certain acts of the carrier were held to have violated the act to regulate commerce. The contention of the government was that, because wrongful acts of a particular character had been committed, therefore an injunction should be awarded against any and all violations in the future of the act to regulate commerce. Whilst this broad request was denied, it was carefully pointed out that the power existed to enjoin the future commission of like acts to those found to be illegal, and the injunction was so awarded. The whole argument here made results from a failure to distinguish between an injunction generally restraining the commission of illegal acts [229]in the *future and one which simply restrains for the future the commission of acts identical in character with those which have been the subject of controversy, and which have been adjudged to be illegal.

Affirmed.

UNITED STATES, Appt.,
v.
R. P. ANDREWS & COMPANY.

(See S. C. Reporter's ed. 229–243.)

United States — liability for paper purchased for use in Philippine Islands.

1. The United States, and not the government of the Philippine Islands, must be deemed the purchaser of paper to be used by the public printing office in those Islands, where the Division of Insular Affairs, under an order of the Secretary of War, conducted the negotiations for such purchase with no intimation that it was acting as the agent for the government of the Philippine Islands, other than can be inferred from the statement of the purpose for which the paper was intended, the contrary inference being supported by a reference to the "Philippine funds" as the source of payment, and by the subsequent correspondence and dealings, which showed that both parties regarded the contract as one made in the name of, and for the account of, the United States.

Delivery to carrier as delivery to purchaser.

2. Delivery of paper purchased by the United States for the public printing office in the Philippine Islands to the carrier designated by the government, coupled with the acceptance by the government of the bills of lading made to the consignee or his order, constitute a delivery to the United States, relieving the seller of risk of injury during shipment, although the words "f. o. b. Manila" were used in the proposal by which the negotiation was commenced, where the context and subsequent correspondence showed that these words were used as implying that, inasmuch as the freight to Manila was to be included in the purchase price, it was to be primarily defrayed by the seller.

Public contracts — requirement as to execution — executed contracts.

3. The invalidity of a public contract because of noncompliance with the requirement of U. S. Rev. Stat. § 3744, U. S. Comp. Stat. 1901, p. 2510, that such contracts be reduced to writing and be subscribed by the contracting parties, is immaterial after the contract has been performed.

[No. 44.]

Argued and submitted November 8, 11, 1907. Decided December 2, 1907.

APPEAL from the Court of Claims to review a judgment against the United States for the contract price of paper purchased for use in the public printing office in the Philippine Islands. Affirmed.

See same case below, 41 Ct. Cl. 48.

The facts are stated in the opinion.

Assistant Attorney General **Van Orsdel** argued the cause, and, with Mr. Charles F. Kincheloe, filed a brief for appellant:

Of the facts as to the status and duties of the insular division of the War Department the court will take judicial notice.

Greenl. Ev. 12th ed. §§ 6, 6a; Meade v. United States, 9 Wall. 691, 19 L. ed. 687; De Celis v. United States, 13 Ct. Cl. 126; Fendall's Case, 16 Ct. Cl. 121.

An agent cannot be held personally liable on a contract made for his principal, where his principal and the fact of his agency were disclosed to the other party.

Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Cliquot's Champagne (Cliquot v. United States) 3 Wall. 114, 18 L. ed. 116; United States v. The Burdett, 9 Pet. 682, 9 L. ed. 273.

While, according to commercial usage, delivery by a vendor to the carrier is, in the absence of special agreement to the contrary, delivery to the vendee, yet no one will question the right and power of the parties to vary this rule by contract provisions requiring delivery to be made by the vendor at the point of final destination.

Dunlop v. Lambert, 6 Clark & F. 620; Pacific Iron Works v. Long Island R. Co. 62 N. Y. 272.

The fact of the consignment of the goods to Governor Taft, even were it not one of the contract provisions, would afford no material proof of any intention on the part of the parties to the contract to waive the plain and unequivocal provision of the con-

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NOTE.—As to passing of title to property by delivery thereof to carrier for transportation to consignee or vendee—see note to Ramsey & G. Mfg. Co. v. Kelsea, 22 L.R.A. 415.

As to necessity and sufficiency of delivery—generally to transfer title—see notes to Schutz v. Jordan, 35 L. ed. U. S. 705 and Briggs v. United States, 36 L. ed. U. S. 180.

tract requiring delivery to be made at Manila, or of intention that the shipment was to be at the vendee's risk, as the consignee is as often the mere agent of the shipper as he is the owner of the shipment.

Benjamin, Sales, 282, 289; Dunlop v. Lambert, supra; Moakes v. Nicholson, 19 C. B. N. S. 290; Castle v. Playford, L. R. 5 Exch. 165.

The delivery by the contractor of copies of bills of lading to the insular division furnishes no evidence of transfer of title and an imposition upon the vendee of the risk of transportation, as this was also one of the specific contract provisions; and especially since Governor Taft was, under the contract, the consignee, and the bills of lading were delivered to the insular division for transmission to him, in order that he might secure the delivery of the paper.

Dunlop v. Lambert and Moakes v. Nicolson, supra; Shepherd v. Harrison, L. R. 4 Q. B. 196; Castel v. Playford, supra; Kitson Mach. Co. v. Holden, 74 Vt. 104, 52 Atl. 271; Congar v. Galena & C. U. R. Co. 17 Wis. 477; Abbott, Shipping, 326, 331, 337.

The selection of the carrier, route of shipment, and consignee, the delivery of duplicate bills of lading, and the alleged payment of freight charges by the government, in no way affect or abrogate the contract provision for delivery at Manila.

Dunlop v. Lambert, 6 Clark & F. 622.

The contract was in violation of law, and void, on account of its not having been reduced to writing and signed by the parties, in accordance with U. S. Rev. Stat. § 3744, U. S. Comp. Stat. 1901, p. 2510, and there can therefore be no recovery on the contract.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; South Boston Iron Co. v. United States, 118 U. S. 37, 30 L. ed. 69, 6 Sup. Ct. Rep. 728.

Mr. **A. A. Hoeling, Jr.**, submitted the cause for appellee:

The expression "f. o. b.," in its ordinary acceptance and use, means simply "free on board,"—that is, that the expense of carriage and delivery of a consignment at a given point shall be paid by the consignor.

Re Rosevear China Clay Co. L. R. 11 Ch. Div. 565; Stock v. Inglis, L. R. 12 Q. B. Div. 573; Browne v. Hare, 3 Hurlst. & N. 484; Silberman v. Clark, 96 N. Y. 522.

Ordinarily, and in the absence of anything appearing to the contrary, delivery of goods by a consignor to a common carrier is, prima facie, a delivery to the consignee.

Duttin v. Solomonson, 3 Bos. & P. 582; Dawes v. Peck, 8 T. R. 330; Dunlop v. Lambert, 6 Clark & F. 600; Prince v. Boston & L. R. Corp. 101 Mass. 542, 100 Am. Dec. 129; Kelsea v. Ramsey & G. Mfg. Co. 55 N. J. 320, 22 L.R.A. 415, 26 Atl. 907; Orcutt v. Nelson, 1 Gray, 536.

Where, however, the purchaser designates the mode of conveyance and a particular carrier, the latter becomes the agent of the purchaser, and delivery to such carrier constitutes, in law, a delivery to the purchaser.

Vale v. Bayle, 1 Cowp. 294; Dawes v. Peck, and Dunlop v. Lambert, supra; The Mary & Susan, 1 Wheat. 26, 39, 4 L. ed. 27, 30; Putnam v. Tillotson, 13 Met. 517; Merchant v. Chapman, 4 Allen, 362; Spencer v. Hale, 30 Vt. 314, 73 Am. Dec. 309; Stanton v. Eager, 16 Pick. 467; Magruder v. Gage, 33 Md. 344, 3 Am. Rep. 177.

The facts conclusively establish, it is submitted, a complete legal delivery of the goods to vendee.

Evans v. Marlett, 1 Ld. Raym. 271; Brown v. Hodgson, 2 Campb. 36; Griffith v. Ingledew, 6 Serg. & R. 429, 9 Am. Dec. 444.

The bill of lading, as expressed in the decisions, is the symbol of the property, and represents it.

Straus v. Wessel, 30 Ohio St. 211; Forbes v. Fitchburg R. Co. 133 Mass. 154; Gates v. Chicago, B. & Q. R. Co. 42 Neb. 379, 60 N. W. 583; Union P. R. Co. v. Johnson, 45 Neb. 57, 50 Am. St. Rep. 540, 63 N. W. 144; Kentucky Ref. Co. v. Globe Ref. Co. 104 Ky. 559, 42 L.R.A. 353, 84 Am. St. Rep. 468, 47 S. W. 602; Pennsylvania R. Co. v. Stern, 119 Pa. 24, 4 Am. St. Rep. 626, 12 Atl. 756; Conard v. Atlantic Ins. Co. 1 Pet. 386, 7 L. ed. 189; Gibson v. Stevens, 8 How. 384, 12 L. ed. 1123; Stanton v. Eager, supra.

Mr. Justice **White** delivered the opinion of the court:

The United States appeals from a judgment against it for the contract price of paper purchased for use in the public printing office in the Philippine Islands. We summarize from the findings the status of the Philippine Islands at the time of the contract, stating besides the facts concerning the organization in the War Department of what is now known as the Bureau of Insular Affairs.

After the occupation of Manila, up to September 1, 1900, a *military government prevailed. [232] From September 1, 1900, to July, 1901, authority of a legislative nature was vested in the Philippine commission, under and subject to rules and regulations to be prescribed by the Secretary of War. From July 4, 1901, the executive authority as to civil affairs was transferred to the president of the Philippine commission under the title of civil governor, his authority being exercised under instructions from the President, subject to the direction and control of the Secretary of War. The Secretary of War organized the Division of Insular Affairs, which was given general charge of departmental business concerning the Philippine Islands. The organization of the division was confirmed and ratified by Congress on July 1, 1902 (32 Stat. at L. 712, chap. 1369, U. S. Comp. Stat. Supp. 1907, p. 23), and after that act the division became known as the Bureau of Insular Affairs of the War Department. The facts concerning the contract in controversy are these:

In May, 1901, the president of the Philippine commission telegraphed the Secretary of War, stating the necessity for a government printing office at Manila, asking concerning the qualifications of a particular individual suggested for superintendent, and recommending the immediate purchase and shipment of an outfit for the proposed printing office. The findings expressly state, or by clear implication establish, the following:

In response to said cablegram, the Secretary of War directed the Insular Bureau of the War Department to purchase and forward to Manila the necessary machinery, equipment, and supplies for the establishment and operation of such printing office, and also to secure the services of a competent force of operators therefor; which duty was performed by said division.

On and prior to August 17, 1901, claimant was furnishing and supplying defendants divers papers and stationery, under contract, for use in various of its departments; and, thereupon, the Chief of the Division of Insular Affairs solicited claimant to furnish and supply, for use in said Philippine public printing office, being established at Manila, Philippine Islands, certain papers of described kinds, as follows:

[233] *(Circular D.)

War Department, Office of the Secretary,
Division of Insular Affairs,
Washington, D. C., August 17, 1901.

R. P. Andrews & Co.,
627 Louisiana avenue, Washington, D. C.

Gentlemen:—

Under instructions from the Chief of Division of Insular Affairs I write you as follows:

Will you furnish, for the use of the Philippine public printing office, Manila, P. I., articles called for in the inclosures 1 and 2, f. o. b. Manila, at the price at which the same is now furnished to the government printing office, Washington, D. C., plus freight from New York; payment to be made from Philippine funds on invoice verification at Manila, P. I.

Inspection at Insular Division, where samples are to be sent.

When can supplies be shipped from port of departure?

Bills for supplies to be submitted, in duplicate, to the Chief of Division of Insular Affairs, for verification of prices at government printing office rates.

Copies of bills of lading from New York to be submitted, in duplicate, to Chief of Division of Insular Affairs for verification.

Very respectfully,

III.

In reply claimant, on August 28, 1901, submitted a proposal as follows:

Washington, D. C., August 28, 1901.

Chief of Division of Insular Affairs,
War Department, City.

Dear Sir:—

Replying to your favor of the 17th instant, circular D, we beg to advise you that we will furnish the different lots of paper called for in inclosures 1 and 2, which accompanied said circular, at the prices for which the same is now being furnished to the government printing office, Washington, D. C., plus freight rate from New York to Manila, P. I., *except lots. . . . All other [234] lots mentioned we will, as stated above, furnish at the same prices that the same class of goods are being furnished to the government printing office, plus, as stated above, the freight from New York to Manila, P. I. Payment to be made from Philippine funds on invoice verification at Manila, P. I. Inspection at Insular Division, where samples are to be sent. Bills for supplies to be submitted in duplicate to the Chief of Division of Insular Affairs for verification of prices at government printing office rates. Copies of bills of lading from New York to be submitted in duplicate to Chief of Division of Insular Affairs for verification.

We can have the goods ready for shipment October 1st to November 15th.

IV.

On the same date (August 28, 1901) said Chief of the Division of Insular Affairs wrote claimant as follows:

(Circular E.)

War Department, Office of the Secretary,
Division of Insular Affairs,
Washington, D. C., August 28, 1901.

R. P. Andrews & Co.,
627 Louisiana avenue, Washington, D. C.

Gentlemen:—

Please deliver f. o. b. Manila, P. I. (*via* Suez canal) the following:

Articles called for in inclosures 1 and 2.

To be shipped between October 20 and November 1, 1901.

Quality of goods furnished will be considered in making future orders.

Please acknowledge the receipt of this circular by return mail.

To be properly packed for export shipment.

Ship care Barber & Co., steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J. (See note inclosed.)

Marked as follows:

No. , Governor W. H. Taft, Manila, P. I.

Contents, ; weight, lbs.

[235] *For Philippine public printing plant.

As per your agreement in your letter dated August 28, 1901, now on file in this office.

Very respectfully,

The inclosures marked 1 and 2, referred to in this letter, were statements tabulating the quantity and quality of paper to be furnished. The note referred to and inclosed in the letter was the following:

"Note.—(Care Barber & Company, steamship agents, Pier B, Pennsylvania docks, Jersey City, N. J.)

"A special arrangement has been made so that, after f. o. b. delivery, as above, at Jersey City, the freight rate for the transportation of these supplies and the equipment of the Manila printing office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment."

Before the paper was shipped, the Division of Insular Affairs gave further instructions as follows:

"Note.—(Care Barber & Company, East Central Pier, Brooklyn, N. Y.)

"A special arrangement has been made so that, after f. o. b. delivery, as above, at Brooklyn, the freight rate for the transportation of the supplies and equipment of the Manila printing office will not be higher than $11.05 per ton (dead weight) and possibly less. Rate for measurement freight to be made on a correspondingly low basis, in accordance with the space occupied. Therefore the Philippine government will, upon invoice verification at Manila, reimburse you for the cost of this ocean shipment."

The findings relating to the value of the paper, its forwarding to and arrival of a part at Manila, and the subsequent controversy between Andrews & Company and the government concerning the same, show the following to be the case:

*In compliance with the directions, Andrews & Company packed the paper for export shipment, directing it to Governor W. H. Taft, Manila, Philippine Islands, in care of Barber & Company, East Central Pier, Brooklyn, New York, and prepaid the freight. The quoted value of the paper was $3,087.75. The freight charges from New York to Manila were $196.35, which, together with $1 for clearance papers, prepaid by Andrews & Company, brought the total purchase or invoice price to $3,285.10. When the paper was delivered to Barber & Company, Andrews & Company took triplicate bills of lading, consigning the paper to Governor W. H. Taft or his assigns, Manila, Philippine Islands, and delivered the duplicate bills of lading to the Chief of Division of Insular Affairs, in accordance with the instructions given. Barber & Company forwarded the paper by the steamship Indrasamaha. When the vessel arrived at Singapore, it was found that a portion of her cago, including the consignment of paper, was badly damaged by water. Some of the paper was condemned by a board of survey convened by the agents of the ship, and was sold in Singapore. The remainder was repacked and forwarded to Manila. When it arrived it was so damaged as to render it unfit for use. The consignee (Governor Taft) refused to accept it, and a committee, which was appointed by him as civil governor, recommended that the paper be stored in a warehouse of the Philippine government until instructions were received from Andrews & Company, who had no agent in the islands. Thereupon the public printer of the Philippine Islands wrote Andrews & Company, informing them of the facts just stated, and asking instructions as to what they wished done, and on May 31, 1902, the Division of Insular Affairs also wrote Andrews & Company on the same subject as follows: [236]

War Department, Office of the Secretary,
Division of Insular Affairs,
Washington, D. C., May 31, 1902.

Gentlemen:—

I have the honor to inform you that a letter dated April 14th, 1902, has been received from Mr. John S. Leech, public printer, Manila, P. I., advising this division of the *accident which occurred to the S. S. "Indrasamaha," which resulted in damaging 500 reams linen paper, valued at $3,285.10, as per your bill of October 24th, 1901. [237]

Mr. Leech requested that you be informed that the paper is damaged so badly that it will be impossible to use any of it; that an insurance inspector and a government inspection committee were then surveying and inspecting the damaged goods, and that this action was taken for the protection of the contractors, who had taken the precaution to insure their goods against losses.

Very respectfully,

Andrews & Company thus replied to this letter:

Washington, D. C., June 7, 1902.
Lieut. Col. Edwards,
Chief Division of Insular Affairs,
War Department, Washington, D. C.
Dear Sir:—

We are in receipt of your favor May 31st, No. 5423-1, quoting letter received by Mr. John S. Leech, public printer, Manila, P. I., with regard to map paper, therein stated to have been damaged in transportation on steamship "Indrasamaha."

This paper was shipped as per your order, bills of lading being obtained as directed, and your instructions carried out implicitly. Your goods were turned over, upon direction of your office, to Messrs. Barber & Company, your agents in that behalf at Jersey City, N. J., in good order and condition, whereupon our responsibility ceased.

We have the honor, therefore, to request that our bill as rendered be approved for payment.

Kindly advise us also whether you desire us to make a duplicate of said shipment.

Requesting the favor of an early reply, we are,

Very respectfully yours,

The shipment of paper was not insured either by the government or by Andrews & Company. The proceeds of the sale at Singapore never reached either the government [238] or Andrews & Company, *and the paper stored at Manila remained there until May, 1903, when it was sold, producing a sum insufficient to pay the storage charges, and the proceeds were turned into the treasury of the government of the Philippine Islands in partial payment of the charges.

All the propositions which the government has elaborately pressed at bar are reducible to two.

First. That the paper was purchased by the government of the Philippine Islands, and therefore, in any event, there was error in holding the United States liable.

Second. That, even if the United States was the purchaser, it was erroneously held liable, because the paper was never delivered, and therefore was at the risk of the owner, Andrews & Company, and the loss and damage fell upon them.

We proceed to consider these propositions:

1. We need not consider the contention that the Philippine Islands were a distinct governmental entity, for whose contracts the United States was not bound, because that subject is irrelevant, since it begs the real question,—that is, whether the purchase was made by the United States. Testing whether the paper was bought by the United States by the contract and course of dealing as disclosed by the findings, we think there is no escape from the conclusion that the United States was the party contracting for the purchase. It cannot be doubted that the findings make clear the fact that the Secretary of War, through his agent, the Division of Insular Affairs, was the actor on one side and Andrews & Company on the other. Nothing in the dealings, as disclosed by the findings, would warrant the conclusion that the Division of Insular Affairs acted or purported to act as the agent of the government of the Philippine Islands. The telegram to the Secretary of War, which opened the subject, did not even suggest a contract to be made in the name of the government of the Philippine Islands, but simply submitted recommendations to the Secretary of War for his action, accompanied with the request that, if the recommendation was favorably considered, he, the Secretary of War, *should make the purchase desired. In the [239] second place, the Division of Insular Affairs undertook the negotiation under an order of the Secretary of War, directing that the paper required be purchased, without an intimation that it was contemplated that the Division of Insular Affairs, in executing the authority conferred, should act as the agent of the government in the Philippine Islands, instead of as the representative of the Secretary of War, as a result of the authority vested in him. The first letter written on the part of the Division of Insular Affairs to Andrews & Company, soliciting a proposal to furnish the paper, we think manifests that the purpose of the division was to make the purchase for the United States, in accord with the direction under which the division was acting, —that is, the authority of the Secretary of War, acting for the United States. True it is, the letter made it clear that the paper which the United States proposed to purchase was intended for use in the Philippine Islands, and contained a statement that the price would be "paid from Philippine funds." But the mere statement of the purpose for which the paper was intended would not justify the conclusion that the Division of Insular Affairs was acting as the mere agent of the government in the Philippine Islands, instead of as the agent of the Secretary of War, representing the United States. The statement of the fund from which the payment was to be made, instead of justifying the inference that the contract was intended

to be made in the name of the government of the Philippine Islands, through its agent, gives countenance to a contrary inference. This follows, because, if the government of the Philippine Islands was the contracting party, its funds would, as a matter of course, be the source from which the payment was to be made. The reference, therefore, to the fund from which the payment was to be made, but served to indicate that the United States, in making the contract, contemplated that the purchase price would be discharged by it from the Philippine funds under its control. That Andrews & Company, when they replied to the inquiry made to them as to price, etc., understood that the contract proposed was on behalf of [240]*the United States, we think is deducible from their reply. Besides, the subsequent correspondence and dealings which we shall hereafter consider in determining whether the paper was delivered under the contract prior to the happening of the damage, we think will serve to make clear the fact that both parties deemed the contract was one made in the name of and for account of the United States. Especially is this so when it is borne in mind that the findings, either directly or by necessary implication, establish that in October, 1901, soon after the goods were shipped, a bill for the amount of the total purchase price, including the freight to Manila, was rendered by Andrews & Company to the Division of Insular Affairs, and there is nothing in the findings warranting even an implication that that division made any objection upon the ground that the bill should have been made out against the Philippine government as the purchaser, and have been transmitted to that government for payment. Yet further, it is apparent from the letter written by the division to Andrews & Company, after it was learned that the paper had been damaged or lost, that the Division of Insular Affairs was solicitous, not because a bill had been mistakenly rendered, but as to whether the loss should fall upon the United States or upon Andrews & Company.

2. That, as a general rule, the delivery of goods by a consignor to a common carrier, for account of a consignee, has effect as delivery to such consignee, is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question. Certain also is it that when, on the delivery of goods to a carrier, bills of lading are issued for the delivery of the goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery. Of course, the presumption of delivery arising from the application of any or all of these elementary rules would not control in a case where, by contract, it clearly appeared that, despite the shipment, the goods should remain at the risk *of the consignor until arrival at [241] the point of ultimate destination. And such in effect is the contention here made on behalf of the government. We come briefly, then, to consider the findings concerning the contract, for the purpose of showing that this contention is without merit.

In considering the matter, it is to be conceded that the contract is not to be deduced alone from the letter of the Division of Insular Affairs of August 17, 1901, and the reply of Andrews & Company of August 28, but is to be ascertained by a consideration of those letters and the subsequent correspondence under which the purchase was concluded and the shipment made.

The statement in the proposal of the Division of Insular Affairs of August 17, 1901, by which the negotiation was commenced, "f. o. b. Manila," might give rise, if standing alone, to the implication that it was intended that the goods should be delivered at the cost of the seller at Manila. But the further statement in the letter, that the freight from New York to Manila was to be a part of the purchase price, and to be paid as such by the purchaser, rebuts the implication that the words "f. o. b. Manila" were understood as implying that the amount of the freight charges for the shipment of the goods to Manila should be at the cost of the seller. These words not therefore having been used in their ordinary commercial sense, their meaning must be sought in the context of the proposal in which they are found. Considering that context, it would seem most reasonable to conclude that the words implied that, as the government desired the freight to Manila to be included in the purchase price, the freight therefore to Manila was to be primarily defrayed by the seller. That this was the understanding of Andrews & Company we think results from their reply, in which no reference whatever was made to the f. o. b. Manila clause, but a willingness was expressed to furnish the paper at a price to be fixed by the price paid by the government in Washington for like paper, with the addition of the freight rate to the Philippine Islands, thereby saving the seller from bearing the burden of the freight to Malina, and at the same time securing *to [242] the government the delivery of the paper at Manila without the payment there to the carrier of the cost of the freight as such, since that item would become a part of and be included in the price. It is certain, when the subsequent correspondence is considered, that this construction, which the reply of

Andrews & Company put upon the words "f. o. b. Manila," as used in the proposal, was deemed by the Division of Insular Affairs to be the correct one, since that reply was, in the subsequent correspondence, treated by the division as being directly responsive to and an acceptance of the proposal submitted. Moreover, we think the subsequent correspondence, when considered in other aspects, makes certain the conclusion that the words "f. o. b. Manila," as used in the proposal, meant precisely what we have stated the context of the proposal indicated that those words were intended to imply. This we think results from the provisions of the letter of August 28, selecting a particular firm to whom the goods were to be delivered for transport to Manila, and of all the other directions contained in the letter, since they are inconsistent with the theory that the words "f. o. b. Manila" were used as meaning that the goods should not be delivered as directed, but should remain the property of Andrews & Company, and be under their control and subject to their risk until delivered at Manila. Especially is it impossible to attribute to the words "f. o. b. Manila," used in the original proposal and reiterated in the letter of August 28, any other meaning than that which we have affixed to them, when the note which was expressly referred to in the letter of August 28, and which was inclosed therein, is considered. By the terms of that note not only were the previous specific directions as to the mode of shipment confirmed, but it was expressly provided that the delivery to the agent selected by the Division of Insular Affairs should be "f. o. b. Jersey City," thus making clear the distinction between the sense in which the words "f. o. b. Manila" were used in the proposal and their meaning applied to the final delivery at Jersey City in consummation of the contract by which the sum of the freight to Manila had [243] been included *in the purchase price. So, also, the same implications arise from the final instruction, shifting the place of delivery from Jersey City and directing that the merchandise should be delivered to the agent selected, "f. o. b. Brooklyn." We think the contention made in argument, that the letter of August 28 and the acceptance by Andrews & Company of the terms of that letter, should be alone held to constitute the contract, disregarding the note inclosed in the letter as a part thereof, is refuted by its mere statement. In any event, taking the most favorable view possible for the government of the contract, we think it cannot be said that the presumption which arises from the delivery of the goods to the carrier designated by the government, and the acceptance by the government of the bills of lading made to the consignee or his order, is rebutted by the contract.

Lastly, it is urged that, in any event, the court below erred, since the contract in question was not "reduced to writing and signed by the contracting parties with their names at the end thereof," as required by Rev. Stat. § 3744, U. S. Comp. Stat. 1901, p. 2510. But it is settled that the invalidity of a contract because of a noncompliance with the section referred to is immaterial after the contract has been performed. St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 163, 48 L. ed. 130, 132, 24 Sup. Ct. Rep. 47. The contention that the contract in question had not been executed because there had been no delivery is disposed of by what we have already said.

As the views which we have expressed concerning the delivery dispose also of many subsidiary contentions based upon isolated provisions of the contract, such as the right to verify the contents of the package at Manila, etc., it follows that the judgment below was right, and it is therefore affirmed.

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*HENRY M. EARLE, Administrator *de Bonis Non*, with the Will Annexed, of William E. Earle, Deceased, Appt., [244]
v.
T. PERCY MYERS and John J. Hamilton, Administrators *de Bonis Non*, with the Will Annexed, of James H. Causten, Deceased. (No. 12.)

HENRY M. EARLE, Administrator *de Bonis Non, cum Testamento Annexo*, of William E. Earle, Deceased, Appt.,
v.
T. PERCY MYERS and John J. Hamilton, Administrators *de Bonis Non, cum Testamento Annexo*, of James H. Causten, Deceased. (No. 388.)

(See S. C. Reporter's ed. 244-251.)

Appeal — review of facts.

1. Findings of fact made by an auditor to whom a case is referred to state the account, and confirmed by the courts below, will be affirmed by the Supreme Court of the United States unless clearly erroneous.

Laches — delay in bringing suit.

2. Failure to bring suit for an accounting under an agreement to divide the net attorneys' fees received in the prosecution of French spoliation claims until two years after the enactment of the appropriation

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NOTE.—As to finality of decree for purpose of appeal—see notes to Schlosser v. Hemphill, 49 L. ed. U. S. 1001; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; and Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482.

act of March 3, 1899 (30 Stat. at L. 1161, 1191, chap. 426, U. S. Comp. Stat. 1901, p. 751), from which payment might be made, is not such laches as defeats a recovery.

Accounting — contract for division of attorneys' fees.

3. The estate of an attorney who agreed to divide the net fees received in the prosecution of French spoliation claims, in consideration of the exclusive use of certain papers, may be required to account for fees received for services performed by his administrator, where the accounting has been treated by both parties as one proper to be made for the whole period.

Appeal — finality of decision.

4. A decree which reversed some of the findings and conclusions of law of the court below in an action for an accounting, and directed a new decree to be entered in accordance with the opinion of the court, is not final for the purpose of an appeal to the Supreme Court of the United States.

[Nos. 12, 388.]

Argued October 15, 1907. Decided December 2, 1907.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed some of the findings and conclusions of law of the Supreme Court of the District, confirming the report of an auditor in an action for an accounting, and directed a new decree to be entered in accordance with the opinion of the court. Dismissed for lack of a final judgment. Also an

APPEAL from the Court of Appeals of the District of Columbia to review a decree affirming a decree of the Supreme Court of the District, confirming the auditor's report in the same action, after such auditor had restated the account in accordance with the direction of the Court of Appeals. Reversed.

See same case below, in No. 12, 25 App. D. C. 582.

Statement by Mr. Justice **Peckham:**

The appeals in the above numbers involve the judgment of the court of appeals of the District of Columbia (25 App. D. C. 582), which modified the decree of the supreme court, confirming the report of an auditor. The action was brought by the appellees against the administrator of Earle's estate for an accounting, and after issue joined it was referred to an auditor to state the account upon the pleadings and proof placed before him. The auditor reported in favor of allowing the complainant, as due the Causten estate, the sum of $7,462.20. After [245] the report had been confirmed by *the supreme court, each side took an appeal and the court of appeals reversed some of the findings and conclusions of law of the court below, and directed a new decree to be entered, in accordance with the opinion of the court. The defendants appealed from that order to this court, and that appeal is the above number 12.

Fearing that there might be some doubt as to the finality of this decree for the purpose of an appeal to this court, the parties, pursuant to the decree of the court of appeals, took the case down to the trial court, which referred it to the auditor, who restated the account in accordance with the direction of the court of appeals, to which exceptions were filed by the defendant, which were overruled, the auditor's report confirmed and another decree entered, from which an appeal was taken to the court of appeals and there affirmed, and from the decree of affirmance an appeal has been taken to this court and allowed, which is number 388.

The material facts which appear in the record are the following: For many years a series of attempts had been made to secure legislation from Congress looking to the payment of claims made by American citizens for damages arising from illegal seizure of their vessels by the government of France, which the United States had, by treaty, undertaken to pay. Such attempts had been unsuccessful, until at length an act was passed by Congress, chapter 25 of the Laws of 1885 (23 Stat. at L. 283, U. S. Comp. Stat. 1901, p. 750), which provided for the ascertaining of claims of American citizens for spoliation prior to the 31st of July, 1801.

During quite a number of years preceding the act of 1885 one James H. Causten, a resident of the District of Columbia, had accumulated papers which were regarded as of considerable value in facilitating proofs of these claims. Mr. Causten died before the passage of the act of Congress, leaving these papers in the hands of Mr. William E. Earle, who was also interested in the prosecution of said claims, and therefore, desired the benefit of the use of these papers, and, after the act of Congress, Mr. Earle and Mr. Waggaman, the administrator of the estate *of Mr. Causten, entered into a contract as [246] of the date of June 12, 1885, by which Mr. Earle was to be allowed to continue in the possession and exclusive use of these papers in the prosecution of the spoliation claims, for which possession and exclusive use he was to pay to the administrator (Waggaman) 25 per cent of all fees which he should receive on account of these claims, "after deducting from all such fees received, or which shall hereafter be received by him, the proper expenses incurred by him, since the passage of the act of Congress, referring said cases to the court of claims in the prosecution of said French spoliation claims, such as clerk hire, printing, advertising, office rent, and the compensation of other attorneys necessarily associated with him, and in whose compensation said Earle does not share. And settlements between said Earle and said Waggaman, administrator as aforesaid, or his successor in office, shall be made every six months, and the proportionate part of said fees due said administrator shall be paid over to said administrator or his successor in office, at such settlement."

Earle agreed to keep true books of account of all fees and retainers received by him, and also of all expenses attending the prosecution of the claims in which he should be engaged as counsel or otherwise, the books of account to be open at all times for the inspection of the administrator, or his successor in office.

Thereafter proceedings were taken by Earle in the court of claims towards proving the claims of his clients, and the action of that court recognizing such claims among others, to a certain extent, was certified to Congress, as provided in the act of 1885.

On March 3, 1891 (26 Stat. at L. 897, chap. 540), Congress made an appropriation in payment of a portion of all claims so certified, and out of this appropriation Mr. Earle received as fees up to July, 1893, the sum of about $38,000, while his books showed an expenditure of over $57,000, leaving Mr. Earle some $18,000 behind. Future legis-[247]lation was expected, which would turn *this deficit into a profit. It was hoped that a further appropriation would be made in 1893, but that hope was not realized. Mr. Earle died in August, 1893, and an administrator was thereafter appointed. No further appropriation was made until March 3, 1899 (30 Stat. at L. 1161, 1191, chap. 426, U. S. Comp. Stat. 1901, p. 751). Under this appropriation the estate of Earle received some $50,000 in fees.

Negotiations for the settlement of the accounts between the administrator of Earle's estate and the administrator of Causten's estate were proceeded with, but proved unsuccessful, when this suit was instituted by the Causten administrator for an accounting. Pleadings were had in due form, and the case was referred to an auditor of the court for a statement of the account, who, after considerable testimony had been adduced, filed his report and found the sum of $7,462.20 to be due from the defendant to the complainant. Exceptions were filed by both parties, which were overruled by the supreme court, and the auditor's report was confirmed.

The court of appeals modified the decree entered by the supreme court, as already stated.

Messrs. **John C. Gittings** and **Henry E. Davis** argued the cause and filed a brief for appellant:

This court has held that, in a proper case, it will assert a defense of limitations and laches of its own motion, even when not suggested in argument.

Sullivan v. Portland & K. R. Co. 94 U. S. 811, 24 L. ed. 326; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437.

The doctrine of laches should have been applied in this case in all of its phases.

Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367.

The court below erred in refusing to allow appellant credit for all the payments made by Earle to the attorneys associated with him in securing the 1891 appropriation; just as it would have erred in sustaining the defense, if made, that all of Earle's fees were the fruits of a champertous, and therefore, illegal, arrangement with the claimants.

Knut v. Nutt, 83 Miss. 374, 102 Am. St. Rep. 452, 35 So. 686; Affirmed in 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732.

Messrs. **T. Percy Myers** and **M. J. Colbert** argued the cause, and, with Mr. S. T. Thomas, filed a brief for appellees:

The authorities cited by counsel in support of their theory are irrelevant. All of the cases involved the question of "lobby" services in contracts between attorney and client and between copartners in the distribution of a fund created by the partners engaged in an unlawful enterprise.

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567.

The length of time during which the party neglects the assertion of his right, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, and lapse of time must be so great, and relation of defendant to rights such, that it would be inequitable for plaintiff to assert them.

Halstead v. Grinnan, 152 U. S. 412–416, 38 L. ed. 495–497, 14 Sup. Ct. Rep. 641; Alsop v. Riker, 155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. Rep. 162.

A finding of fact by the auditor, two courts having subsequently reached the same conclusion on the same question of fact, must be accepted as correct until it is made clear that their conclusion was erroneous.

Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367; Furrer v. Ferris, 145 U. S. 132, 36 L. ed. 649, 12 Sup. Ct. Rep. 821; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Evans v. State Nat. Bank, 141 U. S. 107, 35 L. ed. 654, 11 Sup. Ct. Rep. 885; Richardson v. Van Auken, 5 App. D. C. 209; Grafton v. Paine, 7 App. D. C. 255; Smith v. American Bonding & T. Co. 12 App. D. C. 192; Hutchins v. Munn, 28 App. D. C. 271; France v. Coleman, 29 App. D. C. 287.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

In making up the account, the representative of the Earle estate claimed a credit for the sum of $19,558.05 as part of the proper expenses incurred by or in behalf of defendant in obtaining the appropriations above mentioned. The auditor struck out $13,058.05 of such claimed credit, leaving $6,500 as a proper credit in favor of the administrator of Earle. The thirteen thousand and some odd dollars were stricken out by the auditor because of the fact, as he found, [248]that these moneys *were paid for lobbying services, in efforts to secure the appropriation by Congress, which services he held were contrary to public policy and discountenanced by the courts, and therefore not to be allowed as a proper credit. The balance, $6,500, the auditor held that the proof showed had been paid by the defendant for legal services by the individuals named, and that such services were valuable, and the amount paid was not excessive or unreasonable. This amount consisted of three separate items, two items for $2,000 and one item for $2,500.

Upon the argument in the court of appeals, the defendant's counsel insisted that the whole $19,000 should have been allowed as a proper credit, while the plaintiffs' counsel asserted that the disallowance of the 13,000-dollar credit was right, but that the court erred in admitting the $6,500 as a proper credit. The court of appeals, as we have said, affirmed that portion of the decree in which the auditor disallowed the $13,000 claimed for credit, but reversed that portion of the decree by which the auditor allowed the credit of $6,500, and directed the decree to be amended by striking out the above credit for that sum. This was upon the ground that the $6,500 claimed was also illegal. The court said that it was impossible to read the record without coming to the conclusion that these alleged services were of the kind known as lobbying services; that, although proof on the subject was meager, yet, so far as it went, it tended unmistakably to show the illicit character of the services, being personal influence and personal solicitation with members of Congress, and that courts had branded services of a like nature as improper, and for which no recovery would be allowed.

The auditor before whom the case was tried and who heard the witnesses, while holding that certain of the credit claims were illegal, as claims for lobbying services, yet held that these particular claims for services performed by members of the bar, and representing the $6,500 allowed, were for proper professional services, and as such should be allowed. The supreme *court of[249] the District confirmed the report of the auditor, and thereby held that the credit claimed for the payment of these services was proper.

After a careful examintion of the testimony in the case we are unable to concur with the court of appeals on this question. We cannot find any evidence to justify a reversal of the report of the auditor, confirmed as it is by the supreme court. The payments were proved to have been made, and there is no evidence of any illegality connected with the services performed sufficient to justify an appellate tribunal in reversing the finding of the auditor and the supreme court upon this question of fact. It is unnecessary to embody in this opinion a reference to the testimony in the case or to make extracts therefrom, but it is enough to say that we are satisfied, from a careful perusal thereof, that we are right in the conclusions which we have come to.

As to the 13,000-dollar credit which the auditor and the supreme court and the court of appeals have all disallowed, we are of the opinion that there was sufficient evidence to justify its disallowance. The evidence would seem to justify the finding of the auditor that these particular services thus paid for were of the character generally designated as lobbying services, and in such case it is proper to follow the general rule of affirming a finding of fact made and confirmed by the courts below, unless the same be clearly erroneous.

Again, the auditor disallowed in part a claim of some $15,000, which the defendant asserts was paid to two other attorneys for their services, under a special agreement which was made between the administrator of the Earle estate and such attorneys. The auditor made a finding of the facts in regard to such employment, and carefully considered the conditions as they appeared in the proof, and stated that he was of the opinion that the services in question did not require the time and attention of these three gentlemen, and that it would not be just to impose the burden of the payment to them upon this case in such a manner as to di- [250] minish the small *amount which would be found due and payable to the complainant. He therefore in the account allowed a credit for but one half of the amount, which he said was, in his "judgment, a liberal allowance for the present account." Counsel for the defendant have failed to show from the evidence in the record that this item was improperly disposed of by the auditor.

As to the alleged laches on the part of the complainant in bringing this suit, we think the courts below have committed no error in their judgments. The evidence showed that during the time of the life of Mr. Earle, although the books of account were quite meager, yet, such as there were, had been examined by the administrator of Causten, in the office of Mr. Earle, and that objection had been made to the payment of the moneys to these persons in regard to whom the charge of lobbying services was made. There was no account stated, and the failure to bring suit for an accounting until January, 1901, two years after the appropriation act of 1899, from which payment might be made, cannot be regarded as laches to prevent a recovery in this suit.

The objection that there was in reality no liability on the original contract arising out of services performed by the administrator after the death of William E. Earle cannot be sustained. The accounting has been treated by both parties as one proper to be made for the whole period, including that which elapsed subsequently to the death of Mr. Earle. The defendant recognized this right by making the accounting not only for fees received prior to the death of Mr. Earle, but for such fees as were received under the appropriation act of 1899. The account presented by the Earle estate to the Causten estate admits an indebtedness due from the administrator of the former of something over $2,000, and the account purports to be one between the estate of Earle and the estate of Causten, and it embraces not only fees received by William E. Earle in his lifetime under the appropriation act of 1891, but fees received by the estate of Earle under the appropriation act of 1899. Thus both parties seem to have treated the ac- [251] count as *one account, with reference to the act of 1891 and also to that of 1899, and we think that, under the circumstances, the defendant should be held liable to account therefor as indicated.

The account should be restated by allowing credit to the defendant of $6,500, the amount paid the attorneys as already stated. As to all other matters, the decree is right. The proper disposition of the case is to dismiss the appeal in No. 12, because the decree appealed from is not a final one, and to reverse the decree in No. 388, for the purpose of making the proper credit to defendant in the account.

Reversed.

OZAN LUMBER COMPANY, Petitioner,
v.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

(See S. C. Reporter's ed. 251–257.)

Constitutional law — equal protection of the laws — state regulation of sale of patented articles.

The exemption of merchants and dealers who sell patented things in the usual course of business from the operation of Kirby's (Ark.) Dig. §§ 513–516, requiring a negotiable instrument taken in payment for a patented article to show on its face for what it was given or be void, does not render such statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[No. 37.]

Submitted November 5, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Arkansas, sustaining a demurrer to the defense in an action upon certain promissory notes, that they did not show on their face that they were taken in payment for a patented article. Judgments of both courts reversed and the cause remanded to the Circuit Court for further proceedings.

See same case below, 76 C. C. A. 218, 145 Fed. 344.

Statement by Mr. Justice **Peckham**:

This case comes here upon certiorari directed to the circuit court of appeals for the eighth circuit. The action was commenced in the United States circuit court for the western district of Arkansas, upon certain promissory notes, which the defendant, the Ozan Lumber Company, in its answer alleged had been given by it in payment for a patented article, such notes not being executed upon a printed form, showing they were given in consideration of a patented machine, as required by the statute of Arkansas. Kirby's Digest Laws of Arkansas, §§ 513 to 516, inclusive.

A demurrer to the defense was interposed on the ground that it did not state facts constituting a defense. The circuit court sustained the demurrer, because, as it held, the act was in violation of the 14th Amendment, as denying to the plaintiff the equal protection of the laws. 127 Fed. 206. The case was taken by writ of error to the circuit court of appeals, where the judgment was affirmed for the reason that the act was an illegal discrimination against patented articles. 76 C. C. A. 218, 145 Fed. 344. The application by defendant for a certiorari to review that judgment was granted.

Messrs. **U. M. Rose** and **Thomas C. McRae** submitted the cause for petitioner.

Mr. **Morris M. Cohn** submitted the cause for respondent:

The statute was void, because of the improper classification made.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Dobbins v. Los Angeles, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Ex parte Deeds, 75 Ark. 542, 87 S. W. 1030; Woods v. Carl, 75 Ark. 335, 87 S. W. 621; Ex parte Ft. Smith & V. B. Bridge Co. 62 Ark. 461, 36 S. W. 1060; State ex rel. McCue v. Ramsey County, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Dixon v. Poe, 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518; Harmon v. State, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Re Flukes, 157 Mo. 125, 51 L.R.A. 176, 80 Am. St. Rep. 619, 57 S. W. 545; Stimson v. Muskegon Booming Co. 100 Mich. 347, 59 N. W. 142; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Templar v. State Examiners, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The validity of this very statute of Arkansas (at least, until Congress legislates upon the subject) has already been affirmed by this court (Woods v. Carl, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99), and the validity of statutes of a somewhat similar nature has also been affirmed in the case of Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, immediately preceding the case above cited.

It is sought to avoid the authority of our decision upon this Arkansas statute by asserting that nothing was therein decided except the validity of the 1st section of the act, and that the validity of the act when considered in connection with the 4th section was not argued or decided. The 4th section reads as follows: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business." Other reasons for an affirmance are set up in the brief of respondent.

The grounds given for the decision by the circuit court and the circuit court of appeals differ somewhat. The circuit court says that the effect of the 4th section of the statute is to violate that portion of the 14th Amendment to the Federal Constitution which provides that no state shall *deny to [255] any person within its jurisdiction the equal protection of the laws; while the circuit court of appeals bases its judgment upon the unlawful discrimination evidenced by the act against those who are protected by a patent granted by the United States.

In 203 U. S. 358 (supra) this court held the statute valid as against an objection of the same nature as that taken herein by the circuit court of appeals. Our decision in that case had not been made at the time of the decision of this case in the courts below. The ground taken by the circuit court was not discussed in our opinion in 203 U. S., and although it might be urged that all objections to its validity arising upon the face of the statute, even if not specially discussed, were overruled by the decision, yet, assuming that the particular question now presented is still open in this court, we are of opinion that the exception contained in § 4 does not render the statute invalid. The plain purpose of the whole statute is to create and enforce a proper police regulation. Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in § 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. When the sale of the article was effected by such representations, and a note given for the amount of the sale, a transfer of the note to a bona fide purchaser for value before its maturity prevented the vendee from showing the fraud by which the sale had been accomplished. In order to reach such a transaction and to permit the vendee to show the fraud, the statute was passed. It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute. The various itinerant venders of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have [256]*become proverbial, were, of course, in the mind of the legislature, and were included in this legislation. Indeed, they are the principal people to be affected by it.

The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of § 4. He may be none the less a dealer, selling in the usual course of his business, because he is also a manufacturer of the article dealt in. Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual, and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of circuit court herein, 127 Fed., supra. But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the Amendment.

It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things. See Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and cases cited; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638. We can see reasons for excepting merchants and dealers who sell patented things, in the usual course of business, from the provisions of the statute, *and we think the [257] failure to exempt some few others, as above suggested, ought not to render the whole statute void as resulting in an unjust and unreasonable discrimination.

The case of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, one of the cases cited by the circuit court, is not, in our opinion, applicable. The statute did not apply to agricultural products or live stock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject-matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination.

We think there is a distinction, founded upon fair reasoning, which upholds the principle of exemption as contained in the 4th section, and that, consequently, the statute does not violate the 14th Amendment on the ground stated.

The case was decided by the courts below solely upon constitutional grounds, and upon those grounds the decision cannot rest. It must, therefore, be remanded, and if there be any other facts to be urged they can be presented on another trial.

The judgments of the Circuit Court and the Circuit Court of Appeals must be reversed and the case remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Reversed.

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*BANK OF KENTUCKY, National Bank of [258]
Kentucky, Oscar Fenley, and Edwin W.
Hayes, Plffs. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 258-270.)

Judgment — res judicata.

1. A decree of a Federal court, enjoining

a state board of valuation and assessment from assessing bank stock for taxation, which proceeds solely upon the ground that such board is the agent of the local municipalities, and is therefore bound by the prior injunction decree obtained against a county in a suit to which the board was not a party, cannot conclude another county, on any theory of the dependence of the power of the county to collect taxes upon the valuation and apportionment made by the board,—especially where the state courts do not adopt this theory of the relation of the board of valuation to the counties and other municipalities of the state.

Constitutional law — impairing contract obligations.

2. Contract obligations created by a state statute exempting a bank from any other taxes than those therein prescribed are not impaired by a subsequent statute changing the day when the bank is to report its property for assessment, the effect of which is to impress a lien on its property which continues, notwithstanding the repeal of its charter before liability under the former statute attached, and the transfer of its assets to another bank, organized for the purpose of taking them over.

[No. 87.]

Argued October 23, 1907. Decided December 2, 1907.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Jefferson Circuit Court, in that state, which had in turn affirmed a judgment of the Jefferson County Court, directing an assessment for taxation of the assets of a bank. Affirmed.

See same case below, 29 Ky. L. Rep. 643, 94 S. W. 620.

The facts are stated in the opinion.

Mr. **Alexander Pope Humphrey** argued the cause and filed a brief for plaintiffs in error.

Mr. **Henry Lane Stone** argued the cause, and, with Messrs. Samuel B. Kirby and Robert W. Bingham, filed a brief for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

This case involves the liability of plaintiffs in error, Bank of Kentucky and National Bank of Kentucky, to be assessed for certain back taxes under the revenue law [262] of the state of *Kentucky. That law makes it the duty of "auditor's agent to cause to be listed for taxation all property omitted or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years." Ky. Stat. Carroll's Compilation, 1903, § 4241.

In pursuance of other provisions of the section this suit was brought. There is no dispute about the facts. The Bank of Kentucky was chartered by the legislature of Kentucky in 1834. Its charter was subsequently twice extended, but was repealed by an act approved March 22, 1900. On May 1st, 1900, the National Bank of Kentucky was organized and took over its assets.

The purpose of the suit is to subject these assets to assessment for taxes for Jefferson county for the years 1898, 1899, and 1899–1900, and for the state for the year 1899–1900. Against the assessment for county taxes plaintiffs in error pleaded a judgment of the circuit court of the United States, which, it is contended, established that it had been adjudged that the Bank of Kentucky was only taxable under a law of the state, called the Hewitt law, and that such law constituted an inviolable contract between the bank and the state. And against the state taxes it was urged that the bank had ceased to exist by the repeal of its charter before liability under the Hewitt law attached.

1. By its original charter the Bank of Kentucky was required to pay 25 cents on each share of its stock in lieu of all other taxation. By an exercise of a power reserved the legislature increased this to 50 cents. By the Hewitt law it was provided that the banks in the commonwealth should pay to the state 75 cents on each share of their capital stock outstanding, and the ordinary rate of state taxation on the amount of its profits, less 10 per cent thereof. The tax was to be in lieu of all local taxation, except upon the real estate occupied by the bank for the purpose of its business. It was provided that banks organized prior to its passage might accept *the terms of the law. If they failed to do [263] so they were to be taxed as other corporations were taxed, and also should be subject to local taxation. The Bank of Kentucky accepted the terms and paid the taxes required. In 1891 Kentucky adopted a new Constitution, which provided that all property of individuals and corporations should be taxed according to its value. In 1892, to enforce the provision of the Constitution, the legislature passed a general revenue bill. Under the terms of the bill, banks, as well as other corporations, are subject to taxation, and it is provided that their property at its fair cash value "shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on that day shall list it with the assessor, and re-

main bound for the tax, notwithstanding he may have sold or parted with the same." Corporations are also required to pay a tax on their franchise to the state and to the locality where the franchise is exercised, to be levied by a board denominated the "board of valuation and assessment," constituted of the auditor, treasurer, and secretary. It is the duty of the board to determine the apportionment of the tax where more than one jurisdiction is entitled to a share of the tax, and fix the place of its payment. The auditor is chairman of the board, and it is made his duty, at the expiration of thirty days after the final determination of such values, to certify to the county clerks the amount liable for local tax, who in turn certifies it to the local tax officer.

The judgment relied on as *res judicata* was entered in a suit brought by the Bank of Kentucky in the circuit court of the United States for the district of Kentucky, wherein it impleaded Samuel H. Stone as the auditor of public accounts of the state of Kentucky, Charles Fenley as the secretary of state, and George W. Long as the treasurer of state, the city of Louisville as a municipal corporation, the county of Franklin as a municipal corporation, and the board of councilmen of the city of Frankfort as a municipal corporation.

The bill alleged the rights of the bank under the Hewitt law as a contract between it and the state, its exemption from taxation [264] *except under that law, the invalidity as to it of the act of November 11, 1892. The bill also set forth various litigations which the bank had theretofore conducted, and in which, it insisted, it had been adjudged that it could not be taxed otherwise than under the Hewitt law. And it was alleged that the defendants would proceed to value the franchise of the bank in the manner set forth in the act of November 11 for the years 1895, 1896, and 1897, and certify such value to the clerk of Jefferson county, and that those assessments would be illegal.

The bill prayed that Stone, Fenley, and Long be perpetually enjoined from assessing the value of the bank's capital stock under the act of November 11 for the years mentioned; that Stone be enjoined from certifying such valuation to the said several municipalities, and that such municipalities be enjoined and restrained from collecting any tax upon such valuation; that the bank's contract be fully established; that it be declared that, upon conforming to the same by making the payments under the Hewitt law or under its charter, no other or further taxes should be exacted from it under any form or by any authority. Issue was joined and the court decreed, among other things, as follows:

"It is further adjudged, ordered, and decreed, by reason of the several pleas of *res judicata*, relied on by complainant in this bill and as shown by the exhibits therewith, complainant has an established contract with the commonwealth of Kentucky, under the provisions of article 2 of the act of the general assembly of the state of Kentucky, entitled 'An Act to Amend the Revenue Laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the commonwealth of Kentucky cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for state purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for [265] *county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise or shares of stock, except to the extent and in the manner provided by §§ 1, 2, and 3 of article 2 of the said act, approved May 17, 1886, and except to assess a tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

It is insisted that this decree "decided that the Bank of Kentucky had a full and binding contract under the Hewitt law,—a contract which the commonwealth of Kentucky could not alter or change,"—and that, by the terms of that contract, its property was only subject to taxation under that law. It is further insisted that the extent of the decree is not limited by the reasons given for it, and Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154, is cited.

The important consideration is, Upon whom is the decree binding? Meeting the inquiry, the bank contends "that the county of Jefferson is clearly bound by this decree as privy thereto," notwithstanding it was not a party to the suit in which the decree was rendered, and deduces this from the dependence of the power of the county to collect taxes upon the assessment by the board of valuation of the value of the franchise of the bank and the certification of the proportion thereof that was subject to county taxation. It is hence further deduced that a judgment against the state board of valuation determines the rights of all the local communities claiming under a valuation and apportionment made by the board and the auditor.

The action of the Bank of Kentucky is inconsistent with this contention. In its litigation it made the local communities parties, and in the suit the decree in which [266]is pleaded in *the case at bar as establishing its exemption from taxation, except under the Hewitt law, it secured an injunction against the board of valuation and assessment by reason of a decree obtained against Franklin county in a suit to which the board was not a party. The court decided, and it was required to decide in order to give the bank the benefit of the decree, that the state board of valuation was the agent of the municipalities, county and city, and, as a consequence, that judgment rendered against the county of Franklin in the courts of the state, adjudging the Hewitt law a contract between the bank and the state, was binding upon the board of valuation. "Nor can there be any doubt," the court said, "that the parties to the former litigation and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin county, the city of Frankfort, and the city of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise, and to certify it to them for the collection of taxes. The members of the board of valuation are nothing but their agents, created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is, in respect to the former judgments, privy to the city of Louisville and county of Franklin, and the city of Frankfort." Bank of Kentucky v. Stone, 88 Fed. 383. And, on account of this agency and consequent privity with those municipalities, the board of valuation was enjoined from action against the contract, determined to exist by the judgment set up and to which the board was not a party by name. The reason given for the decision is now opposed by plaintiffs in error and a decree obtained on account of it is asserted to be independent of it. The vicarious character of the board, as declared by the court, is attempted to be put out of view, and a decree made against it because, and only because, it was the agent of certain munici-[267]palities, is *sought to be made an instrument to bind all others without power of question or resistance on their part. This attempt is not justified by Deposit Bank v. Frankfort, and, as was said by the circuit court in another case, "would be extending the doctrine of *res judicata* further than any authority will justify." Northern Bank v. Stone, 88 Fed. 415.

The Northern Bank of Kentucky had obtained a judgment against Bourbon county and its sheriff, adjudging that under the Hewitt law, it had an irrevocable contract, and the bank sought to use the judgment as an estoppel against other counties and municipalities as well as against Bourbon county. It was sustained as to the latter, but rejected as to the other, municipalities. The argument was that Bourbon county was a municipal corporation under the state government, and that the state was bound by the litigation against it, and therefore every other municipality was bound. The court rejected the contention, making the remarks we have quoted. The relation of the board of valuation to the counties of the state was again decided to be that expressed in Bank of Kentucky v. Stone. The latter case was affirmed by this court by a division of its members. 174 U. S. 799, 43 L. ed. 1187, 19 Sup. Ct. Rep. 881.

There is another answer to the contention of plaintiffs in error. The relation of the board of valuation to the counties and other municipalities of the state is necessarily a matter of state regulation.

The court of appeals of Kentucky in the case at bar, answering the contention based on the effect of the judgment pleaded as *res judicata*, quoted, with approval, the views expressed by the circuit court for the district of Kentucky in the Northern Bank Case, of the relation of the state to its counties and cities, and pronounced those views conclusive of "the duty of the Bank of Kentucky to pay its taxes for the years in question." And the court applied the doctrine of the case of Henderson County v. Henderson Bridge Co. 116 Ky. 164, 105 Am. St. Rep. 197, 75 S. W. 239, and declared that the question there considered was substantially the *same as involved in the case at[268] bar. Quoting that doctrine, the court said: "A person or municipality is not bound by former litigation, unless it was a party, either actually or by its representative. Under our statute the fiscal court has control of the affairs of the county, and the sheriff is only a tax collector, in no wise a representative of the county in the management of its affairs, and the county is not therefore bound by any adjudication to which it was not a party." In other words, the court held that neither a sheriff nor an assessor had control of the affairs of the county, and a judgment against either did not bind the county. Applying this, the court further said: "The board of assessment and valuation did not have control of the fiscal affairs of Jefferson county, and, in our opinion, the judgment did not bind Jefferson county." [29 Ky. L. Rep. 646, 647, 94 S. W. 622.]

2. To support the contention that there is no liability to the state for the tax of 1900, it is contended that the property of the Bank of Kentucky was only assessable under the Hewitt law, and before the property was required to be returned for assessment under that law the Bank of Kentucky had ceased to exist, and its property passed to the National Bank of Kentucky, free from any lien.

A brief recapitulation of the facts will make the contention clear. Under the Hewitt law the stock and assets of banks were ascertained as of July 1, and the tax paid thereon. On May 1, 1900, as we have seen, by not accepting the conditions imposed upon it by the legislature, the charter of the Bank of Kentucky was repealed. On that day the National Bank of Kentucky was organized and the property of the Bank of Kentucky transferred to it. Under the general laws of the state all taxable property was required to be assessed and valued as of the 15th of September in the year listed, and the owner or possessor is required to list it with the assessor on that day, and remains bound for the taxes, notwithstanding he may have sold or parted with it. § 4052. Under the act of 1892, which repealed the Hewitt law, banks were required to make reports on or before the [269] 1st of March of each year as *of the preceding 31st of December. This provision fixed the time the property of banks should be assessed. The court of appeals held that this law was applicable to the Bank of Kentucky and fixed a lien on its property, which continued, notwithstanding the repeal of the charter of the bank and the transfer of the property to the National Bank of Kentucky. This result followed, the court of appeals further said, even viewing the Hewitt law as an irrevocable contract. In other words, it was decided that either one or the other of the two dates was the day of assessment and the commencement of the lien. That of December 31, if the Hewitt law should be regarded as repealed by the act of 1892, and the court decided that it was repealed. That of September 15, if the Hewitt law was not repealed, because the provision for the assessment of property as of the 15th of September was a part of the law. The court said:

"If, under the Hewitt law, banks were assessed at the same time the taxes were due and payable, then the assessment did not take place until the day after the close of the fiscal year for which the assessment was made and the taxes were paid. The act does not say that the assessment shall take place on July 1, nor does it say that it is assessed as of that date. The bank is required to make a report and pay on that day. The Hewitt law provides that the holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for the taxes thereon. Hewitt Law, § 6, art. 1, Gen. Stat. 1888, ed. p. 1035."

It was further decided that the only right which the bank secured was to pay taxes upon the property as designated by the Hewitt law. "When the right to do this is maintained," the court observed, "every right it [the Bank of Kentucky] had under its irrevocable charter has been respected."

The conclusions of the court are contested by plaintiffs in error, and it is insisted that the day of assessment was not *September 15 or December 31, but July 1, [270] the day the bank was required to make its report, and that a lien for taxes could not attach until that day, and before that day the Bank of Kentucky had ceased to exist. But we have seen that the court of appeals of Kentucky, construing the laws of the state, made the 15th of September the day of assessment under the Hewitt law; in other words, distinguished between the day of assessment and the day that bank was required to make its report. We are not prepared to say that the conclusion is not justified. But passing that, we concur with the court of appeals of Kentucky that it was competent for the legislature to change the day the bank should report its property for assessment, and that the lien of assessment would follow the property in the possession of its vendee, the National Bank of Kentucky.

Judgment affirmed.

ARKANSAS SOUTHERN RAILROAD COMPANY and George C. Griffith, Plffs. in Err.,

v.

GERMAN NATIONAL BANK.

(See S. C. Reporter's ed. 270–277.)

Error to state court — Federal question — decision on non-Federal ground.

A judgment of a state court against a carrier for the value of a shipment of cot-

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NOTE.—On the general subject of writs of error from the United States Supreme Court ton which it delivered without the surrender of the bills of lading is not reviewable in the Supreme Court of the United States although the state court refers to, and upholds, over an objection of repugnancy to the Federal Constitution, a state statute forbidding delivery under such circumstances, where the court treats the contract of shipment itself as requiring a delivery to shipper's order, and only upon the production of the bills of lading, properly indorsed.

[No. 56.]

Argued November 14, 15, 1907. Decided December 2, 1907.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Union County, in that state, directing a verdict for plaintiff in an action to recover from a carrier the value of a shipment of cotton delivered without surrender of the bills of lading. Dismissed for want of jurisdiction.

See same case below, 77 Ark. 482, 113 Am. St. Rep. 160, 92 S. W. 522.

The facts are stated in the opinion.

Mr. **Edward B. Peirce** argued the cause and filed a brief for plaintiffs in error:

While this court will not examine the evidence, yet, for the purpose, not of deciding the facts, but of throwing light on the findings, it will examine the entire record, including the opinion of the court below.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

If it sufficiently appears from the record itself that the repugnancy of a statute of a state to the Constitution of the United States was drawn in question, or that the question was applicable to the case, this court has jurisdiction of the cause, although the record should not in terms state that the repugnancy of the statute of the state to any part of the Constitution was drawn in question.

Satterlee v. Matthewson, 2 Pet. 380, 410, 7 L. ed. 458, 468; McCullough v. Virginia, 172 U. S. 119, 43 L. ed. 388, 19 Sup. Ct. Rep. 134; Bridge Props. v. Hoboken Land & Improv. Co. 1 Wall. 116, 143, 17 L. ed. 571, 576.

It will be sufficient, for this court to maintain jurisdiction, if the record shows that the constitutionality of a state law must have been questioned, and the decision has been in favor of the party claiming under such law.

Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903.

If the necessary effect of the judgment is to determine adversely to the plaintiffs in error rights and immunities claimed by them, involving a Federal question, the jurisdiction of this court may be invoked, on the ground that a right or immunity claimed by them under the Constitution of the United States has been denied by the judgment sought to be reviewed.

Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47.

Mr. **John Fletcher** argued the cause, and, with Messrs. W. C. Ratcliffe, Moore, Smith, & Moore, and Smead & Powell, filed a brief for defendant in error:

It is settled that this court will not review a state judgment, although a Federal question was decided adversely to the plaintiff in error, if another question, not Federal was also raised and decided against him the decision of which is sufficient to sustain the judgment. It must appear that the judgment could not have been rendered without deciding the Federal question.

Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; Johnson v. Risk, 137 U. S. 307, 34 L. ed. 686, 11 Sup. Ct. Rep. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

This court will not re-examine the evidence, and, when the facts are found by the court below, as in this case, this court is concluded by such finding.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Cornell University v. Fiske, 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. Rep. 775; Hale v. Akers, 132 U.

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to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Jenkins v. Lœwenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; Dower v. Richards, 151 U. S. 658, 668, 38 L. ed. 305, 309, 14 Sup. Ct. Rep. 452; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

Messrs. John Fletcher, W. C. Ratcliffe, and Moore, Smith, & Moore filed a separate brief for defendant in error:

Instead of questioning the validity of any part of the bills of lading, the court simply construed them. Its construction is, we submit, clearly sound. But whether sound or not, it is not for this court to determine. It is a non-Federal question, and, like the finding of facts, this court will not enquire into it. It is broad enough to sustain the judgment in this case without regard to the statutes.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the defendant in error, hereafter called the plaintiff, for the failure of the railroad company, hereafter called the defendant, to deliver cotton in accordance with the terms of bills of lading issued by the railroad and held by the plaintiff as indorsee. The cotton in question was purchased by the Alphin & Lake Cotton Company, and shipped over the defendant's road to El Dorado, Arkansas, mainly from Bernice, Louisiana. The Bank of Bernice, having made advances, took the bills of lading as shipper and sent them, with drafts on the purchaser, to the Bank of Little Rock. The Bank of Little Rock, wishing to reduce the account of the Alphin & Lake Cotton Company, these bills subsequently were transferred to the plaintiff as security for an advance. The bills of lading bore the words "Consigned to S/O. % Compress El Dorado, Ark. Notify Alphin & Lake Cotton Co." They also contained a notice that the liability of the railroad as a common carrier ended on the arrival of the cotton at the station of delivery, and that, unless removed by the consignees within twenty-four hours, the cotton might [274] be removed and *stored by the railroad at owner's risk and expense in a warehouse of its choice.

The only place at which the cotton could be stored at El Dorado, and the place at which all the cotton coming over the railroad was delivered, was a compress company of which Lake, a member of the purchasing company, was president. The railroad, on the arrival of this cotton, followed its custom and handed the cotton over to the compress company. It is stated by the supreme court of Arkansas, whose decision we are asked to review, that the delivery was made at once, for account of Alphin & Lake Cotton Company, with no further directions and without mention of the restriction to shipper's order, on the supposition that it belonged to the Alphin & Lake Cotton Company. The bills of lading were outstanding, and were not asked for as a condition of the bailment. In the defendant's answer it is admitted that the cotton was not delivered to the plaintiff, on demand some weeks later, and while it is alleged that the delivery to the compress company was made to it as agent for the holders of the bills of lading, it is alleged also that the Alphin & Lake Cotton Company was the owner of the cotton and thereafter took possession of it, sold it, and received the proceeds.

The judge before whom the case was tried directed a verdict for the plaintiff, and, on exceptions, the supreme court of the state affirmed the judgment of the trial court. 77 Ark. 482, 113 Am. St. Rep. 160, 92 S. W. 522.

The statutes of Arkansas enact that such bills of lading may be transferred by indorsement and delivery of the same, with the effect of conveying a valid title to or lien upon the produce for which they are given, and forbids the delivery of such produce except on surrender and cancelation of the bills of lading, with a proviso exempting documents having the words "not negotiable" on their face. A violation of the enactment is made criminal and severely punished, and it is provided that any person aggrieved may recover all damages sustained by reason of such violation. Kirby's Digest, §§ 530, 531. It is *argued that the [275] case could not have been withdrawn from the jury, or the judgment upheld, except on the assumption that these sections of the statutes were valid, that they invalidated the stipulation in the bills of lading for a right to store, and overrode the directions contained in them, and that the plaintiff made out a case on the undisputed fact that the cotton was delivered to the compress without a surrender of the bills of lading. It is argued further that the sections, so far as they bear on these transactions, are repugnant to the Constitution, article 1, § 8, as an unauthorized attempt to regulate commerce among the states, and this is the error relied upon here, although by no means the only one assigned.

But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Leathe v.. Thomas, Nov. 11, 1907 [207 U. S. 93, ante, 118, 28 Sup. Ct. Rep. 30]. Therefore, if we should be of opinion, as we are, that the supreme court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether, in our opinion, its views were right or wrong.

It will have been noticed that under the answer there was only a very narrow issue of fact possible, although there was one. There was an issue as to whether the delivery to the compress company was not a delivery to it as agent for the holders of the bills of lading. If that was as the defendant alleged, it might be that the contract was fulfilled and the defendant discharged, unless the statute made a change. [276]But, on the evidence, *there was hardly room for argument or doubt. There was no real question that the cotton was handed over at once, and not in the exercise of the stipulated right after twenty-four hours, that no directions about delivery were given to the compress company, and that the persons handling the cotton at El Dorado thought that it belonged to the Alphin & Lake Cotton Company, or acted as if it did. Both sides asked the judge to direct a verdict, and evidently regarded the questions as mainly questions of law. While it may be that the judge would not have felt technically justified in directing the jury to find for the plaintiff, but for his views on the effect of the statute, the supreme court seems to have thought the facts indisputable, and stated them categorically with no hint of hesitation or doubt.

Whether the supreme court was warranted in assuming the facts to be as it set them forth is no concern of ours. The important thing is that it was at pains to state them, and that it can have had no purpose in doing so other than to establish a liability under the contract at common law. If the statute imposed liability for delivery without a surrender of the bills of lading, whether the contract was performed or not, there was no need to go into these details. It is true that the court refers to and upholds the statute, but it does so after stating the duties and liabilities of the carrier at common law, and says more than once that the relevant enactment is for the enforcement of duties already existing; that is, it would seem, that it is only declaratory so far as this case is concerned. The court treats the contract itself as requiring a delivery to shipper's order, and only upon a production of the bills of lading properly indorsed. Its concluding words are, "under the contract, as shown by the bills of lading, it was relieved of liability on account of the storage, but not of the failure to deliver according to law." Whether the analysis of the contract was correct or not, and whether or not there were other grounds of common law upon which the defendant ought to have escaped, are matters upon which we cannot speculate. When we see *that the opinion[277] of the court upon the constitutional question first appearing in that opinion was not necessary to its judgment upon the case, we have nothing more to do.

Writ of error dismissed.

ELBEE PATCH, Administrator *de Bonis Non* of the Estate of Charles W. Maxon, Deceased, Plff. in Err.,

v.

WABASH RAILROAD COMPANY.

(See S. C. Reporter's ed. 277-284.)

Foreign administrator — right to object to Federal jurisdiction.

1. A foreign administrator who has brought an action in Illinois to recover for the negligent killing of his intestate is not precluded from filing a plea to the jurisdiction of the Federal circuit court, to which the action has been removed, by the proviso to Hurd's (Ill.) Rev. Stat. 1905, chap. 3, § 18, that no nonresident shall be appointed or act as administrator.

Removal of causes — citizenship of corporation.

2. A corporation organized and existing under and by virtue of the laws of several states, including the one in which suit against it is brought, must be regarded as a citizen of the latter state for the purpose

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NOTE.—As to removal of causes for diverse citizenship—see notes to Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

As to residence or citizenship of corporation for purpose of Federal jurisdiction in state other than that where created—see note to Stephens v. St. Louis & S. F. R. Co. 14 L.R.A. 184.

of determining its right to remove the cause to a Federal circuit court,—especially where the Constitution and laws of that state require that a majority of the directors shall be residents, and that the corporation shall keep a general office in the state.

[No. 57.]

Argued November 15, 1907. Decided December 2, 1907.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois to review a judgment for defendant, entered upon sustaining a demurrer to a plea to the jurisdiction filed by the plaintiff after the case was removed from the state court. Reversed and cause remanded to the state court.

The facts are stated in the opinion.

Mr. **George C. Otto** argued the cause and filed a brief for plaintiff in error:

The jurisdiction of the court was in issue.

Rhode Island v. Massachusetts, 12 Pet. 657, 718–720, 9 L. ed. 1233, 1258, 1259; Capron v. Van Noorden, 2 Cranch, 126, 2 L. ed. 229; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; People use of Sexton v. Seelye, 146 Ill. 189, 32 N. E. 458; Bassick Min. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. 65; United States v. Arredondo, 6 Pet. 691, 709, 8 L. ed. 547; Grignon v. Astor, 2 How. 319, 338, 17 L. ed. 283, 290; Scott v. Sandford, 19 How. 393, 427, 15 L. ed. 691; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

The defendant was a citizen and resident (1) of Illinois (the state in which the suit was brought) and also (2) of each of these states of Missouri, Indiana, Michigan, and Ohio.

Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Westheider v. Wabash R. Co. 115 Fed. 840; Winn v. Wabash R. Co. 118 Fed. 55; Sheppard v. Graves, 14 How. 505, 510, 14 L. ed. 518, 520; Chitty, Pl. chap. 6, title 1; Stephen, Pl. Tyler's ed. p. 84; Bacon, Abr., Abatement; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837, 6 Sup. Ct. Rep. 632; Jones v. League, 18 How. 76, 81, 15 L. ed. 263, 264; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 558, 11 L. ed. 353, 377; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Marshall v. Baltimore & O. R. Co. 16 How. 314, 328, 14 L. ed. 953, 959; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 68, 20 L. ed. 354; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15 L. ed. 896; Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 295, 296, 17 L. ed. 130, 132, 133; Philadelphia & W. B. R. Co. v. Maryland, 10 How. 376, 392, 13 L. ed. 461, 468; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Paul v. Virginia, 8 Wall. 168, 181, 19 L. ed. 357, 360; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; State ex rel. Wine v. Keokuk & W. R. Co. 99 Mo. 30, 6 L.R.A. 222, 1 S. W. 290; Evans v. Interstate Rapid Transit R. Co. 106 Mo. 601, 17 S. W. 489; State ex rel. Houck v. Lesueur, 145 Mo. 322, 46 S. W. 1075; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Walters v. Chicago, B. & Q. R. Co. 104 Fed. 377; Pacific R. Co. v. Missouri P. R. Co. 5 McCrary, 373, 23 Fed. 565; Uphoff v. Chicago, St. L. & N. O. R. Co. 5 Fed. 545; Fitzgerald v. Missouri P. R. Co. 45 Fed. 812; Johnson v. Philadelphia, W. & B. R. Co. 9 Fed. 6; Anderson v. Watt, 138 U. S. 694, 701, 34 L. ed. 1078, 1080, 11 Sup. Ct. Rep. 449; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; Farum v. Blackstone Canal Corp. 1 Sumn. 47, Fed. Cas. No. 4,675; Mower v. Kemp. 42 La. Ann. 1007, 8 So. 830; Racine & M. R. Co. v. Farmer's Loan & T. Co. 49 Ill. 331, 95 Am. Dec. 595; Chicago & N. W. R. Co. v. Auditor General, 53 Mich. 91, 18 N. W. 586; Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Baltimore & O. R. Co. v. Pittsburg W. & K. R. Co. 17 W. Va. 812; Henen v. Baltimore & O. R. Co. 17 W. Va. 882; Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207.

The question of jurisdiction was properly certified by the court on June 1, 1906, although no certificate of the question was necessary.

Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

No certificate, whatever its contents, forced into the record by the defendant in error, at any time, could deprive the plaintiff in error of his right to have the action of the court below on the question of jurisdiction reviewed by this court.

Ansbro v. United States, 159 U. S. 695, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; United States ex rel. Iron County v. Severens, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768; Cabot v. McMaster, 13 C. C. A. 39, 24 U. S. App. 571, 65 Fed. 533; Davis & R. Bldg. & Mfg. Co. v. Barber, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; 1 Desty, Fed. Proc. § 175, note 1.

The order of June 13, 1906, amending the certificate of the question in issue, was made without authority of law.

Bronson v. Schulten, 104 U. S. 410, 415, 26 L. ed. 797, 799; Hickman v. Ft. Scott, 141 U. S. 415, 418, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; Müller v. Ehlers, 91 U. S. 249, 250, 23 L. ed. 319, 320.

Mr. **Frederic D. McKenney** argued the cause, and, with Mr. Wells H. Blodgett, filed a brief for defendant in error:

For the purposes of jurisdiction of the courts of the United States, domicil is the test of citizenship; and, in a jurisdictional sense, the words "citizen" and "domicil" are synonymous.

Poppenhauser v. India-Rubber Comb Co. 14 Fed. 707; McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 577; Collins v. Ashland, 112 Fed. 175; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; Sun Printing & Pub. Asso. v. Edwards, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696.

Thet word "resident," as used in the last proviso to § 18, chap. 3, of the administration statutes of Illinois, as amended by the act of 1905 (Laws of Illinois, 1905, p. 2) is synonymous with domicil.

Re Mulford, 217 Ill. 242, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 75 N. E. 345; McDaniel v. King, 5 Cush. 469; Stoughton v. Cambridge, 165 Mass. 251, 43 N. E. 106; Oliveri v. Atkinson, 168 Mass. 28, 46 N. E. 422; State ex rel. Hannon v. Grizzard, 89 N. C. 115; Kennedy v. Ryall, 67 N. Y. 379.

Whatever view this court may take of the authority of the trial court to grant the amended certificate, the fact will remain that such amended certificate is a part of the record in this case, and may at least be considered as the opinion of the learned trial judge on the questions raised below on defendant's demurrers to the plea, and the grounds of such decision, and, as such, may very properly be referred to by this court.

Courtney v. Pradt, 196 U. S. 91, 49 L. ed. 399, 25 Sup. Ct. Rep. 208.

The amending of the original certificate at the same term, because inadvertently entered, left the case as if the inadvertent certificate had not been issued.

Ætna L. Ins. Co. v. Hamilton County, 25 C. C. A. 94, 49 U. S. App. 122, 79 Fed. 575; Wyler v. Union P. R. Co. 89 Fed. 41.

The question of jurisdiction not being passed upon by the circuit court, according to the express statement contained in the amended certificate, and consequently no question of jurisdiction being certified here, this court has no jurisdiction under the first class named in § 5 of the act of March 3d, 1891.

Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259, 37 L. ed. 725, 13 Sup. Ct. Rep. 840; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Moran v. Hagerman, 151 U. S. 329, 38 L. ed. 181, 14 Sup. Ct. Rep. 354; Davis & R. Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397.

Where the decision of the trial court, either in dismissing the action, or in rendering judgment against a plaintiff in error is on any ground other than that of jurisdiction alone, then the writ of error or appeal cannot be sustained under any of the classes mentioned in § 5 of the judiciary act of March 3, 1891.

Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

Mr. Justice **Holmes** delivered the opinion of the court:

This was an action brought by the plaintiff in error to recover for the death of his intestate in a collision upon the defendant's railroad in Illinois. The action was begun in a court of the state and the defendant forthwith filed a petition for the removal of the cause to the United States circuit court. The petition averred, among other things, that the defendant was a corporation organized under the laws of Ohio, and a citizen of that state, and was not a resident of Illinois, and that the plaintiff was a citizen and resident of Illinois. The removal was ordered and completed. Thereupon the plaintiff filed in the United States court a plea, in which he alleged that the defendant was a corporation organized and existing under and by virtue of the laws of

Illinois, Missouri, Indiana, Michigan, and Ohio, by the consolidation of five other corporations, severally created by the laws of those states respectively, that the defendant was a citizen of and resident in Illinois and each of said other states, and that the plaintiff was a citizen of Ohio; and the plaintiff prayed judgment whether the court could take cognizance of the action.

The defendant, after having pleaded the general issue to the action, demurred to the plaintiff's plea. Upon a hearing the demurrer was sustained, and the plaintiff electing to stand by his plea, a judgment was entered that the defendant recover its costs. The plaintiff prayed a writ of error, [281]and the judge *certified that the judgment was based solely on the ground that the controversy was one between citizens of different states, that in his opinion the record showed that the defendant was not a citizen of or resident in Illinois, that no other ground of jurisdiction appeared, and that jurisdiction was retained only for the reasons stated. A few days later, but after the writ of error had been taken out and filed, and after a new term of the circuit court had begun, the judge undertook to amend the certificate on the ground that it had been signed inadvertently, under a mistake as to its nature and contents, and to certify instead that the question of jurisdiction was not passed upon, but that the ground of the decision was that the plaintiff, being a citizen of Ohio, and therefore presumed not to be a resident of Illinois, was forbidden by the statutes of Illinois to act as administrator, and therefore had no standing to maintain the action or file the plea.

It is obvious that the mistake alleged by the new certificate was not clerical. The judge did not write one thing when he meant to write another, and no inferior officer made a record not corresponding to the action of the court. We cannot read the words "under a mistake as to the nature and contents thereof," as meaning that the judge did not know that he was signing a certificate for this court, or as signifying more than that, if he had given the matter greater attention, he would not have signed one saying what it said. The certificate must have received some consideration, as it contains a statement or ruling adverse to the plaintiff, to which we shall refer in a moment. This being so, it appears to us extremely questionable, at least, whether such a certificate, which is an act of record, stands on any different ground from judgments and the like when the term has passed (see Wetmore v. Karrick, 205 U. S. 141, 153, et seq. 51 L. ed. 745, 749, 27 Sup. Ct. Rep. 434; Michigan Ins. Bank v. Eldred, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. Rep. 450); and also whether the so-called amendment, supposing it otherwise valid and properly made without leave of this court, can be considered by this court on the present writ of error (Michigan Ins. Bank v. Eldred, supra; McCarren v. *McNulty, 7 Gray, 139; Rice v.[282] Minnesota & N. W. R. Co. 21 How. 82, 16 L. ed. 31).

If we were to consider the amendment it would amount to this: The plaintiff pleaded to the jurisdiction of the court as a court of the United States, and stood upon his plea. The judge, however, laid down a proposition of law on which he denied the right of the plaintiff to plead to the jurisdiction, and thereupon took jurisdiction so far as to give judgment for costs. By the analogies of the action of this court in other cases, we should decide for ourselves the preliminary as well as the final question of law, in order to decide whether the circuit court, as a court of the United States, had the right to give any judgment, even for costs. If the preliminary question should be considered, it would seem that the judge below was wrong in taking the proviso in the Illinois statute (Laws of 1905, p. 2; Hurd's Rev. Stat. 1905, chap. 3, § 18, pp. 107, 108), "that no nonresident of this state shall be appointed or act as administrator or executor," as opening the appointment of a citizen of Ohio to this kind of collateral attack. See Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Salomon v. People, 191 Ill. 290, 294, 61 N. E. 83. It is not reasonable to interpret it as making such a severance between the appointment, and the power to act which is a consequence of the appointment, as to leave the former unimpeachable in these proceedings, but its effect open to dispute. The words "or act" may have reference more especially to executors, and may be a reminiscence of the ancient law, by which they derived their powers from the will,—a notion that has died hard. At all events presumably they offer an alternative to "shall be appointed," and refer to action without appointment in Illinois; for instance, action by an administrator appointed elsewhere, not to action after appointment when one is made. As we read them with our present light, at least, we deem them insufficient to prevent the plaintiff from insisting upon his right to keep out of the United States court.

We proceed, then, to deal with the merits of the plea. The original certificate declares that the record shows that the defendant *is not a citizen of or resident in[283] the state of Illinois. If this be correct, it maintains the right to remove, so far as it goes. The right is given in cases of this sort to defendants "being nonresidents of that state;" that is, of the state in which the suit is brought. Act of Aug. 13, 1888, chap. 866, 25 Stat. at L. 433, 434, U. S. Comp. Stat. 1901, p. 508. If the defendant is to be regarded as a citizen of Illinois. the right to remove did not exist. Martin v. Snyder, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706. It was for this reason, no doubt, that the petition for removal alleged that the defendant was a citizen of Ohio, and that the certificate declared that it was not a citizen of Illinois. But the plea averred that it was organized and existed under the laws of that state as well as of the others named. It is true, however, that it did not and could not traverse the averment of the petition, considered as an averment of fact, and it was demurred to specially on that ground. Therefore the question is raised how a corporation or corporations thus organized shall be regarded for the purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same state, and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere. The assent of the state to such incorporation elsewhere, supposing it to have been given,—a matter upon which we express no opinion,—cannot be presumed to have intended or to import such a change. This seems to be the opinion of the supreme court of Illinois, as it certainly has been shown to be that of this court. Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; Quincy R. Bridge Co. v. Adams County, 88 Ill. 615; Winn v. Wabash R. Co. 118 Fed. 55. What would be the law in case of a suit brought in Illinois upon a cause of action which arose in Ohio is a question that may be left on one side, as also may be the [284]decisions in cases where a *corporation originally created in one state afterwards becomes compulsorily a corporation of another state for some purposes in order to extend its powers. Southern R. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621. In the case at bar the incorporations must be taken to have been substantially simultaneous and free. See Memphis & C. R. Co. v. Alabama, supra. If any distinction were to be made it hardly could be adverse to the jurisdiction of Illinois, in view of the requirements of its Constitution and statutes, that a majority of the directors should be residents of Illinois, and that the corporation should keep a general office in that state. We are of opinion that the defendant must be regarded in this suit as a citizen of Illinois, and therefore as having had no right to remove. It follows that the cause should be remanded to the state court.

Judgment reversed.

Suit to be remanded to the state court.

AMERICAN TOBACCO COMPANY, Plff. in Err.,
v.
EMIL WERCKMEISTER, Deft. in Err.

(See S. C. Reporter's ed. 284–302.)

Copyright — inscribing notice on original painting.

1. Inscribing the copyright notice upon the published copies without placing such inscription upon the original painting satisfies the requirement of U. S. Rev. Stat. § 4962, as amended by the act of June 18, 1874 (18 Stat. at L. 78, chap. 301, U. S. Comp. Stat. 1901, p. 3411), that such notice shall be inserted in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statuary, or model or design intended to be perfected and completed as a work of the fine arts, upon some visible portion thereof, or of the substance on which the same shall be mounted.

Copyright — transfer of right.

2. A complete transfer of the property right of copyright existing in an original painting, and not a mere license or personal privilege, must be deemed intended by an instrument executed by the artist, reciting that, for a named consideration, he trans-

NOTE.—As to conditions and extent of copyright—see note to Belford, C. & Co. v. Scribner, 36 L. ed. U. S. 514.

Exhibition of picture as a publication.

In Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54, Reversing 63 Fed. 445, it was held by a divided court that public exhibitions of a painting in Europe for two months in one public gallery, and during the following summer in another, without any notice of copyright, amounts to publishing the picture, within the meaning of the United States copyright laws.

The opinion in this case is said, in Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321, fers the copyright in his painting, where there is no evidence of any intention on his part to retain any further interest in this copyright, and he offers the painting for sale with the copyright reserved.

Copyright — who may take out — assigns.

3. An artist may, before publication of his painting, assign, independently of the ownership of the painting itself, the right or privilege of taking out the copyright secured by U. S. Rev. Stat. § 4952, as amended by the act of March 3, 1891 (26 Stat. at L. 1106, chap. 565, U. S. Comp. Stat. 1901, p. 3406), to the "author, inventor, designer, or proprietor . . . and the executors, administrators, or assigns of any such person."

Copyright — publication.

4. Entering an original painting with the copyright reserved at an exhibition of the Royal Academy, whose by-laws prohibit copying, is not such a publication as defeats the right to take out a copyright in such painting.

Appeal and error — objection — when too late.

5. An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for new trial after verdict.

Constitutional law — searches and seizures — due process of law.

6. Constitutional rights of a corporate defendant in an action for the forfeiture of infringing copies of a painting protected by copyright are not violated by the admission in evidence of the replevin proceedings under which such infringing copies were seized, over the objection that, by such proceedings, rights under the 4th and 5th Amendments to the Federal Constitution were invaded.

[No. 28.]

Argued October 30, 1907. Decided December 2, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York for the forfeiture of certain infringing copies of a painting protected by copyright. Affirmed.

See same case below, 76 C. C. A. 647, 146 Fed. 375.

Statement by Mr. Justice **Day**:

This is a writ of error to the circuit court of appeals for the second circuit, seeking reversal of a judgment affirming the judgment of the United States circuit court for the southern district of New York in favor of the defendant in error, adjudging him to be entitled to the possession of 1196 sheets, each containing a copy of a certain picture called "Chorus," the same representing a company of gentlemen with filled glasses, singing in chorus. The painting was the work of an English artist, W. Dendy Sadler. The defendant in error claimed to be the owner of a copyright taken out under the law of the United States.

The judgment was rendered under authority of § 4965, as amended March 2, 1895 ([28 Stat. at L. 965, chap. 194] U. S. Comp. Stat. 1901, p. 3414).

In January, 1894, by agreement between the artist and Werckmeister, the defendant in error, it was agreed that the painting should be finished by March 1, and then sent to Werckmeister to be photographed and returned to Sadler in time to *exhibit [286] at the Royal Academy in 1894. The painting was sent to Werckmeister at Berlin, where it was received on March 8, 1894, and was returned to Sadler in London on March 22, 1894. On April 2, 1894, the artist Sadler executed and delivered the following instrument:

I hereby transfer the copyright in my picture "Chorus" to the Photographische

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to be based apparently on the assumption, in the absence of proof that copying was prohibited, that the painting was publicly exhibited and therefore published within the meaning of the copyright act; and it was accordingly held in the last-cited case that the exhibition of a painting at an academy of arts to which the public is admitted only by payment of a fee, and the rules of which expressly forbid patrons to copy paintings while so on exhibition, is not a publication, although it contains no notice of copyright, which will prevent the artist or his assignee from enforcing against persons subsequently attempting to publish copies of it for commercial purposes the rights which would have been secured by compliance with the copyright law.

Nor will the exhibition of a picture in a salon, the public not being permitted to copy it, and the publication in the salon catalogue of a crayon sketch of it, amount to an abandonment or dedication to the public, nor end the artist's common-law rights. Werckmeister v. Springer Lithographing Co. 63 Fed. 808.

The exhibition of a picture by the artist at the Royal Academy, the publication, by his permission, of a wood engraving of it in a magazine, and its exhibition by the purchaser, who sold the copyright to the plaintiff to produce engravings, and gave him leave to exhibit the picture to obtain subscribers, has been held not to amount to a publication so as to affect the owner's common-law rights, as the English statutes of the time did not cover paintings. Turner v. Robinson, 10 Ir. Ch. Rep. 121.

Gesellschaft, Berlin (The Berlin Photographic Company), for the sum of £200. London, April 2, 1894.
(Signed) W. Dendy Sadler.

Werckmeister was a citizen of the German Empire, doing business in Berlin, Germany, under the trade name of "Photographische Gesellschaft," and did business in New York city under the name of the "Berlin Photographic Company."

The Photographische Gesellschaft of Berlin, by letter dated March 31, 1894, received on April 16, 1894, deposited the title and description of the painting and a photograph of the same in the office of the Librarian of Congress, the intention being to obtain a copyright under the act of Congress. [Rev. Stat. 4956] U. S. Comp. Stat. 1901, p. 3407. After the painting was returned to London it was exhibited by Sadler at the exhibition of the Royal Academy at London, and was there on exhibition for about three months; the exhibition opening the first Monday of May and closing the first Monday of August, 1894. The exhibition was opened to the public on week days, from 8 A. M. to 7 P. M. upon the payment of the admission fee of 1 shilling, and during the last week was open evenings, the entrance charge being 6 pence. There was a private view for the press on May 2, and on May 3 up to 1 o'clock, and the remainder of the day was for the Royal private view. There was also a general private view on May 4. The members and the associate members of the Royal Academy and the artists exhibiting at the exhibition and their families were entitled at all times to free admission, and they, as well as the public, visited the exhibition in large numbers.

During the time that the painting was shown at the exhibition it was not inscribed [287] as a copyright, nor were any words *thereon indicating a copyright, nor on the substance on which it was mounted, nor on the frame, as required by the copyright act ([18 Stat. at L. 78, chap. 301] U. S. Comp. Stat. 1901, p. 3411), if the original painting is within the requirements of the law in this respect.

The painting, while on exhibition, was for sale at the Royal Academy, but with the copyright reserved, which reservation was entered in the gallery sale book. The bylaws of the Royal Academy provided "that no permission to copy works on exhibition shall on any account be granted." The reasons for the by-law, as it appears upon minutes of the Academy, are as follows:

"That so much property in copyright being intrusted to the guardianship of the Royal Academy, the council feel themselves compelled to disallow, in future, all copying within their walls from pictures sent for exhibition."

The photogravures of the painting were placed on sale in June, 1894, or in the autumn of 1894; those photogravures were inscribed with the notice of copyright.

Mr. Sadler, the artist, afterwards, in October, 1899, sold the painting to a Mr. Cotterel, residing in London, England, since which time, so far as has been shown, it has been hanging in the dining room of the house of that gentleman.

On June 20, 1902, Werckmeister commenced an action, by the service of a summons, against the American Tobacco Company, plaintiff in error, and on the same day a writ of replevin was issued out of the circuit court of the United States for the southern district of New York, directed to the marshal of the same district, requiring him to replevin the chattels described in an annexed affidavit. Under the writ the marshal seized upon the premises of the American Tobacco Company 203 pictures. On July 23, 1902, Werckmeister caused another writ of replevin to issue out of the same court, directed to the marshal of the western district of New York, under which writ the marshal seized 996 pictures.

An amendment to the complaint set forth the seizure of the pictures. The copies seized were adjudged to be forfeited to the plaintiff, Werckmeister, and to be of the value of $1,010.

*The judgment rendered in the circuit [288] court was taken upon error to the United States circuit court of appeals and there affirmed. 76 C. C. A. 647, 146 Fed. 375. The present writ of error is prosecuted to reverse the judgment of the court of appeals.

Mr. **William A. Jenner** argued the cause and filed a brief for plaintiff in error:

The object of the notice is to notify the public—whoever sees the painting—that the rights of statutory copyright have supervened.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 55, 28 L. ed. 349, 350, 4 Sup. Ct. Rep. 279.

Infringements of copyrights are, under U. S. Rev. Stat. § 4965, U. S. Comp. Stat. 1901, p. 3414, penal in their nature, and the consequences are severe, as they involve both forfeitures and penalties.

Backus v. Gould, 7 How. 798–811, 12 L. ed. 919–924; Bolles v. Outing Co. 175 U. S. 262–264, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94.

To get at the thought or meaning expressed in a statute, a contract, or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them.

Lake County v. Rollins, 130 U. S. 662–670, 32 L. ed. 1060–1062, 9 Sup. Ct. Rep. 651.

One canon of interpretation is that qualifying words and phrases should be confined to their next antecedent.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; Caha v. United States, 152 U. S. 214, 38 L. ed. 416, 14 Sup. Ct. Rep. 513.

A verbal notice is not notice, nor is any notice of the copyright other than that derived from an inscribed notice, conforming to the statute, any notice at all.

Mifflin v. R. H. White Co. 190 U. S. 264, 47 L. ed. 1042, 23 Sup. Ct. Rep. 769.

A prior act may be regarded when necessary to construe doubtful language.

United States v. Lacher, 134 U. S. 624–626, 33 L. ed. 1080–1082, 10 Sup. Ct. Rep. 625.

It is true, the owner of the painting, if he sells it, or the owner of the copyright, may give oral or written notice, by advertisement or oral proclamation, of the copyright taken, but unless the notice is inscribed, and unless it is given by the copyright owner, it is not the notice required by the statute, and, therefore, is no notice at all.

Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710.

Where the language is plain and unambiguous, a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1–36, 39 L. ed. 601–611, 15 Sup. Ct. Rep. 508; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107–111, 18 L. ed. 518, 519; Denn ex dem. Scott v. Reid, 10 Pet. 524–527, 9 L. ed. 519, 520; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168.

The primary rule is that a statute is to receive the meaning which the ordinary reading of its language warrants.

United States v. Fisher, 2 Cranch, 386, 2 L. ed. 313; United States v. Hartwell, 6 Wall. 395, 18 L. ed. 832; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42.

The notice is a condition precedent to perfecting the copyright.

Thompson v. Hubbard, 131 U. S. 123–150, 33 L. ed. 76–86, 9 Sup. Ct. Rep. 710; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Merrell v. Tice, 104 U. S. 557, 26 L. ed. 854; Callaghan v. Myers, 128 U. S. 617, 652, 32 L. ed. 547, 557, 9 Sup. Ct. Rep. 177.

There is no common-law copyright in this country and never has been. If there ever was, it has been superseded by the statute.

Holmes v. Hurst, 174 U. S. 85, 43 L. ed. 905, 19 Sup. Ct. Rep. 606.

However the question may arise, the test of publication is whether the public have, by the author's consent, access to the subject. The test is not in any restriction which may be placed on the public's use of the thing, nor in any understanding which may be imposed upon the public, by the author's conditions, nor in the fact that the public are required to pay for the privilege of access. The fact that the public are invited to read, to see, is enough.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Callaghan v. Myers, 128 U. S. 617, 657, 32 L. ed. 547, 559, 9 Sup. Ct. Rep. 177; Larrowe-Loisette v. O'Loughlin, 88 Fed. 896; Holmes v. Hurst, 76 Fed. 757, 25 C. C. A. 610, 51 U. S. App. 271, 80 Fed. 514, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Ladd v. Oxnard, 75 Fed. 703; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082.

To constitute a publication it is necessary that the work should be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying it.

Copinger, Copyright, 3d. ed. p. 119; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 251, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Prince Albert v. Strange, 2 De G. & S. 652.

Because of the great dissimilarities between the British statutes and our own, British cases can throw little light on the principles discussed above.

Respecting the application of U. S. Rev. Stat. § 4962, U. S. Comp. Stat. 1901, p. 3411, to foreign paintings, the question of extraterritoriality does not arise.

McLoughlin v. Raphael Tuck & Sons Co. 191 U. S. 267, 48 L. ed. 178, 24 Sup. Ct. Rep. 105.

A license in respect to real estate is defined to be an authority to do a particular act or series of acts on another's land without possessing any estate therein.

Sullivan Timber Co. v. Mobile, 110 Fed. 195; Emerson v. Birgin, 76 Cal. 197, 18 Pac. 264; 1 Washb. Real Prop. 398; Bagg v. Robinson, 12 Misc. 299, 34 N. Y. Supp. 37.

The word "license" means permission or authority; and the license to do any particular thing is an authority to do that thing.

Gibbons v. Ogden, 9 Wheat. 193, 6 L. ed. 69; United States v. The Planter, Newb. 262, Fed. Cas. No. 16,054; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

In the law of patents, a license is an authority to exercise some of the privileges secured by the patent, but which still leaves in the patentee the monopoly of the patent.

Theberath v. Celluloid Mfg. Co. 5 Bann. & Ard. 577, 3 Fed. 147; McKay v. Smith, 39 Fed. 558.

The sole matter conveyed by a license is the right not to be sued by the patentee.

Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 290.

A license is not assignable or descendible without apt words.

Oliver v. Rumford Chemical Works, 109 U. S. 75, 27 L. ed. 862, 3 Sup. Ct. Rep. 61; Troy Iron & Nail Factory v. Corning, 14 How. 193–216, 14 L. ed. 383–393; Bowers v. Lake Superior Contracting & Dredging Co. 79 C. C. A. 493, 149 Fed. 986.

The marshals' proceedings would seem to have been in violation of defendant's rights under the 4th Amendment to the Constitution, as they constituted an unreasonable search and seizure, and also in violation of defendant's rights under the 5th Amendment, as a taking of property without due process of law.

Boyd v. United States, 116 U. S. 616, 633, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524.

Mr. **Antonio Knauth** argued the cause and filed a brief for defendant in error:

Both in England and in the United States an absolute property in unpublished intellectual creations of art and literature is recognized which no one can take from the producer without his consent.

Banker v. Caldwell, 3 Minn. 94, Gil. 46; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480; Tabor v. Hoffman, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Ockenholdt v. Frohman, 60 Ill. App. 300; Cooley, Torts, ¶ 354; Morgan, Literature, ¶ 386; Shortt, Literature, ¶ 48; Bell, Scotland, ¶ 1356; Drone, Copyright, p. 103; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784; Goldmark v. Kreling, 35 Fed. 661; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196; 7 Am. & Eng. Enc. Law, 2d ed. p. 517; Donaldson v. Becket, 4 Burr. 2408; Turner v. Robinson, 10 Ir. Ch. Rep. 513; Jefferys v. Boosey, 4 H. L. Cas. 867; Prince Albert v. Strange, 1 Macn. & G. 25.

This exclusive right of the author to control the publication of his work until, by a publication, it may be dedicated to the public, is an incorporeal right, entirely disconnected from the substance in which the thought or mental creation may be embodied.

Millar v. Taylor, 4 Burr. 2303; Jefferys v. Boosey, 4 H. L. Cas. 888; Stephens v. Cady, 14 How. 528, 14 L. ed. 528; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155; Patterson v. J. S. Ogilvie Pub. Co. 119 Fed. 451; Bryan v. University Pub. Co. 112 N. Y. 386, 2 L.R.A. 638, 19 N. E. 825; 7 Am. & Eng. Enc. Law, 2d. ed. p. 512.

As property, this right is assignable, irrespective of the substance.

Turner v. Robinson, 10 Ir. Ch. Rep. 121.

The same rules apply to pictures, drawings, and the like, as to any other subject of copyright.

Prince Albert v. Strange, 2 De G. & S. 652, 1 Macn. & G. 25; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; Werckmeister v. Springer Lithographing Co. 63 Fed. 808.

In the case of manuscripts it would be impossible to determine to which of them this incorporeal right should cling, should there be more than one, as is often the case. This is likewise so in the case of lectures which are delivered orally, but may be written out by the students without imparting to them any right of publication as long as the lecture has not been published by the lecturer.

Bartlett v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1,076; Queensbury v. Shebbeare, 2 Eden, 329; Abernethy v. Hutchinson, 3 L. J. Ch. 209; Keene v. Kimball, 16 Gray, 549, 77 Am. Dec. 426; Nicols v. Pitman, L. R. 26 Ch. Div. 374; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Caird v. Sime, L. R. 12 App. Cas. 326; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; 2 Story, Eq. Jur. § 943; Drone, Copyright, p. 99; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480.

Again, it is well established in the case of letters, that, although the receiver of the letter is the owner of the letter itself, he has no right to publish the same, which right remains in the sender of the letter. This has always been the law in England and in this country.

Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, 2 Ambl. 737; Granard v. Dunkin, 1 Ball. & B. 207; Perceval v. Phipps, 2 Ves. & B. 19; Gee v. Pritchard, 2 Swanst. 402; Palin v. Gathercole, 1 Colly. Ch. Cas. 565; Oliver v. Oliver, 11 C. B. N. S. 139; Re Wheatcroft, L. R. 6 Ch. Div. 97; Lytton v. Devey, 54 L. J. Ch. N. S. 293; Howard v. Gunn, 32 Beav. 462.

The same principles are recognized and applied in the American cases.

Denis v. Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712; Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901; Woolsey v. Judd, 4 Duer, 379; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509; 2 Story, Eq. Jur. pp. 946–948; Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273; Agawam Woolen Co. v. Jordan, 7 Wall. 583, 19 L. ed. 177; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Mifflin v. R. H. White Co. 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769; Palmer v. DeWitt and Werckmeister v. Springer Lithographing Co. supra; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196.

A parol assignment would have been sufficient.

Callaghan v. Myers, supra; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 618; Belford, C. & Co. v. Scribner, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734.

The assignment of the common-law copyright would also be presumed from a former assignment of a secured copyright for a term allowed by an existing statute, which is afterwards amended so as to lengthen the term of protection.

Paige v. Banks, 13 Wall. 608, 20 L. ed. 709.

A sale of the painting without the copyright, and, again, a sale of the copyright without the painting, could undoubtedly be made in England, which was, at the time of the transaction, a party to the Berne convention. Even before it acceded to that convention, it was recognized by the English copyright statute that the author might sell the picture and reserve to himself the copyright, or *vice versa;* and that the assignee of the copyright was entitled to the statutory protection upon registering his title.

Cocks v. Purday, 5 C. B. 860; Turner v. Robinson, 10 Ir. Ch. Rep. 510; Copinger, Copyright, 3d ed. pp. 122, 440–442; Cumberland v. Planche, 1 Ad. & El. 580; Stephen's Dig. Eng. Law of Copyright, p. 198.

The copyright statute intended to refer to the same person by the words "legal assigns" and "proprietor."

Mifflin v. R. H. White Co. supra.

The assignee of the copyright would be similarly regarded as entitled to register the copyright under the statute in England as the "proprietor." The English act defines the word "assigns" to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise.

Lover v. Davidson, 1 C. B. N. S. 182; Copinger, Copyright, 3d ed. p. 177; Macgillivray, Copyright, pp. 171–177.

The phraseology of the statute is undoubtedly obscure; it has, however, never been held as regulating any existing common-law rights, but as creating and conferring upon authors, as a compensation for their contributions to the promotion of general knowledge, the exclusive right to their respective writings for limited times.

Carter v. Bailey and Holmes v. Hurst, supra; Wabash R. Co. v. Pearce, 192 U. S. 179, 186, 48 L. ed. 397, 399, 24 Sup. Ct. Rep. 231.

The exhibition of the picture at the Royal Academy was not a publication.

Abernethy v. Hutchinson, 3 L. J. Ch. 209; Nicols v. Pitman, L. R. 26 Ch. Div. 374; Caird v. Sime, L. R. 12 App. Cas. 326; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Palmer v. DeWitt, 47 N. Y. 532; Turner v. Robinson, supra; Werckmeister v. Springer Lithographing Co. 63 Fed. 808.

For the purposes of the present case it would seem to be immaterial whether or not the original picture is included in the words "in the several copies of every edition published," because clearly the statute cannot be construed to require a notice on the unpublished painting. The object of the statute requiring notice is to give notice to the public. The statutes refer only to the published edition, which is an edition offered to the public for sale or circulation.

Falk v. Gast Lithograph & Engraving Co. 4 C. C. A. 648, 14 U. S. App. 15, 54 Fed. 894; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; Snow v. Mast, 65 Fed. 995; 7 Am. & Eng. Enc. Law, 2d ed. p. 555; Thompson v. Hubbard, 131 U. S. 123, 150, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710; Mifflin v. R. H. White Co. 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769.

After assigning the entire copyright in the painting, the artist could not, by any act on his part, destroy the assignee's copyright.

Paige v. Banks, 13 Wall. 608, 615, 20 L. ed. 709, 711; Boucicault v. Wood, 2 Biss. 34, Fed. Cas. No. 1,693; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; Palmer v. DeWitt, supra; Goldmark v. Kreling, 35 Fed. 661; American Press Asso. v. Daily Story Pub. Co. 66 L.R.A. 444, 57 C. C. A. 70, 120 Fed. 766.

Abandonment always requires an intention to abandon; and, in order to prove that defense, the proofs must establish such an intention, either by direct evidence or by a necessary inference from the facts.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

In order to fully understand the force and scope of any statute or body of statutes, we must have regard to the conditions and circumstances for which the legislation was intended, and under which it is to become operative. We are not narrowly to read the letter and ignore the state of affairs to which that legislation was intended and is applicable.

Wabash R. Co. v. Pearce, 192 U. S. 179, 48 L. ed. 397, 24 Sup. Ct. Rep. 231.

The seizure of the sheets containing the illegal copies was not an illegal proceeding, nor an invasion of the defendant's constitutional right, as provided by the 4th and 5th Amendments.

Boyd v. United States, 116 U. S. 616, 623, 641, 29 L. ed. 746, 748, 754, 6 Sup. Ct. Rep. 524. See also Adams v. New York, 192 U. S. 585, 597, 48 L. ed. 575, 580, 24 Sup. Ct. Rep. 372.

U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, does not apply to evidence furnished by the issuing of and seizure under a writ of the court.

United States v. Hughes, 12 Blatchf. 553, Fed. Cas. No. 15,417.

Mr. Justice **Day** delivered the opinion of the court:

This case involves important questions under the copyright laws of the United States, upon which there has been diversity of view in the Federal courts.

Before taking up the errors assigned it may aid in the elucidation of the questions involved to briefly consider the nature of the property in copyright which it is the object of the statutes of the United States to secure and protect. A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles's edition, volume 1, p. 436, is: "The exclusive privilege, [291] secured according to certain legal *forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions." And further, says the same author, "the foundation of all rights of this description is the natural dominion which everyone has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others." That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.

There was much contention in England as to whether the common law recognized this property in copyright before the statute of Anne; the controversy resulting in the decision in the House of Lords in the case of Donaldson v. Becket, 4 Burr, 2408, the result of the decision being that a majority of the judges, while in favor of the common-law right, held the same had been taken away by the statute. See Wheaton v. Peters, 8 Pet. 591-656, 8 L. ed. 1055-1079; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606.

In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in article 1, § 8, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." See 8 Pet. 591, supra; Banks v. Manchester, 128 U. S. 244, 252, 32 L. ed. 425, 428, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123, 151, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710.

Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose.

*The first question presented in oral [292] argument and upon the briefs involves the construction of § 4962 as amended (U. S. Comp. Stat. 1901, p. 3411), which is as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, *viz.:* 'Entered according to act of

Congress, in the year ——, by A. B. in the office of the Librarian of Congress, at Washington;' or, at his option, the word 'copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: 'Copyright 18—, by A. B.'"

It is the contention of the plaintiff in error that the original painting was not inscribed as required by the act, and therefore no action can be maintained, and it is insisted that the inscription upon the photogravures offered for sale is not sufficient.

It must be admitted that the language of the statute is not so clear as it might be, nor have the decisions of the courts been uniform upon the subject. In Werckmeister v. Pierce & B. Mfg. Co. 63 Fed. 445, Judge Putnam held that the failure to inscribe the copyright notice upon the original painting did not affect the copyright. That judgment was reversed by the circuit court of appeals for the first circuit by a divided court. 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54.

In the case of Werckmeister v. American Lithographic Co. 142 Fed. 827, Judge Holt reached the same conclusion as Judge Putnam, and in the case at bar the circuit court of appeals for the second circuit approved of the reasoning of Judges Putnam and Holt [293] and disagreed with the majority of *the judges of the circuit court of appeals for the first circuit.

Looking to the statute, it is apparent that if read literally the words "inscribed on some visible portion thereof," etc., apply to the antecedent terms "maps, charts, musical composition, print, cut, engraving, photograph, painting," etc., and the words of the first part of the sentence, requiring notice to be inserted in the several copies of every edition published, apply literally to the title page or the page immediately following, if it be a book.

But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But, while seeking to gain the legislative intent primarily from the language used, we must remember the objects and purposes sought to be attained.

We think it was the object of the statute to require this inscription, not upon the original painting, map, photograph, drawing, etc., but upon those published copies concerning which it is designed to convey information to the public which shall limit the use and circumscribe the rights of the purchaser.

As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought.

We have been cited to no case, nor can we find any direct authority in this court upon the question. But the opinion of Mr. Justice Miller in Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279, is pertinent. The court there considered whether Congress had the constitutional right to protect photographs and negatives by copyright, and the second assignment of *error relates to the sufficiency of the words "Copyrighted 1892 by N. Sarony," when the copyright was the property of Napoleon Sarony. [294] In treating this question the learned judge used this very suggestive language (111 U. S. p. 55):

"With regard to this latter question, it is enough to say that the object of the statute is to give notice of the copyright to the public, by placing *upon each copy*, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."

If the contention of the plaintiff in error be sustained the statute is satisfied only when the original map, chart, etc., or painting is inscribed with the notice, and this is requisite whether the original painting is ever published or not. We think this construction ignores the purpose and object of the act, which Mr. Justice Miller has said, in the language just quoted, is to give notice of the copyright to the public,—that is, to the persons who buy or deal with the published thing.

It is insisted that there is reason for the distinction in the statute between books, and maps, charts, paintings, etc., in that a book can only be published in print and becomes known by reading, while paintings, drawings, etc., are published by inspection and observation.

It may be true that paintings are published in this way, but they are often sold to private individuals and go into private collections, whilst the copies, photographs, or photogravures, may have a wide and extended sale.

It would seem clear that the real object of the statute is not to give notice to the artist or proprietor of the painting or the person to whose collection it may go, who need no information, but to notify the public who purchase the circulated copies of the existing copyright, in order that their ownership may be restricted.

There does not seem to be any purpose in requiring that an original map, chart, or painting shall be thus inscribed, while there is every reason for requiring the copies of [295] editions published *to bear upon their face the notice of the limited property which a purchaser may acquire therein.

This construction of the statute which requires the inscription upon the published copies is much strengthened by the review of the history of copyright legislation which is contained in Judge Putnam's opinion in Werckmeister v. Pierce & B. Mfg. Co. 63 Fed. 445; that legislation, before the statute of 1874, in which paintings were for the first time introduced, shows the uniform requirement of notice upon copies. The apparent incongruities in the statute, in the light of its history, have grown up from enlarging the scope of the law from time to time by the introduction of new subjects of copyright and engrafting them on the previous statutes. The same argument which requires original paintings to be inscribed would apply to all other articles in the same class in the present law, as maps, charts, etc., which were formerly classed with books, so far as requiring notice upon copies is concerned.

Such original maps and charts, etc., may and usually do remain in the possession of the original makers, and there is no necessity of any notice upon them, but the copyright is invalid, as the plaintiff in error insists, unless the original is itself inscribed with the notice of copyright.

For the learned counsel for plaintiff in error says: "If the painting or like article is ripe for copyright, it is ripe for the inscription of the notice. The statute requires the inserting of notice in published things only in respect to published editions of books. The term 'published' is not used in connection with paintings, statutes, and the like." And it is urged there can be no such thing as an "edition" of a painting, and copies of published editions are the only copies mentioned in the statute. But this phrase survives from former statutes, which dealt only with books, maps, charts, etc. When paintings and other things not capable of publication in "editions" were introduced into the statute, the language was not changed so as to be technically accurate in reference to the new subjects of copyright.

[296] *But the sense and purpose of the law was not changed by this lack of verbal accuracy, and we think, while the construction contended for may adhere with literal accuracy and grammatical exactness to the language used, it does violence to the intent of Congress in passing the law, and that the requirement of "inscription upon some visible portion thereof" should be read in connection with the first part of the sentence, which requires notice to be inserted in the several copies of every edition published, on the title page if it be a book, upon some visible portion of the copy if it be a map, chart, painting, etc.

As we have said in the beginning, the statute is not clear. But read in the light of the purpose intended to be effected by the legislation, we think its ambiguities are best solved by the constructions here given, and that the circuit court of appeals made no error in this respect.

Again, it is contended that under the facts stated Werckmeister was but the licensee of Sadler, and, as such, not within the terms of the statute (§ 4952, as amended 1891 [26 Stat. at L. 1106, chap. 565], U. S. Comp. Stat. 1901, p. 3406), which is as follows:

"The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same, and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others, and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

But we think the transfer in this case accomplished what it *was evidently intended [297] to do,—a complete transfer of the property right of copyright existing in the picture. There is no evidence of any intention on the part of Sadler to retain any interest in this copyright after the sale to Werckmeister; and when the painting was offered for sale at the Royal Academy it was with a reservation of the copyright.

It would be giving an entirely too narrow construction to this instrument to construe it to be a mere license or personal privilege, leaving all other rights in the assignor. That it was the purpose of the parties to make a complete transfer is shown by the instrument executed, when read in the light of the attendant circumstances.

In this connection it is argued that under the statute above quoted (§ 4952, as amended March 3, 1891) an author cannot, before publication, assign the right or privilege of taking a copyright independent of the "transfer of the copyrightable thing itself," and it is contended that the terms "author," "inventor," "designer," refer to the originator of the book, map, chart, painting, etc., and that the term "proprietor" refers to the person who has a copyrightable thing made for him under such circumstances as to become the proprietor; as, for instance, one who causes a digest to be compiled or a picture to be painted.

But we think this statute must be construed in view of the character of the property intended to be protected. That it was intended to give the right of copyright to others than the author, inventor, or designer is conclusively shown in the use of the terms "proprietor" and "assigns" in the statute.

It seems clear that the word "assigns" in this section is not used as descriptive of the character of the estate which the "author, inventor, designer, or proprietor" may acquire under the statute, for the "assigns" of any such person, as well as the persons themselves, may, "upon complying with the provisions of this chapter," have the sole liberty of printing, publishing, and vending the same. This would seem to demonstrate the intention of Congress to vest in "assigns," before copyright, the same privilege [298] of subsequently acquiring complete *statutory copyright as the original author, inventor, designer, or proprietor has. Nor do we think this result is qualified because the statute gives to assigns, together with the right of publishing, vending, etc., the right of "completing, executing, and finishing" the subject-matter of copyright.

And a strong consideration in construing this statute has reference to the character of the property sought to be protected. It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection. While not, in all respects, analogous, this proposition finds illustration in Stephens v. Cady, 14 How. 528, 14 L. ed. 528, in which it was held, where the copyright for a map had been taken out under the act of Congress, a sale upon execution of the copperplate engraving from which it was made did not pass the right to print and sell copies of the map. Mr. Justice Nelson, delivering the opinion of the court, said:

"But, from the consideration we have given to the case, we are satisfied that the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map; or, as said by Lord Mansfield in Millar v. Taylor, 4 Burr. 2396, 'a property in notion, and has no corporeal tangible substance.'"

And the same doctrine was thus stated by Mr. Justice Curtis in Stevens v. Gladding, 17 How. 447, 15 L. ed. 155:

"And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other."

While it is true that the property in copyright in this country is the creation of statute, the nature and character of the *prop- [299] erty grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work. We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that the statute means to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute, independently of the ownership of the article itself.

It is further contended that the exhibition in the Royal Gallery was such a publication of the painting as prevents the defendant in error from having the benefit of the copyright act. This question has been dealt with in a number of cases, and the result of the authorities establishes, we think, that it is only in cases where what is known as a general publication is shown, as distinguished from a limited publication under conditions which exclude the presumption that it was intended to be dedicated to the public, that the owner of the right of copyright is deprived of the benefit of the statutory provision.

Considering this feature of the case, it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same. One or many persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired.

The subject was considered and the cases reviewed in the analogous case of Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 134 Fed. 321, in a full and comprehensive opinion by the late Circuit Judge Townsend, which leaves little to be added to the discussion.

The rule is thus stated in Slater on the Law of Copyright and Trade Marks p. 92):

"It is a fundamental rule that to constitute publication there must be such a dis-[300]semination of the work of art itself *among the public as to justify the belief that it took place with the intention of rendering such work common property."

And that author instances as one of the occasions that does not amount to a general publication the exhibition of a work of art at a public exhibition where there are by-laws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege.

We think this doctrine is sound and the result of the best-considered cases. In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Starting with the presumption that it is the author's right to withhold his property, or only to yield to a qualified and special inspection which shall not permit the public to acquire rights in it, we think the circumstances of this exhibition conclusively show that it was the purpose of the owner, entirely consistent with the acts done, not to permit such an inspection of his picture as would throw its use open to the public. We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying.

It is next objected that the form of action in this case was the ordinary action for replevin under the New York Code, and as the plaintiff did not have the right of property or possession before the beginning of this action, no such action would lie. Whether this action was the one in the nature of replevin for the seizures of the plates and copies indicated in the case of Bolles v. Outing Co. 175 U. S. 266, 44 L. ed. 157, 20 Sup. Ct. Rep. 94, we do not find it necessary to determine. [301]After verdict, and upon motion for *a new trial, plaintiff in error, defendant below, moved to set aside the verdict "on the ground that replevin, under the statutes of the state of New York, is not an appropriate remedy or a lawful and legal remedy for taking possession of the alleged incriminating sheets or pictures, and that the proceedings taken in that behalf by the plaintiff were illegal and invalid, and that the plaintiff cannot avail of any benefit of that proceeding, and the introduction in evidence of the replevin proceedings was an error." The motion was denied and exception duly taken.

The learned counsel for the plaintiff in error admits that this question was not formally raised until the defendant's motion for a new trial, but maintains that the same question was raised by the objection to admission in evidence of the replevin proceedings by the marshal for western and southern districts of New York, respectively.

Examining this record, it is perfectly apparent that no objection was made to the form of the action until it was embodied after verdict, in the motion for a new trial. Upon the admission of the writ of replevin, addressed to the marshal of the western district of New York, and affidavit, the objection stated was "on the ground that the process of replevin that was executed by the marshal in Buffalo was an invasion of defendant's constitutional right, was an unwarrantable search, an illegal act, and nothing done under it, or information obtained by virtue of it, can be used in evidence against defendant under the 4th and 5th Amendments of the United States Constitution."

The same objection was made when the writs of replevin, affidavit, and return were offered in evidence concerning the southern district of New York, and it was said: "Defendant's counsel objects on the same grounds as stated to the introduction of the stipulation; namely, that the papers constitute an illegal proceeding, an invasion of the defendant's constitutional right, as provided by the 4th and 5th Amendments, and plaintiff cannot avail of them as evidence in this case, on account of their illegality."

*The argument which followed, could it be[302] assumed to broaden the objection, was far from complaining of the form of action as such, but rested upon the Constitution and the character of the seizure of the goods, of which it was maintained the plaintiff was not entitled to possession until after a judgment of forfeiture.

The record shows that the objection to the form of the remedy was first taken in any adequate way upon the motion for a new trial, when it was too late.

In conclusion, it was suggested rather than argued that the constitutional rights of the plaintiff in error were violated by the seizure of the goods, and reference was made to the 4th and 5th Amendments. We think we need only refer in this connection to Adams v. New York, 192 U. S. 585-597, 48 L. ed. 575-580, 24 Sup. Ct. Rep. 372, and Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

Finding no error in the judgment of the Circuit Court of Appeals, the same is affirmed.

SARAH CHUNN, Plff. in Err.,
v.
CITY & SUBURBAN RAILWAY OF WASHINGTON.

(See S. C. Reporter's ed. 302-309.)

Appeal and error — review — discretionary order.

1. An exception to the refusal of the trial court to reconsider its order, made on defendant's motion, permitting the withdrawal of a plea in abatement and the filing of a plea in bar, and to allow the trial of the issue joined on the plea in abatement, is not available in the Federal Supreme Court.

Trial — question for jury — negligence.

2. Whether it is negligence to run a street car at full speed past a usual stopping place when persons can plainly be seen standing upon the platform between the inner rails, awaiting a car approaching from the opposite direction, is a question for the jury, where the street car company had sanctioned such a practice on the part of intending passengers, and the space between the rails, while wide enough to enable a person standing in the center to escape injury, left but a narrow margin of safety.

Carriers — contributory negligence of intending passenger.

3. A person is not, as a matter of law, guilty of such contributory negligence in following the customary practice sanctioned by a street car company of standing upon the platform between the two inner rails at a usual stopping place, awaiting an approaching car, as precludes a recovery for injuries sustained from being struck by a car which ran by this stopping place on the other track at full speed, where the space between the rails, though leaving but a narrow margin of safety, was wide enough to permit a person standing directly in the center to escape injury.

Proximate cause — contributory negligence.

4. The negligence of one who carelessly places herself in a position exposed to danger cannot, as matter of law, be said to be the proximate cause of an injury, if her negligence was discovered in time to avoid the injury by the use of reasonable care, and such care was not exercised.

[No. 43.]

Argued November 8, 1907. Decided December 2, 1907.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, directing a verdict for defendant in an action to recover damages for a personal injury. Reversed and remanded, with directions to reverse the judgment of the trial court and remand the cause to that court with a direction to set aside the verdict and award a new trial.

See same case below, 23 App. D. C. 551.

The facts are stated in the opinion.

Messrs. **Percy Metzger** and **Victor H. Wallace** argued the cause and filed a brief for plaintiff in error:

The court below erred: 1. In affirming the action of the trial court, permitting the defendant to withdraw its plea in abatement after evidence had been taken under the issue joined upon that plea. 2. In affirming the action of the trial court, denying the plaintiff's motion to reconsider the order permitting the withdrawal of the plea in abatement, and refusing to permit the case to be tried under the issue joined on that plea.

Yeatman v. Henderson, 1 Pittsb. 20, Fed. Cas. No. 18,132; Robbins v. Treadway, 2 J. J. Marsh, 540, 19 Am. Dec. 152.

3. In affirming the action of the trial court, directing a verdict for the defendant, and thus denying the plaintiff in error the right of trial by jury.

Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68; Chicago, M. & St. P. R. Co. v. Lowell, 151 U. S. 209, 219, 220, 38 L. ed. 131, 136, 137, 14 Sup. Ct. Rep. 281; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558, 559, 35 L. ed. 270, 272, 273, 11 Sup. Ct. Rep. 653; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; Jones v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; McDermott v. Severe, 202 U. S. 604, 609, 50 L. ed. 1165, 1168, 26 Sup. Ct. Rep. 709; Hawley v. Columbia R. Co. 25 App. D. C. 1; Boentjen v. New York & H. R. Co. 36 App. Div. 460, 55 N. Y. Supp. 847; Conway v. New Orleans City & Lake R. Co. 51 La. Ann. 146, 24 So. 780. See also Union P. R. Co. v. Sue, 25 Neb. 772, 41 N. W. 801; Dale v. Brooklyn City, H. P. & P. P. R. Co. 1 Hun, 146; Dobiecki v. Sharp, 88 N. Y. 203.

Messrs. **George P. Hoover** and **Charles A. Douglas** argued the cause and filed a brief for defendant in error:

In allowing the plea in abatement to be withdrawn, the court was exercising its judicial discretion, which is reviewable only for gross abuse.

Eberly v. Moore, 24 How. 147, 16 L. ed. 612; Piquignot v. Pennsylvania R. Co. 16 How. 104, 14 L. ed. 863; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; German Evangelical Soc. v. Prospect Hill Cemetery, 2 App. D. C. 310; Morris v. Wheat, 11 App. D. C. 201.

A person stepping in front of a moving car is guilty of contributory negligence which bars a recovery.

Harten v. Brightwood R. Co. 18 App. D. C. 260; Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Barrett v. Columbia R. Co. 20 App. D. C. 381.

The failure of the plaintiff to use her senses as a precautionary measure to avoid danger constituted contributory negligence, which will preclude a recovery.

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542; Northern P. R. Co. v. Freeman, supra; Edgerton v. Baltimore & O. R. Co. 6 App. D. C. 516; Miller v. St. Paul City R. Co. 42 Minn. 454, 44 N. W. 533; Childs v. New Orleans City R. Co. 33 La. Ann. 154; St. Louis, I. M. & S. R. Co. v. Martin, 61 Ark. 549, 33 S. W. 1070; Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; Halpin v. Third Ave. R. Co. 8 Jones & S. 175.

If the plaintiff was in a dangerous position as the car approached her, which does not appear by the evidence, the motorman was justified in presuming that she would withdraw therefrom in time to prevent a collision.

Booth, Street Railways, § 305; Nellis, Street Surface Railroads, p. 301; West Chicago Street R. Co. v. Schwartz, 93 Ill. App. 387; Citizens' Street R. Co. v. Shepherd, 107 Tenn. 444, 64 S. W. 710; Baltimore Consol. R. Co. v. Armstrong, 92 Md. 554, 54 L.R.A. 424, 48 Atl. 1047; State use of Egner v. United Railways & Electric Co. 98 Md. 397, 56 Atl. 789.

In Patton v. Texas & P. R. Co. 179 U. S. 658–660, 45 L. ed. 361–363, 21 Sup. Ct. Rep. 275, this court has very thoroughly defined the right and duty of a trial court to direct a verdict in favor of one party or the other, as from the evidence appears proper.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to the court of appeals of the District of Columbia. The plaintiff in error brought an action to recover damages for personal injuries which she alleged were suffered by her through the negligence of the defendant in error, a corporation operating an electric street railway. The defendant pleaded in abatement that the plaintiff was, at the time of bringing action, an infant under the age of twenty-one years. Issue was joined on the plea. Thereafter the defendant, *on motion and payment of the costs, was permitted to withdraw this plea and file a plea in bar. [305] When the case came for trial at a later term the plaintiff tendered back the costs and moved the court to reconsider its order that the plea in abatement might be withdrawn and the plea in bar filed, and that the trial proceed upon the issue joined on the plea in abatement. To the refusal to grant these motions the plaintiff excepted. This exception requires no further consideration than that given to it in the court below, and is overruled.

The plaintiff then introduced testimony in support of her declaration, and at the close of this testimony the judge presiding at the trial directed a verdict for the defendant. The plaintiff excepted to the order of the court and her exception was overruled by the court of appeals, and is now here for our consideration. The question is whether there was evidence which, with the inferences reasonably to be drawn from it, tended to prove all the essential elements of the plaintiff's cause of action.

Without reciting all the testimony, which is set forth in full in the opinion of the court of appeals, the facts disclosed by it may be stated in narrative form. The plaintiff, a young woman, had lived and worked in Riverdale, Maryland, for about a year before the accident. During that time she had frequently traveled to Washington on the defendant's cars. It was the custom of persons who traveled from Riverdale to Washington on the defendant's railway to board the cars from what was called the platform near the station of the Baltimore & Ohio Railroad. At that point there are two tracks of the defendant, running north and south. The distance between the inner rails of the two tracks was 7 feet, 10 inches. The steps of the cars projected 2 feet, 2 inches beyond the tracks, leaving, when two cars passed each other at this point, a clear space between them of 3 feet, 6 inches, so that, as one of the plaintiff's witnesses said, "there was ample room to stand if you were thinking what you were doing." The platform extended 30 feet lengthwise along the tracks. *It consisted [306] of boards laid on the ground and sleepers and parallel with the tracks. It covered the space between the tracks and the rails of the tracks and the width of two boards beyond the outside tracks. A road ran west of and near the tracks. West of the tracks there was "a kind of sink," and those boarding the cars for Washington from that side had "to stand out in the mud or in that hole to get on the car." The cars to Washington ran on the west, and the cars from Washington ran on the east, track. It was the custom of persons taking the Washington car to board it from the east side, standing on the platform between the tracks, and the doors of the cars were opened to receive them from that side; sometimes, however, such passengers entered from the west side. The purpose for which the platform was originally constructed was not shown, but it was used in the manner stated and for the passage of persons and vehicles. One standing on the platform at this point could see or be seen for a distance of at least a quarter of a mile north or south. On the evening of September 29, 1900, the plaintiff came to this place to take the car for Washington. The hour was not stated, but it was light enough to recognize a person a hundred yards away. The plaintiff testified that she remembered nothing from the time she left her house until she recovered consciousness in the hospital; but from other testimony it appears that, as the car for Washington approached from the north, she went to the platform and stood between the tracks. There were other persons intending to take the car, one of whom stood near her and also between the tracks. As the car for Washington came from the north, another of defendant's cars came from the south. The Washington car slowed down and came to a stop just as the latter car, without stopping, ran by "at a rapid rate of speed," as one witness said, or "12 to 15 miles an hour," as another witness said. No one saw exactly what happened to the plaintiff, who was standing near the north end of the platform, but the sound of "a shock" was heard, and the plaintiff was found unconscious between [307]the tracks, 10 or 15 *feet north of the north end of the platform. It may be inferred that she was struck by the rapidly passing car bound north, which did not come to a stop, as one witness said, for one or two hundred feet beyond the platform.

If, upon these facts, reasonable men might fairly reach the conclusion that the plaintiff, while herself in the exercise of due care, was injured by the negligence of the defendant, the case should have been submitted to the jury. Warner v. Baltimore & O. R. Co. 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68. That the plaintiff was injured by being hit by the car running north does not admit of doubt. We need not delay at that point, but may proceed at once to the other aspects of the case. The plaintiff had come to a place where passengers had habitually boarded the defendant's cars. The defendant had encouraged and invited persons to enter its cars going south from the space between the tracks, by opening the doors and receiving them from that side. It was a place which, in itself, was perfectly safe, unless made otherwise by the manner in which the defendant used the east track for the passage of cars. The plaintiff, therefore, was not a trespasser nor a mere traveler upon the highway. It is not important to determine whether she had become a passenger. Intending to become a passenger, she had come to a place recognized by the practice of the defendant as a convenient and suitable one from which to enter the car, and the car stopped to receive her. The defendant owed her an affirmative duty. It was bound to use that care for her protection which was reasonably required in view of the situation in which she had, at the defendant's invitation, placed herself, of the purpose for which she was there, of the approach of the car which she was intending to enter, and of the dangers to be apprehended from contact with a rapidly moving car, propelled by mechanical power. A jury might well say that, under such circumstances, reasonable care demanded the exercise of the utmost viligance, foresight, and precaution. The motorman of the northbound car could see plainly that the car for Washington was about to stop, and that passengers were standing upon the space between *the tracks, intending to enter it.[308] He might readily have understood that the noise of the transit of the two cars would be commingled, and that those who intended to enter the other car would naturally direct their attention to it, and might fail to notice the approach of his own car. In point of fact, the motorman took no precaution whatever; he assumed that those who were standing on the platform would take care of themselves, and ran his car by them at full speed as if oblivious of their existence. We think, as the court of appeals held, that from the evidence the jury might have found that the defendant was negligent. The question whether the plaintiff herself was guilty of contributory negligence presents somewhat greater difficulty. There was room to stand between the two cars and escape contact with either. But the margin of safety was narrow and left little allowance for the infirmities of mankind. In the confusion of two cars approaching from opposite directions it is too much to expect nice calculations of distances. It is not to be wondered at that in the attempt to escape the one the plaintiff fell foul of the other. The same witness (himself standing on the platform between the tracks) who said that "there was ample room to stand if you were thinking about what you were doing" also said: "I realized that I would have to hold myself strictly in the center of the two tracks." We think that the plaintiff, if she was rightly where she was, was not, as a matter of law, guilty of negligence in failing to appreciate accurately the boundaries of the narrow zone of safety which the defendant's conduct had left to her. The 3 feet, 6 inches width of the clear platform cannot fairly be considered without taking into account the dangers which infested the borders upon each side. A platform which would be wide enough for a child to walk in safety from the base of the Washington monument to the steps of the Capitol, if elevated to extend from the summit of one to the dome of the other, would imperil the passage of the man of steadiest nerve. Nor was the plaintiff necessarily wanting in due care by taking her place between the [309]tracks. It was the usual place *from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume that the defendant would not commit such an act of negligence, and that, when it stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril. We think that it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence. That issue, with the others in the case, should have been submitted to the jury with appropriate instructions. Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury. Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 429, 36 L. ed. 485, 493, 12 Sup. Ct. Rep. 679; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 571, 583, 37 L. ed. 284, 289, 13 Sup. Ct. Rep. 557; Tuff v. Warman, 5 C. B. N. S. 573; Radley v. London & N. W. R. Co. L. A. 1 App. Cas. 754; Thomp. Neg. 2d ed. §§ 238, 239; Pollock, Torts, 6th ed. pp. 441 to 447, inclusive.

The judgment is reversed and the case remanded to the Court of Appeals, with directions to reverse the judgment of the Supreme Court of the District of Columbia, and remand the cause to that court with a direction to set aside the verdict and award a new trial.

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*THOMAS POLK, William I. Moody, James [310]
L. Long, et al.,
v.
MUTUAL RESERVE FUND LIFE ASSOCIATION OF NEW YORK and Mutual Reserve Life Insurance Company.

(See S. C. Reporter's ed. 310-328.)

Constitutional law — impairing contract obligations.

1. Contract obligations between an association insuring lives upon the co-operative plan and its members are not unconstitutionally impaired by the reorganization of such association as a mutual level premium company, pursuant to N. Y. Laws 1901, chap. 722, under a new name and without the consent of the members, because such statute provides that outstanding assessment contracts shall be appraised as liabilities as if they were one-year term insurance at the ages attained.

Constitutional law — impairing contract obligations — reserved right to repeal or amend.

2. The power to amend or repeal, reserved by the state Constitution in force when an association insuring lives upon the co-operative plan was incorporated under general law, will sustain, as against an objection founded on the contract clause of the Federal Constitution, so much of N. Y. Laws 1901, chap. 722, as authorized the reorganization of such association under a new name as a mutual level premium company without the consent of the members, although the association may have been insolvent and the scheme of reincorporation may have been devised, and legislation authorizing it procured, by its officers with the intent to defraud the members.

Constitutional law — due process of law.

3. Vested rights, privileges, or property rights of the members of an association insuring lives upon the co-operative plan are not taken without due process of law by the reorganization of such association as a mutual level premium company, pursuant to N. Y. Laws 1901, chap. 722, under a new name and without the consent of the members.

[No. 45.]

NOTE.—As to reserved power to alter, amend, or repeal charter, see note to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961.

Argued November 11, 1907. Decided December 2, 1907.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to whether contract obligations were impaired or due process of law denied by the reorganization of an association insuring lives upon the co-operative plan as a mutual level premium company, under a new name, and without the consent of the members. Answered in the negative.

Statement by Mr. Justice **Moody**:

In this case the circuit court of appeals for the second circuit certified certain questions of law upon which it desired instruction. Such part of the statement accompanying the questions as we find material and the questions themselves follow:

The above-named appellants filed their bill in equity in the United States circuit court for the southern district of New York, praying for the appointment of a receiver of both defendants, the winding up of both defendants, an accounting to ascertain the interest of complainants and all other policy holders of Mutual Reserve Fund Life Association in the assets of Mutual Reserve Life Insurance Company, and the marshal-[311]ing *and distribution of said assets. A final decree was entered by the circuit court sustaining a demurrer of the defendant to the amended bill of complaint and dismissing the bill. From that decree the complainants have appealed to this court.

The amended bill of complaint alleges the existence of the following facts:

The complainants became members and policy holders of the said association respectively on various dates from 1886 to 1900. The policy of each complainant is made a part of the bill and also the application for insurance of two of the complainants. The material provisions of the policies and applications are hereto annexed as exhibits 1 and 2. Said association became a corporation organized and existing under the laws of the state of New York. It was originally organized in 1881, under the corporate name of Mutual Reserve Fund Life Association of New York, under chapter 267, Laws of 1875, entitled "An Act for the Incorporation of Societies and Clubs for Certain Lawful Purposes." The original certificate of incorporation stated the objects and business of the company to be "the mutual benefit of ourselves and all others who may become members of the society, by providing benefits for families and others dependent upon such members by means of voluntary contributions to meet exigencies occurring from time to time, and to provide a fund for the common and exclusive benefit of all members." In 1883 the association reincorporated under chapter 175, Laws of 1883, entitled "An Act to Provide for the Incorporation and Regulation of Co-operative or Assessment Life and Casualty Insurance Associations and Societies." Its amended charter or certificate of incorporation, filed in 1883, after reciting the desire of the corporation to reincorporate under said act of 1883, provided:

"First. We do hereby express our intention to form an organization for the transaction of life insurance upon the co-operative or assessment plan.

. . . .

"Fourth. The mode and manner in which the corporate *powers granted are to be [312] exercised are by issuing certificate of membership, policy, or other evidence of interest to, and promise or agreement with, its members, whereby, upon the decease of member, money or other benefit, charity, relief, or aid is to be paid, provided, or rendered by said corporation or association to the legal representative of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief, or aid are derived from voluntary donations, or from admission fees, dues, and assessments, or some of them, collected or to be collected from the members thereof or members of a class therein, and interest and accretions thereon, or rebates from amounts payable to beneficiaries or heirs, and wherein the paying, providing, or rendering of such money or other benefit, charity, relief, or aid is conditioned upon the same being realized in the manner aforesaid; and wherein the money or other benefit, charity, relief, or aid so realized is applied to the uses and purposes of said corporation or association, and the expenses of the management and prosecution of its said business."

The existence and corporate powers of the association under the name of Mutual Reserve Fund Life Association of New York continued from that time unchanged until April 17th, 1902. On that date a declaration and amended charter of the said association was filed under and pursuant to the provisions of chapter 722, Laws of 1901, which act was an amendment of § 52 of chapter 690, Laws of 1892, known as the insurance law of the state of New York. This amended charter of 1902 was adopted and filed pursuant to a resolution of the board of directors of the said association, adopted by more than a majority of said board. The declaration and amended charter was duly certified by the attorney general of the state to be in accordance with the requirements of law, and the state superintendent of insurance issued his certificate of the filing of such declaration and amended charter, and consented to the transaction of the business of insurance by the said Mutual Reserve Fund Life Insurance [313]Company as *in said amended charter provided. The material provisions of said declaration and amended charter are as follows:

"This is to certify that the Mutual Reserve Fund Life Association, a corporation originally organized under and by virtue of chapter 267 of the laws of 1875, and reincorporated and transacting business under chapter 175 of the Laws of 1883 of the state of New York, and the laws amendatory thereof and supplementary thereto, has duly accepted the provisions of the act of the legislature of the state of New York, being chapter 690 of the Laws of 1892, known as 'the insurance law,' and the amendments thereto, and in conformity with the same has duly adopted the following amended charter:

"Article 1.

"The name of the corporation shall be 'Mutual Reserve Life Insurance Company.'

. . . .

"Article 3.

"The business of the company shall be insurance upon the lives or the health of persons and all and every insurance appertaining thereto, the making of endowments, and the granting, purchasing, and dispensing of annuities, such kind of insurance being authorized under subd. 1 of § 70 of 'the insurance law.'

"Article 4.

. . . .

"Sec. 4. The present by-laws of the corporation, which form part of its contracts with its members, shall continue to be the by-laws of the company unless or until the same shall be revised or amended in the manner therein provided.

. . . .

"Article 6.

"Sec. 1. The company shall have no capital stock, but shall be a mutual company.

. . . .

"Article 8.

"The company shall be entitled to have [314]and enjoy all the *rights, privileges, and provisions of existing laws which might be included in the charter and enjoyed by it, if it were originally incorporated under 'the insurance law' of this state."

The consent of the policy holders to this amendment of the defendant's charter was not obtained, and no meeting of policy holders was called for that purpose. The complainants had no notice of said amendment until June 2d, 1902, on which date complainants received the following notice:

Note Change of Name.

Make checks and money orders payable to Mutual Reserve Life Insurance Company.

On April 17, 1902, Mutual Reserve Fund Life Association reincorporated as a mutual level premium company, under the title of *Mutual Reserve Life Insurance Company.* Attention is called to this change of name and to the accompanying report of the recent examination of the corporation by the superintendent of insurance of the state of New York, which shows a surplus over liabilities of $466,885.48.

This reincorporation, while insuring the stability of the company, makes no change in your policy.

Charles W. Camp, Secretary.

The bill suggests no irregularity or defect in the procedure by which the amendment of the charter in 1902 was affected, other than that the consent of the policy holders was not obtained.

It is further alleged that said company was organized about the 17th of April, 1902, by the then officers and directors of the respondent Mutual Reserve Fund Life Association, without authority from and without the knowledge or consent of complainants or the other members and policy holders of said association, and without corporate action by said members and policy holders, and that complainants and the other members of the association were not advised of the organization of the company until on or about June 2, 1902, when they received a printed slip notifying them that the said association *had reincorporated un-[315] der the name "Mutual Reserve Life Insurance Company."

The amended bill then alleges that at the time of the organization of said company the association was, and for a considerable time had been, insolvent, its liabilities being in excess of the value of its assets by a large amount, and that the insolvency of the association was known to the officers and directors thereof, and that the officers and directors, headed by Frederick A. Burnham, president of the association, well knowing the insolvency of the association, devised the scheme for the incorporation of the respondent Mutual Reserve Life Insurance Company, and procured legislation intended to authorize the same, with the object and for the purpose of secretly and fraudulently "depriving complainants and the other members and policy holders of respondent association of their membership rights and privileges, and of abridging the same, and that by their said course in the premises said officers and directors sought and intended to defraud the complainants and the members and policy holders of said association generally, and sought and intended to deprive them of their rights as members and policy holders, or cause a forfeiture of the same."

Complainants in their amended bill allege "that said law, chapter 722 of the Laws of New York of 1901, if its effect and meaning be such as to authorize the pretended reorganization and reincorporation of the respondent association by the officers and directors thereof without due notice to and without the knowledge and consent of complainants or any of the members and policy holders of respondent association . . . is in contravention and violation of § 10, article 1, of the Constitution of the United States, which prohibits any state from enacting a law 'impairing the obligation of contracts,' and complainants invoke and rely upon said provision of the Constitution of the United States, and say that under said provision of the Constitution of the United States said law is unconstitutional, invalid, and void." [316]And complainants further *allege that said law of the state of New York, if given the construction, meaning, and effect aforesaid, is in contravention and violation of those provisions of the Constitution of the United States and of the state of New York which provide that "no person shall be deprived of his property without due process of law," in this,—that they deprive the complainants and the other members and policy holders of respondent association of their vested rights and privileges and of their property rights under their contracts and agreements with respondent association without due process of law, and complainants, as citizens and residents of the state of Tennessee and nonresidents of the state of New York, invoke the provisions of article 14 of the Amendments to the Constitution of the United States, and, upon advice of counsel, allege and charge that said law of the state of New York, if given the force, meaning, and effect aforesaid, is in violation of those clauses of the 14th Amendment to the Constitution of the United States, which provide that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The circuit court of appeals desires instruction upon the following:

Questions.

"1. Does the amended bill of complaint disclose that any contract obligations between complainants and the defendant Mutual Reserve Fund Life Association were impaired by the incorporation of the Mutual Reserve Life Insurance Company in 1902, pursuant to the provisions of chapter 722, Laws 1901, of the state of New York, and the transfer to said company of the assets, properties, and membership of the Mutual Reserve Fund Life Association?

"2. Does the amended bill of complaint disclose and show that chapter 722, Laws of 1901, of the state of New York, was *in[317] violation of article 1, § 10, of the Constitution of the United States, as impairing the obligations of a contract between the defendant Mutual Reserve Fund Life Association and complainants, in so far as it authorized the reincorporation of said association as the Mutual Reserve Life Insurance Company?

"3. Does the amended bill of complaint disclose that chapter 722, Laws of 1901, of the state of New York, is in violation of the provisions of article 14 of the Amendments to the Constitution of the United States, in this,—that the reincorporation of the Mutual Reserve Fund Life Association as the Mutual Reserve Life Insurance Company, and the changes in the charter powers and franchises of the corporation, have the effect of depriving complainants of their property without due process of law, and of their vested contract rights and privileges, and of their property rights under their contracts and agreements with respondent association?

"4. Does the amended bill of complaint disclose that chapter 722, Laws of 1901, of the state of New York, was in violation of those provisions of article 14 of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws?"

Mr. **William Hepburn Russell** argued the cause, and, with Messrs. D. L. Snodgrass, Caruthers Ewing, R. F. Jackson, William Beverly Winslow, and Daniel M. Miers filed a brief for Polk et al.:

The organization of the Mutual Reserve Life Insurance Company by action of the directors and officers of the Mutual Reserve Fund Life Association, acting without the knowledge or consent of the members and policy holders of the association, at a time when the association was insolvent, and under a law, the passage of which they procured in fraud of such members and policy holders, had the effect of depriving the complainants and other members and policy holders of their property without due process of law, of impairing the obligation of their contracts of membership, and of denying to them the equal protection of the laws.

Huber v. Martin, 127 Wis. 412, 3 L.R.A. (N.S.) 653, 667, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135; Zabriskie v. Hackensack & N. Y. R. Co. 18 N. J. Eq. 178, 90 Am. Dec. 617; Chicago City R. Co. v. Allerton, 18 Wall. 233, 21 L. ed. 902; Baker's Appeal, 109 Pa. 461; Hartford & N. H. R. Co. v. Croswell, 5 Hill, 386, 40 Am. Dec. 354; Schwarzwaelder v. German Mut. F. Ins. Co. 59 N. J. Eq. 589, 44 Atl. 769; People v. Ballard, 134 N. Y. 294, 17 L.R.A. 737, 32 N. E. 54; 1 Morawetz, Priv. Corp. 2d ed. §§ 295, 296, 395–397, 404, 406, 512, 514; Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549.

Directors of a mutual membership corporation have no power, without the authority and consent of the members, to alter, amend, and change the corporate charter, either by their own acts or pursuant to legislation procured upon their initiative for such purpose.

Marlborough Mfg. Co. v. Smith, 2 Conn. 583; 1 Morawetz, Priv. Corp. 2d ed. §§ 295, 297, 395. 397, 512–514; Chicago City R. Co. v. Allerton and Baker's Appeal, supra; South Pennsylvania Iron & R. Co. v. Stevens, 87 Pa. 196; Edwards v. Mercantile Trust Co. 124 Fed. 382.

The reserved power of the legislature to amend, annul, or repeal any incorporations formed under acts of the legislature in which such reservation is made does not authorize the directors of a mutual corporation, organized under such an act, to procure general legislation under which they can apply for and obtain a reincorporation of the company without the knowledge and consent of its members, and in change and violation of their contract rights and obligations as between themselves.

Taylor, Corp. 5th ed. §§ 499, 500; Chicago City R. Co. v. Allerton, 18 Wall. 233, 235, 236, 21 L. ed. 902–904; Baker's Appeal, 109 Pa. 472; Zabriskie v. Hackensack & N. Y. R. Co. supra; Botts v. Simpsonville & B. C. Turnp. Road Co. 88 Ky. 54, 2 L.R.A. 594, 10 S. W. 134; Huber v. Martin, 127 Wis. 412. 3 L.R.A.(N.S.) 653, 667, 115 Am. St. Rep. 1046, 105 N. W. 1031, 1135; Black v. Delaware & R. Canal Co. 24 N. J. Eq. 466; Mills v. Central R. Co. 41 N. J. Eq. 8, 2 Atl. 453; Close v. Glenwood Cemetery, 107 U. S. 466, 476, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437, 2 Cook, Corp. 4th ed. § 501; Maine C. R. Co. v. Maine, 96 U. S. 499, 510, 24 L. ed. 836, 840; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 213, 48 L. ed. 406, 413, 24 Sup. Ct. Rep. 241; Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359; People v. O'Brien, 111 N. Y. 1, 52, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Com. v. Essex Co. 13 Gray, 239; Schwarzwaelder v. German Mut. F. Ins. Co. 59 N. J. Eq. 594, 44 Atl. 769; Mills v. Central R. Co. 41 N. J. Eq. 5, 2 Atl. 453.

Chapter 722, Laws of New York of 1901, is unconstitutional and void, and the pretended reincorporation of the Mutual Reserve Fund Life Association under its provisions is invalid, because it impairs the obligation of contracts between a mutual co-operative assessment life insurance society and its members by conferring power upon the directors of the corporation, without the action, knowledge, or consent of the members, to change the corporation into an insurance company of a different class, with different burdens resting upon it, and, through it, upon its members.

3 Thomp. Corp. §§ 3979, 3980; Chicago City R. Co. v. Allerton, 18 Wall. 233, 21 L. ed. 902; Baker's Appeal, 109 Pa. 461; Marlborough Mfg. Co. v. Smith, 2 Conn. 583; Venner v. Atchison, T. & S. F. R. Co. 28 Fed. 581; Knoxville v. Knoxville & O. R. Co. 22 Fed. 758; Green v. Biddle, 8 Wheat. 1, 2, 5 L. ed. 547; People v. Ballard, 134 N. Y. 296, 17 L.R.A. 737, 32 N. E. 54; Mills v. Central R. Co. 41 N. J. Eq. 8, 2 N. E. 453.

The change made in the nature and business of the Mutual Reserve Fund Life Association by its pretended reincorporation as the Mutual Reserve Life Insurance Company, whereby it was transformed from a mutual life insurance society on the co-operative or assessment plan to an old line, level premium company, its policies "valued" and a "legal reserve" created, was fundamental, and, no power of amendment by the directors being reserved in its charter, the pretended reincorporation under N. Y. Laws 1901, chap. 722, by the action of the directors alone, is unconstitutional and invalid, and has the effect of impairing the obligation of contracts with its members, and depriving them of their property without due process of law.

Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 240, 241, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597; Lord v. Equitable Life Assur. Soc. 109 App. Div. 252, 96 N. Y. Supp. 10; Boyd v. Mutual Fire Asso. 116 Wis. 115, 61 L.R.A. 918, 96 Am. St. Rep. 953, 90 N. W. 1086, 94 N. W. 171; Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 631; 2 Cook, Corp. §§ 499, 500; Winter v. Muscogee R. Co. 11 Ga. 438; Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 663, 48 L. ed. 832, 835, 24 Sup. Ct. Rep. 549; Ashton v. Burbank, 2 Dill. 435, Fed. Cas. No. 582; Mills v. Central R. Co. 41 N. J. Eq. 4, 2 Atl. 453; Botts v. Simpsonville & B. C. Turnp. Road Co. 88 Ky. 54, 2 L.R.A. 594, 10 S. W. 134; Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Langan v. Supreme Council A. L. H. 174 N. Y. 266, 66 N. E. 932; Beach v. Supreme Tent, K. M. 177 N. Y. 100, 69 N. E. 281; Evans v. Southern Tier Masonic Relief Asso. 182 N. Y. 453, 75 N. E. 317; Strauss v. Mutual Reserve Fund Life Asso. 126 N. C. 971, 54 L.R.A. 605, 83 Am. St. Rep. 699, 36 S. E. 352, 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55; Wuerfler v. Grand Grove, W. O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; Smith v. Supreme Lodge K. P. 83 Mo. App. 512; Russ v. Supreme Council A. L. H. 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697; Smith v. Supreme Council, A. L. H. 94 App. Div. 357, 88 N. Y. Supp. 44; Supreme Council A. L. H. v. Champe, 63 C. C. A. 282, 127 Fed. 541; Supreme Council, A. L. H. v. Getz, 50 C. C. A. 153, 112 Fed. 119; Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Makely v. Supreme Council, A. L. H. 133 N. C. 367, 45 S. E. 650; Kerr, Ins. 127; Niblack, Ben. Soc. 58; Ebert v. Mutual Reserve Fund Life Asso. 81 Minn. 116, 83 N. W. 506, 84 N. W. 457; Getz v. Supreme Council, A. L. H. 109 Fed. 261; Newhall v. Supreme Council, A. L. H. 181 Mass. 111, 63 N. E. 1; Knights Templar's & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 638; Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 265, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; McCoy v. Mutual Reserve L. Ins. Co. 84 App. Div. 316, 82 N. Y. Supp. 638; Mutual Reserve Fund Life Asso. v. Hamlin, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614; 2 Cooley, Briefs on Insurance, p. 1023; Miller v. Mutual Reserve Fund Life Asso. 109 Fed. 278.

The legal propositions stated under the preceding points of this brief, especially as to the construction of the New York statutes, are, in large measure, sustained by recent decisions of the courts of New York, and the cases upon which respondents rely are clearly distinguishable, both upon their facts and as matter of law, from the case at bar.

Lord v. Equitable Life Assur. Soc. 109 App. Div. 252, 96 N. Y. Supp. 10, Affirming 47 Misc. 187, 94 N. Y. Supp. 65.

Mr. **Frank H. Platt** argued the cause, and, with Mr. Sewell T. Tyng, filed a brief for the Mutual Reserve Fund Life Asso. et al:

Chapter 722 of the Laws of 1901 of the state of New York, under which the defendant amended its charter, does not violate the contract or due process provisions of the Federal Constitution. Appellants, as policy holders of an assessment insurance company, have no vested or contract right to insist that the business of the company shall always be conducted exclusively upon the assessment plan.

Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549.

The laws governing this corporation were subject to amendment at the will of the legislature; of course, within the limits of the Federal and state Constitutions.

Looker v. Maynard, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21; Miller v. New York, 15 Wall. 478, 21 L. ed. 98; C. H. Venner Co. v. United States Steel Corp. 116 Fed. 1012; McKee v. Chautauqua Assembly, 65 C. C. A. 8, 130 Fed. 536; Grobe v. Erie County Mut. Ins. Co. 169 N. Y. 613, 62 N. E. 1096, Affirming 39 App. Div. 183, 57 N. Y. Supp. 290; Barnes v. Arnold, 169 N. Y. 611, 62 N. E. 1093, 45 App. Div. 314, 61 N. Y. Supp. 85; Hinckley v. Schwarzschild & S. Co. 107 App. Div. 470, 95 N. Y. Supp. 357.

Mr. Justice **Moody** delivered the opinion of the court:

The Mutual Reserve Fund Life Association of New York (hereinafter called the "association") was originally incorporated under chapter 267 of the Laws of New York of 1875. The certificate *of incorporation [321] stated the purposes of the association to be to provide "benefits for families and others dependent . . . by means of voluntary contributions . . . and to provide a fund for the common and exclusive benefit of all members.". In 1883 the association reincorporated under chapter 175, Laws of 1883, and while this charter was in existence the complainants became members and policy holders. That law provided for the incorporation and regulation of coöperative and assessment life and casualty insurance associations, and the charter of the association stated the business to be conducted as "the transaction of life insurance upon the co-operative or assessment plan." The law, as will presently be shown, was subject to alteration or repeal. In 1892 an act known as the insurance law (chapter 38 of the General Laws) was passed, repealing previous laws upon the subject of insurance, and expressed to be "applicable to all corporations authorized by law to make insurances." Section 52 of this act, as amended by chapter 722 of the Laws of 1901, is as follows:

"Sec. 52. Reorganizations of Existing Corporations and Amendment of Certificates.—Any domestic corporation existing or doing business at the time this chapter takes effect may, by a vote of a majority of its directors or trustees, accept provisions of this chapter and amend its charter to conform with the same, upon obtaining the consent of the superintendent of insurance thereto in writing; and thereafter it shall be deemed to have been incorporated under this chapter, and every such corporation, in reincorporating under this provision, may, for that purpose, so adopt, in whole or in part, a new charter, in conformity herewith, and include therein any or all provisions of its existing charter, and any or all changes from its existing charter, to cover and enjoy any or all the privileges and provisions of existing laws which might be so included and enjoyed if it were originally incorporated thereunder; and it shall, upon such adoption of and after obtaining the consent, as in this section before provided, to such charter, and filing the same and the record of adoption and consent in the office of the superintendent [322]*of insurance, perpetually enjoy the same as and be such corporation, and which is declared to be a continuation of such corporation which existed prior to such reincorporation; and the offices therein, which shall be continued, shall be filled by the respective incumbents for the periods for which they were elected, and all others shall be filled in the same manner by such amended charter provided. Every domestic insurance corporation may amend its charter or certificate of incorporation by inserting therein any statement or matter which might have been originally inserted therein; and the same proceedings shall be taken upon the presentation of such amended charter or certificate to the superintendent of insurance, as are required by this chapter to be taken with respect to an original charter or certificate; and if approved by the superintendent of insurance and his certificate of authority to do business thereunder is granted, the corporation shall thereafter be deemed to possess the same powers and be subject to the same liabilities as if such amended charter or certificate had been its original charter or certificate of incorporation, but without prejudice to any pending action or proceeding or any rights previously accrued. This section shall apply to insurance corporations organized under or subject to article 6 of the insurance law as well as to insurance corporations organized under special charters or articles 2 and 10 of the insurance law; all contracts, policies, and certificates issued by such corporations prior to accepting the provisions of this chapter shall be valued as one-year term insurance at the ages attained, excepting when such contracts, policies, or certificates shall provide for a limited number of specified premiums or for specified surrender values, in which case they shall be valued as provided in article 2, § 84, of the insurance law."

Following strictly the provisions of this section, the association accepted the provisions of the insurance law, amended its charter, and became entitled to all the privileges of the law as if it had been originally incorporated thereunder. In the amendments to the charter the name of the association was *changed to "Mutual Reserve Life Insurance Company" (hereinafter called the "company"), and the business of the company was stated to be "insurance upon the lives or the health of persons, and all and every insurance appertaining thereto, the making of endowments, and the granting, purchasing, and dispensing of annuities." The effect of this was to broaden the business from that of merely co-operative and assessment life insurance to life insurance of every kind. It is conceded that what was done was within the authority conferred by the statute, and the subject for our consideration is whether any of the rights secured to the complainants by the Constitution of the United States have been impaired. [323]

The first question certified is whether the incorporation of the company and the transfer to it of the assets, property, and membership of the association impaired any contract obligations between the association and the complainants. This question possibly implies that by the reincorporation an entirely new corporation was created, to which the property of the old corporation was transferred. But the question must be interpreted with the aid of the statement of facts which accompanies it. An examination of the facts and of the statute shows that there was simply a reorganization of an existing corporation, and not the creation of a new one. The title of the section is, "Reorganizations of existing corporations and amendment of certificates." It authorizes an existing corporation by vote of its directors to accept the provisions of the chapter and amend its charter. It provides expressly that the corporation, with its added powers and revised charter, shall be a "continuation of such corporation which existed prior to such reincorporation." This, perhaps, makes superfluous the saving of "pending action or proceeding or any rights previously accrued" which the section cautiously insures. The declaration filed by the directors, and certified by the attorney general to be in conformity with law, recites that the association "has duly accepted the provisions" of the insurance law, and "duly adopted the following [324]amended charter." The corporation *was not changed to a stock, but continued as a mutual, company. The change of name cannot control the significance of these facts. We answer this and the other questions upon the assumption, therefore, that the old corporation was still in existence, under a new name, and with added powers, but with unchanged membership, and bound to perform all its existing obligations. Upon this view it is impossible to say that any of the contract obligations of the association to the complainants have been impaired by the reorganization. This was the view apparently accepted by the company, who, in its notice to its members, said: "This reincorporation, while insuring the stability of the company, makes no change in your policy." It is contended, however, that the last clause of the section, which is applicable to associations for insurance under the co-operative or assessment plan, affects the contracts of the old members by converting them into one-year-term insurances at the ages attained. But, as we understand this clause, it has no effect upon the contracts of insurance, but is designed for a totally different purpose. It simply prescribes a standard by which the liabilities on the assessment contracts must be appraised. The superintendent of insurance is charged with the duty of deciding whether the assets of insurance companies bear such a relation to their liabilities that it is safe to allow them to continue in business. A very large part of the liabilities of any insurance company is upon outstanding contracts of insurance, not due and therefore not capable of exact measurement. Such liabilities can only be estimated or "valued." Section 84 of the insurance law provides for the method of estimating or valuing the liability on ordinary life policies, but that method seems inapplicable to assessment policies. In any event, the legislature determined that, when an assessment company was allowed to engage in other kinds of life insurance, its outstanding policies should be appraised as liabilities as if they were "one-year-term insurance at the ages attained." This does not make them such in fact, or authorize the company, in its dealings with the policy holder, to *treat them as such. The stat-[325] utory appraisement of the policies for bookkeeping purposes no more affects the rights of the members under their contracts than the account of stock of a merchant would affect the rights of his creditors. The first question must be answered in the negative.

The second question certified is whether the law of 1901, so far as it authorized the reincorporation of the association, was in violation of the clause of the Constitution forbidding a state from passing a law impairing the obligation of contracts. A similar question was before the court in Wright v. Minnesota Mut. L. Ins. Co. 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549, where it was held that a law of Minnesota, authorizing an assessment insurance company to change its business to that of insurance upon a regular premium basis, was not in violation of this provision of the Constitution. The reasoning of the court in that case need not be repeated. It is conclusive upon this question, unless the case at bar can be distinguished from it. The complainants seek to distinguish the case in several respects, which must be noticed. First, it is said that in the Wright Case the power of amendment of the articles of association was reserved in the articles of association, while no such reservation exists here. But the Constitution of New York, in force since 1846, contains this provision: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*" [Art. 8, § 1.] A constitutional provision of the state of Michigan in substantially the same words was held to authorize important changes in the articles of association of an insurance company incorporated under a general law. Looker v. Maynard, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21. There it was said, page 52: "The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law, subject to which a charter is accepted, is, at the least, to reserve to the legislature the power *to make[326] any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." This case shows that it is immaterial whether the power to alter the charter is reserved in the original act of incorporation, or in the articles of association under a general law, or in a constitution in force when the incorporation under a general law is made, as in the case at bar. Second. It is said that in the Wright Case the change was made by the majority of the members of the association, while in the case at bar it was made by a majority of the directors without the consent of the members. But in each case the change was made in conformity with the provisions of the law authorizing it, and, if the legislature has the constitutional power to authorize the change by the vote of a majority of the members, it has the power to authorize the change by a vote of a majority of the directors. The rights of a protesting member are no more impaired in one case than in the other. Next, it is said that distinctions may be based upon the allegations in this case that the association was insolvent, and that, knowing this, its officers devised the scheme of reincorporation and procured legislation authorizing it, with the intent to defraud the members. That the corporation was solvent was emphasized by the court in the Wright Case, but nothing in the decision of the constitutional question turned upon that. It would introduce a new uncertainty into the law if the constitutionality of statutes were to be judged by the motives and purposes of those who persuaded the legislature to enact them. We are unable to conceive of any possible bearing that these allegations, if accepted as true, could have on the constitutional questions certified to us, or to regard them as creating any real and substantial distinction between the case before us and the Wright Case. On the authority of [327] that case, *therefore, the second question must be answered in the negative.

The other two questions certified inquire whether the law under which the reincorporation was made, or the reincorporation and changes in power made under its provisions, are in violation of the 14th Amendment to the Constitution of the United States. These questions do not require separate or detailed consideration. As applied to the facts of this case, they are practically dealt with in the discussion which has preceded. It is not suggested that any rights secured to the complainants by the 14th Amendment were violated in any other manner than by the reincorporation of the association without the consent of its members, the change in and addition to its powers, and the consequent effect upon the contract rights of the complainants and upon their relation to the corporation. But it has been shown that the contract rights of the complainants have not been affected by the reincorporation, and the same reasoning that leads to the conclusion that the changes in the charter powers, made under the reserved powers of the state, do not violate the contract clause of the Constitution, is apt to show that they do not violate the 14th Amendment. In fact, the only suggestion of a violation of the 14th Amendment made to us is that the reincorporation, under the circumstances of this case, deprived the complainants of their vested rights and privileges and property rights under their contracts, without due process of law. Since the incorporation has deprived the complainants of no vested rights, privileges, or property, the contention fails.

The whole argument of the complainants upon these constitutional questions, though enveloped in many words and presented in divers forms, rests upon a single proposition. That proposition is that they, having become members of an association insuring lives upon the co-operative and assessment plan, and being therefore, in a sense, both insurers and insured, have a vested right that the association shall not, without their consent, engage in other kinds of insurance, which may and *probably will indirectly af-[328] fect, for better or worse, their relations to it. The trouble with this proposition is that it was made and denied in the Wright Case.

We have confined our consideration strictly to the constitutional questions certified. It may be that the complainants' rights under their contracts have not been observed by the company or that they have otherwise been unlawfully injured. These questions are not before us.

The questions are severally answered in the negative.

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
J. H. WHARTON, B. L. Caughman, and John H. Earle, as Railroad Commissioners of the State of South Carolina.

(See S. C. Reporter's ed. 328-337.)

Error to state court — questions reviewable.

1. The adequacy of the local facilities existing at a station at which a through interstate railroad train is required to stop by an order made under state authority, though not inherently a Federal question, may be considered by the Federal Supreme Court on writ of error to a state court in

so far as the existence of such adequate local facilities is involved in the determination of the Federal question as to whether the order does or does not directly regulate interstate commerce.

Commerce — state regulation — requiring stoppage of trains.

2. An order made under state authority, requiring a railroad company to stop on signal two of its through fast mail trains running between Jersey City, New Jersey, and Tampa, Florida, at a small town in South Carolina which is also the junction point with a small branch road, is void as a direct regulation of interstate commerce, where, in addition to several local trains daily, the residents of such town are furnished daily one slower through train each way.

[No. 36.]

Argued November 5, 1907. Decided December 9, 1907.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment granting a mandamus to compel a railroad company to stop on signal two of its through fast interstate mail trains at the town of Latta, in that state, pursuant to an order made by the state railroad commission. Reversed and remanded for further proceedings.

See same case below on demurrer, 71 S. C. 130, 50 S. E. 641; on merits, 74 S. C. 80, 54 S. E. 224.

Statement by Mr. Justice **Peckham**:

The railroad company, plaintiff in error, brings the case here to review a judgment of [329]the supreme court of the state of *South Carolina, which granted a mandamus to compel the company to stop certain of its through trains running between Jersey City, New Jersey, and Tampa, Florida, at a station on its road called Latta, in the state of South Carolina, near the boundary line between that state and the state of North Carolina.

Upon a request filed with him by the railroad commission of South Carolina, the attorney general of that state commenced these proceedings by filing a petition to obtain a mandamus directed to the company, compelling it to stop trains 32 and 35 at the station mentioned, pursuant to an order made by the railroad commission, after a hearing had been had before it.

The company demurred to the petition, the demurrer was overruled, and the company given leave to answer, which it did, setting up several defenses, among others averring that sufficient accommodations were already furnished to the citizens of Latta, and those residing along the Latta Branch Railroad; that the trains mentioned, 32 and 35, were interstate commerce trains, running between New York and Tampa, Florida, and intermediate cities, and the southbound trains were compelled to run at a high rate of speed in order to make connections with the steamers to Havana from Tampa, and so as to make the through trip as fast as possible; that the northbound trains were companion or return trains, making an equally fast schedule time; that to stop them at stations like Latta would result in rendering it impossible for them to make schedule time and they would have to be abandoned as through fast trains; that they carried the United States mail and their trains were made up very largely of through passengers; that there were two competitors for this through travel, and that it would be impossible to keep up the trains in competition with these other railroads if stops were to be made other than those absolutely necessary. The answer also averred that in addition to a number of passenger trains of local character daily, there was also furnished the citizens of Latta the convenience *of a daily passenger train each way for[330] through travel north and south other than trains 32 and 35, and it was averred that the order of the railroad commission of South Carolina was unreasonable and unnecessary, a direct burden upon interstate commerce, and therefore a violation of and in conflict with § 8 of article 1 of the Constitution of the United States, giving Congress the power to regulate commerce.

On the coming in of this answer an order was made referring all issues involved to a referee to take testimony thereon and report back as soon as convenient. Pursuant to such order evidence was taken before a referee and report made thereon to the supreme court, which decided that sufficient accommodations were not furnished to the citizens of Latta and along the Latta Branch Railroad by the plaintiff in error at its station in Latta; and the court thereupon made an order that the passenger trains 32 and 35 should stop when flagged at the Latta station, for the purpose of receiving and

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NOTE.—As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; M'Canna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On tne duty of a carrier to stop trains at passenger stations—see note to Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 362.

delivering passengers at that station, "with the alternative right on your part to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag."

The testimony upon which this order was made is in the record and is substantially uncontradicted. It appears from that testimony that Latta is a small station in the state of South Carolina, near the northern boundary of the state, and on the road of the plaintiff in error, having a population, according to the last United States census, of 453. Clio is another small settlement in the same state, about 20 miles northwest of Latta, on what is termed the Latta Branch Railroad, having a population of 508, by the same census. Dunbar is a station between Latta and Clio, with a population, according to the same census, of 115. The country back of these stations is said to be a somewhat thickly-settled agricultural country. It is also said by witnesses for Latta that these places have increased somewhat in population since the last census.

In addition to several local trains passing [331] through Latta *for stations along this road, or to and from Clio, there was one daily through train each way (Nos. 39 and 40), stopping at this station, and which carried passengers through to New York or Florida and intermediate stations, and they were equipped with first and second-class cars, through Pullman sleepers, mail, express, and baggage cars. The only objection to them was their want of speed; that they stopped so frequently they did not arrive at their destination as swiftly as trains 32 and 35. In addition trains 32 and 35 could be boarded at Florence, a station on the same road, distant about 15 or 20 miles south from Latta, or at Dillon, a station about 7 miles from Latta. The objection made by the people of Latta to this mode of getting these trains was, that if they were going north they rode south from Latta to Florence, and then boarded the train and went directly back over the same road from Florence to Latta, which they would not have to do if the train stopped at Latta. It also involved an additional cost of $1.42 above the price of a ticket from Latta to New York. If they preferred to take the train northbound at Dillon instead of Florence, then they had to drive from Latta to Dillon over what was described by a witness to be in winter "one of the worst roads that ever was made a road." It was also averred that, by stopping the southbound train (No. 35) at Latta, it could be there taken at 3 o'clock in the morning instead of going to Florence the night before and taking the train there at 4 o'clock A. M. the next day, and a close connection could also be made at Florence with Columbia (on a branch road) by taking train 35 at Latta at 3 A. M., so that a citizen could go to Columbia and return to Latta the same day, thus saving a hotel bill, which now had to be paid, as connections were so made that the journey could not be accomplished in one day. The people at Clio and the other stations on the Latta Branch Railroad were accommodated so that they could ride to Latta in time to have substantially the same conveniences in getting away from that station that the people living there had. The distance from Jersey City to Tampa is about 1,200 miles, and the trains *32 and 35 are among the fastest and [332] longest continuous trains in the whole country, exceeding the distance from New York to Chicago. These trains rank with the very best trains run anywhere. They are placed on the road for the convenience of through travel, and could not be profitably run if they were slower trains.

Messrs. **P. A. Willcox** and **Frederic D. McKenney** argued the cause, and, with Messrs. Alexander Hamilton, George B. Elliott, F. L. Willcox, and Henry E. Davis, filed a brief for plaintiff in error:

The interference in other than police matters by a state with fast mail and passenger trains engaged wholly in interstate commerce is invalid.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

A state cannot require trains engaged wholly in interstate commerce and carriage of mails to make stops in order to accommodate local needs, but the extent of state authority is to provide for local conditions by requiring local trains to be run.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

As a general proposition, the police power resides exclusively in the states, and the control of interstate commerce exclusively in the national government; and in their operation each must keep within its own sphere.

Brown v. Maryland, 12 Wheat. 419, 448, 6 L. ed. 678, 689; Hannibal & St. J. R.

Co. v. Husen, supra; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; United States v. E. C. Knight Co. 156 U. S. 1, 11, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Henderson v. New York, supra; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Rhodes v. Iowa, 170 U. S. 412 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

The subjects of interstate commerce fall into two classes; namely, those in which the states may act in the absence of legislation by Congress, and those in which the action of Congress is exclusive, and the states cannot interfere at all.

Cooley v. Port Wardens, 12 How. 300, 319, 13 L. ed. 996, 1005; Leisy v. Hardin, supra; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

There is a class of regulations that come within the exclusive jurisdiction of a state; namely, those concerning the strictly internal commerce of the state, and but remotely bearing upon interstate commerce.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335.

When the subject of regulation is not local in its nature or sphere of operation, but national in character, and requires uniformity of regulation, the power of Congress is exclusive.

Leisy v. Hardin and Robbins v. Taxing District, supra.

Interstate transportation of passengers is a subject over which Congress has exclusive jurisdiction.

Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Leisy v. Hardin, supra; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

If the jurisdiction of Congress is exclusive, it would seem that in no case could state action be taken.

Welton v. Missouri, supra; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; State Freight Tax Case; Hannibal & St. J. R. Co. v. Husen; Tiernan v. Rinker; Mobile County v. Kimball; Webber v. Virginia;

and Gloucester Ferry Co. v. Pennsylvania,—supra; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Wabash, St. L. & P. R. Co. v. Illinois, supra; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, supra; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The power of stoppage affects the entire journey, and hence is not within state jurisdiction.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Wabash, St. L. & P. R. Co. v. Illinois, supra.

The facilities afforded at Latta were all that the travel from that community would warrant.

Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Is it only after all local conditions have been met that railroads doing an interstate commerce business have the right to adopt special provisions for through traffic?

Ibid.; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

Mr. **M. C. Woods** argued the cause, and, with Mr. J. Fraser Lyon, filed a brief for defendants in error:

The primary duty of even an interstate railroad is to its local territory, and the secondary duty is to interstate traffic.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Illinois C. R. Co. v. Mississippi R. Commission, 70 C. C. A. 617, 138 Fed. 327, Affirmed in 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

[334] *Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The questions of the validity of state statutes and orders of state railroad commissions, directing the stoppage of through interstate trains, have frequently, within late years, been before this court. The last case is that of Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, where the prior cases are referred to. See also Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585.

That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void.

It has been decided, however, that some orders which may cause the stoppage of interstate trains made by state authority may be valid if they do not directly regulate such commerce. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. When, therefore, an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but in so far as the existence of such adequate local facilities is involved in the determination of the Federal *question of whether the order concerning [335] an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open and may be considered by us. 203 U. S. supra.

Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accommodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is, therefore, not a valid one.

The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost. In this case the company furnishes eleven different trains a day by which the people of Latta can leave that place, and among them are the daily through trains 39 and 40, for the South and North, respectively. That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more. Fault is found here with the character of some of the local trains, in that the appointments thereof are not up to a sufficiently high standard. It is true that, included in these eleven trains, were some which were a combination of freight and passenger, and others which only ran between Latta and Clio, and those are described as dirty and without proper closets and drinking tanks. These deficiencies are remediable by other means than the stoppage of the two trains in question. It is to be remembered that these two places, Latta and Clio, 336]had together a population, by the *last census, of about a thousand. Two ordinary modern trains of the usual passenger coaches would comfortably transport the total population of these places. The number of people who are inconvenienced by the nonstoppage of these trains is, of course, comparatively quite small. One witness, who was in the hotel and general merchandise business at Latta, said that he sent a man or two every week to meet the fast train at Dillon, because they could not take it at Latta. Other witnesses said that the demand for those particular trains, 32 and 35, was quite frequent, as many as four people a week, while others said that the inconvenience of the through trains, 39 and 40, was on account of their not being fast trains, and hence were not so pleasant as the others, 32 and 35, and did not get them in to their destination as early as the latter trains did. The demand at Latta by people desiring to go to the termination of the road, either at New York or Tampa, would naturally be small. Some of the plaintiff's witnesses said that the demand for transportation at Latta was large, or quite large, and the inconvenience great; but a further examination of these witnesses showed that in specific details there was much lacking, and instances of inconvenience were really somewhat limited. But assuming that the number actually inconvenienced by the want of fast trains was *"quite large,"* as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the state.

To stop these trains at Latta, and other stations like it, which could bring equally strong reasons for the stoppage of the trains at their stations, would wholly change the character of the trains. rendering them no better in regard to speed than the other trains, 39 and 40, and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of *their inability to pay expenses. All these[337] are matters entitled to consideration when the question of convenience and adequate facilities arises. There is no contradiction in the testimony that the company desires, so far as is fairly possible, to pay as much attention to the local demands as to the "through" claims.

Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities, and the defendants in error, it may be conceded, make no such demand. No one would assert that one daily train each way between New York and Philadelphia would furnish adequate facilities for the transportation of passengers. Twenty times that number of trains would be necessary, and yet one through train a day, each way, through so small a place as Latta to New York or Tampa would, in all probability, easily transport all the passengers desiring transportation between these places. Nevertheless, the fair needs of the locality for transportation, to other local points must be considered and provided for. This, as we think, has been done.

Taking all the circumstances into consideration, as shown by uncontradicted evidence, we are of opinion that the judgment of the Supreme Court, directing a mandamus, was erroneous, and it is therefore reversed, and the case remanded to the Supreme Court of South Carolina for further proceedings therein not inconsistent with this opinion.

Reversed.

[338]*HEATH & MILLIGAN MANUFACTURING COMPANY, The Sherwin-Williams Company, et al., Appts.,
v.
J. H. WORST, Director of the North Dakota Government Agricultural Experiment Station.

(See S. C. Reporter's ed. 338–359.)

Constitutional law — equal protection of the laws.

1. The equal protection of the laws is not denied to manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, by a state statute which makes the manufacture and sale of such paints a misdemeanor unless the label shows the constituent ingredients and the quantity or amount of each, because the manufacture and sale of mixed paints containing only the ingredients specified in the statute, and, possibly, of all paste paints, are free from such consequence or condition.

Constitutional law — due process of law.

2. Manufacturers and sellers of mixed paints containing other ingredients than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, are not deprived of their liberty without due process of law by a state statute which makes such manufacture and sale a misdemeanor unless the label shows the constituent ingredients and quantity or amount of each.

[No. 41.]

Argued November 7, 8, 1907. Decided December 9, 1907.

APPEAL from the Circuit Court of the United States for the District of North Dakota to review a decree dismissing, for want of equity, a bill to enjoin the enforcement of a state statute requiring the manufacturers of mixed paints to label them so as to show the constituent ingredients and the quantity and amount of each. Affirmed.

Statement by Mr. Justice **McKenna:**

This is a direct appeal from the circuit court for the district of North Dakota, sustaining the constitutionality of a statute of that state, requiring the manufacturers of mixed paints to label the ingredients composing them.

The statute is as follows:

An Act to Prevent the Adulteration of and Deception in the Sale of White Lead and Mixed Paints.

Be it enacted by the legislative assembly of the state of North Dakota: 1. Every person, firm, or corporation who manufactures for sale or exposes for sale, or sells, within this state, any white lead paint or compound intended for use as such, shall label *the same in clear and distinct open gothic[339] letters upon a white background, and show the true per cent of each mineral constituent contained in said paint, or, if other than linseed oil is used in its preparation, the names of such oils or substitutes shall be shown, together with the percentage thereof, and every person, firm, or corporation who manufactures for sale, or exposes for sale, or sells within this state, any mixed paint or compound intended for use as such which contains any ingredient other than pure linseed oil, pure carbonate of lead, oxid of zinc, turpentine, Japan dryer, and pure colors, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not less than twenty-five and not more than one hundred dollars and costs, or by imprisonment in the county jail not exceeding sixty days; provided, that any such person, firm, or corporation, who shall manufacture for sale, or expose for sale, or sell within this state any white lead paint or mixed paint, containing ingredients other than those as above enumerated, shall not be deemed guilty of a violation of this act in case the same be properly labeled showing the quantity or amount of each and every ingredient used therein and not specified above, and the name and residence of the manufacturer or person for whom it is manufactured.

It is made the duty of the appellee, in his official capacity, to enforce the statute. A few days before the statute took effect (January 1, 1906), the appellants filed a bill to restrain its enforcement, and prayed a preliminary as well as a permanent injunction. A preliminary injunction was granted. It was dissolved on final hearing, and a decree was entered, dismissing the bill for want of equity.

The grounds of attack upon the statute are that it offends against the 14th Amendment of the Constitution of the United States, in that it deprives appellants of their property and liberty without due process of law, and denies them the equal protection of the laws. How it is contend-

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NOTE.—As to constitutional equality of privileges, immunities, and protection generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

For police regulations as to branding or labeling articles of commerce—see note to Ex parte Hayden, 1 L.R.A.(N.S.) 184.

ed the statute produces these effects will be pointed out hereafter.

[340] *The stress of the case is upon paragraph 17 of the bill and the special paragraphs "A" and "B." To these paragraphs an answer was filed. The legal effect of the others was submitted upon demurrer. Upon the issue of fact formed by the answer to paragraph 17 and the special paragraphs, testimony was taken, and upon it and the demurrer to the other allegations, and the affidavit of one Professor Ladd, the case was submitted.

The bill is voluminous. It alleges that the plaintiffs are manufacturers of mixed paints, and sell their respective products in North Dakota, and that each "had established an enviable reputation for its goods;" that each sold in North Dakota mixed paints containing ingredients other than those specified in the statute, which is set out. It is alleged that mixed paint has an absolutely defined meaning in the trade, and means a paint so thinned, "by admixture of the proper liquid vehicles, as to reduce it to a consistency which makes it ready for use." The term mixed paint, it is alleged, is used in contradistinction to "a paste paint," which paint has also a well defined meaning, meaning a paint ready for use, except that it requires thinning material to give it the necessary consistency. White lead, it is alleged, is a commercial, not a scientific, term, and is commonly understood to be a dry powder consisting of commercial carbonate of lead. When ground in oil to a paste consistency it is commonly called in the trade white lead in oil, colloquially referred to frequently as "white lead." In the statute these terms are used interchangeably, and are intended to denote white lead in oil, as above defined. That various compounds containing no carbonate of lead or other ingredients in addition to carbonate of lead are frequently sold in the market labeled as "white lead." And that the words "any white lead paint, or compound intended for use as such," in the act, "are intended to denote a paste paint, intended as a substitute for white lead, and labeled or sold as 'white lead' or 'white lead in oil,' but which does not contain any carbonate of lead, or contains other ingredients in addition thereto."

[341] *Paragraph 17 is as follows:

"Your orators further show unto your honors that the manufacture of paint, and more particularly of mixed paint, involves many practical problems, the proper solution of which demands the application of a variety of scientific principles, and is the result of a great variety of practical tests and experiments; that the means, methods, and processes employed in said manufacture have changed materially in the course of years to conform to the discovery of new scientific facts and the results of practical experiments; that the technology of paint manufacturing has made gradual and constant progress during the last fifty years, during which time it has undergone an evolutionary process which is still far from completed; that until about twenty-five years ago carbonate of lead was the only material which was universally conceded by manufacturers and users of paint to be a proper pigment to be used in paints requiring or admitting of the use of a white pigment; that since said time, and within the last twenty-five years, oxid of zinc gradually gained recognition among manufacturers and users of paint as being equally appropriate for the purposes for which theretofore carbonate of lead had alone been recognized as appropriate, and has come to be universally conceded as possessing important useful qualities as a white pigment not possessed by carbonate of lead; that within the last fifteen years practical experiments and tests, made with a view to widening the range of white pigments properly usable in the manufacture of paint, have demonstrated the following facts, which are now conceded by the most advanced and most successful paint manufacturers of the world, *viz.:*

"a. That there are materials other than carbonate of lead and oxid of zinc which, in some cases, may be used in connection therewith and in other cases may be used instead thereof, and which, either without carbonate of lead or oxid of zinc, or in connection with one or both of these, according to circumstances, are as efficient as, and in some respects more efficient than, carbonate of lead or oxid of zinc, or a combination of *the two, for the purposes [342] for which the latter are used in paint; that among said materials are (a) sublimed lead (which is an artificial product consisting of sulphate of lead and oxy-sulphate of lead), (b) standard zinc lead white (which is commonly called zinc lead, and is an artificial product, made by the United States Smelting Company, and sold in large quantities, and consists of a combination of sulphate of lead and oxid of zinc united by a furnace process), (c) zinc made from Western ores, which carries in its natural composition varying proportions of sulphate of lead and oxid of zinc, and (d) an artificial opaque white pigment, consisting essentially of zinc sulphid, zinc oxid, and barium sulphate, which is known to the paint manufacturing trade under various trade names, such as lithopone, ponolith, lithophone, charlton white, becton white, and Orr's white.

"b. That there are certain white pigments other than carbonate of lead and oxid of zinc which constitute proper and useful ingredients of paints, and which, if so used in connection with carbonate of lead or oxid of zinc, or a combination of the same, or in connection with one or more of said other materials described in the last preceding paragraph as proper substitutes for carbonate of lead and oxid of zinc, furnish to the paint wherein used important useful qualities not possessed by either carbonate of lead or oxid of zinc, or any of said substitutes therefor; that among said other pigments are sulphate of barium, silica, silicate of magnesia, calcium carbonate, hydrated sulphate of lime, and others; that the proportionate amount of the pigments last named which may properly and usefully be made an ingredient of paint, and whether any of them may be properly used as such ingredients, depends upon a great variety of conditions and circumstances, but all of said pigments may, under proper conditions, serve a highly useful purpose, and where properly used do essentially increase the durability and density of the paint."

It is further alleged that the statute, in condemning inferentially the use of the materials [343] mentioned in paragraph 17 and *its subparagraphs, "as ingredients of mixed paint, and branding them as adulterants, ignores the fact that all said substances constitute proper, useful, and necessary ingredients of paint, is based upon antiquated, obsolete, and quite generally discarded prejudices regarding the ingredients proper, useful, and necessary to be used in paint, and is therefore unreasonable and void."

That complainants and most of the successful paint manufacturers of the United States have for many years maintained, and continue to maintain, in connection with their factories, chemical laboratories, wherein are able, accomplished chemical experts, who are constantly conducting experiments in the qualities and properties of new ingredients to produce the best results regarding the purposes of paint, the materials upon which it is used, and the various conditions to which it may be exposed. And that the business success of such manufacturers largely depends upon the efficiency of said laboratories and experiments, "and their readiness and ability to conform their methods of manufacturing to the truths discovered by said investigations and tests." That such experiments have led to the adoption of improved methods of manufacture and the use of a widening range of ingredients and a constantly increasing degree of efficiency in the paint produced, and, if continued, "is sure to bring about a still higher and gradually increasing degree of merit and efficiency in the paint of the future."

Other allegations of the bill set forth the virtues and usefulness of varnish as a vehicle or thinning material of mixed paint in connection with or in place of one or other of the ingredients of the statute for some purposes and situations, and that the statute, by excluding it, brands it as an adulterant, and is hence void. The bill also charges the statute with inaccuracy in its designation of pure carbonate of lead as one of the ingredients of mixed paint specified, and alleges that it cannot be used for the purpose of manufacturing paint, and that the carbonate of lead which is commonly used and has been used from time immemorial, even in paints of the higher grade, contains *approximately 20 to [344] 30 per cent of other ingredients. It is hence charged that the statute, by specifying "pure" carbonate of lead, and prohibiting as a crime the use of commercial carbonate of lead, "without specifying on a label quantity or amount of each of its ingredients, is unreasonable and void." The bill also attacks with much detail the term "pure colors" in the enumeration of the ingredients by the statute, alleges that such term neither has a definite meaning among the manufacturers of such coloring material nor among manufacturers of paint, nor is it capable of an exact, or even an approximately exact, definition; that there is no line of demarcation between pure and impure colors; that while some dry colors are regarded as "pure" and others "impure" by some manufacturers, there is nothing approaching a consensus of opinion upon the subject, and no rational classification has been attempted; that the standard universally applied to dry colors is not purity, but efficiency; that, with the exception of a very few dry colors of limited use in mixed paints, even the very highest and most expensive grades made or imported contain large and widely varying percentages of elements which have no coloring properties. Illustrations are given, and the bill charges "that said act, in specifying 'pure colors' among the ingredients of mixed paint, and making the use of any but 'pure colors' as such ingredient a crime, unless the manufacturer or dealer stigmatizes the paint by a label, as required in said act, is so uncertain and unreasonable as to be void."

It is also alleged that the only purposes for which paint is used is to preserve and beautify, and that that paint is most efficient which accomplishes those purposes for the longest time, and that any ingredient which tends to such ends is a proper ingredient; that there is no natural standard of the purity of paint, nor a widely-accepted standard; that any enumeration of allowable ingredients, short of an exhaustive enumeration of ingredients which may, under particular circumstances and conditions, give to paint a useful quality, is necessarily unjust and unreasonable, and even [345]such enumeration, *though just to-day, by discoveries may be unjust to-morrow; that, to produce an efficient paint, not the ingredients alone must be considered, but the manner and the proportion of every combination, and the purpose and conditions of the use of the paint; that it is, therefore, impossible to speak of a standard of purity as applied to paint, "nor is it reasonable for any statute to attempt to set up a standard of efficiency of paint by an enumeration of allowable ingredients; the only test of the efficiency of paint being its ability to serve the purposes for which it is intended."

It is further alleged that the requirement of the statute "is intended and calculated to create in the minds of the mixed paint dealers and consumers in the state of North Dakota the erroneous belief that all ingredients of mixed paint other than those specified in said act are adulterants, used for the purpose of cheapening the product, and add no quality of usefulness or efficiency to the mixed paint wherein they are used; that said act, in requiring mixed paint containing any ingredients other than those specified in said act as aforesaid, to be labeled as aforesaid, is a requirement that the manufacturer of and dealer in such paint shall brand the same in such a way as to hold it up to the suspicion and prejudice of the users of mixed paint, and thereby make the sale thereof in said state, if not impossible, at least more difficult and expensive."

That the excluded ingredients (they are enumerated in the bill) will have no tendency by their use to render "mixed paint by those applying the same harmful to health in any sense or degree." That while such act was intended as a police regulation for the prevention of fraud, its provisions are such that it has no tendency to accomplish such end; that the act, by failing to specify the maximum and minimum of the proportionate amount of the ingredients specified, permits the manufacture and sale of mixed paint containing those ingredients in such proportions as to make it absolutely inefficient and useless and a fraud upon the purchaser; that by holding up to the prejudice of dealers in and users 346]of other mixed paint has the tendency, *in many instances, to give inferior brands a preference over superior brands of mixed paint. And that such act has no tendency to accomplish the prevention of fraud, because it does not prevent the manufacture and sale "of any imaginable paint concoction in paste form," or impure linseed oil, or any spurious article, as "white lead," or "white lead in oil," or as "white lead paint," because a paint ready for use may be lawfully made of such concoctions and substitutes; "that the manufacture and sale of paste paint is a substantial part of the paint manufacturing and selling business of the United States; that millions of dollars worth of white lead in oil and compounds intended as substitutes therefor are annually manufactured and sold in the United States; that tinting colors for use as an ingredient of paint are manufactured in large quantities and sold in cans, in paste form, throughout the United States; that linseed oil, as such, is an article of commerce throughout the United States;" and that the statute, by failing to place restriction on the manufacture or sale of such paint and material, but imposing penalties and restrictions on the manufacturers of mixed paint, unjustly discriminates against the latter, and, for the same reason and "the other facts and circumstances" stated in the bill, they will be deprived of their property without due process of law.

It was also alleged that each of the complainants manufactures "scores of different kinds and shades of mixed paints, differing from each other in chemical composition; that even the same kind and shade of mixed paint manufactured by any one of your orators has no fixed chemical composition, but varies in such composition from time to time and practically with each lot manufactured, by reason of the wide variations in the chemical composition of the constituent ingredients, more especially the chemical composition of the dry colors used; that in order to properly label the cans of mixed paint manufactured by your orators, and sold in North Dakota, showing 'the quantity or amount of each and every ingredient used therein, and not specified' in said act, each of your orators *would have to have a[347] chemical analysis made of each lot of mixed paint before putting the same up in cans or other containers." It is alleged that this would add materially to the cost of manufacture of mixed paints, cast a burden upon them from which the manufacturers of other paints are free, and would deprive them of their property without due process of law.

It is further alleged that there are dealers in North Dakota who have on hand a stock of mixed paint subject to the act, and who will be subject to criminal prosecution unless the cans containing the same be opened and analyzed and labeled, which opening would make the paint unsalable; that dealers, who, in the future, shall purchase from any of the complainants, and the distributing agents and salesmen of complainants, will be subject to criminal prosecution; and thereby a multiplicity of criminal prosecutions will ensue, and suits to enforce payments for paints sold or to be sold. And if the complainants should label the mixed paints manufactured by them as required by the act they would not only be subject to the expense thereof, but that their products will be held up to suspicion and prejudice of the dealers in and users of the same, which will make it either impossible or more difficult and expensive to sell their products in said state, all of which will produce incalculable and irreparable injury to complainants; that the dealers in paints who are now subject or may be subject to prosecution under such act will not have sufficient interest to or cannot successfully raise the defense of the invalidity of the act, "inasmuch as such defense involves the consideration of the complex state of facts hereinbefore set forth."

Fear is expressed that most of such prosecutions will result in conviction, and that by such the brands of mixed paints involved therein will be branded as adulterated and illegal products, and will thereby be rendered unsalable, all of which will produce incalculable and irreparable injury to complainants, and will constitute the taking of their property without due process of law and the denial to them of the equal protection of the laws.

[348] *It is difficult to separate the admissions and denials of the answer to paragraph 17. It admits that practical problems are involved in the manufacture of paints, particularly of mixed paints, the solution of which is the result of a variety of practical tests and experiments; "that the technology of paint manufacture has made gradual and constant progress during the past fifty years, during which time it has undergone an evolutionary process." It admits that formerly carbonate of lead was the only material which was universally used as the proper pigment in paints requiring or admitting of the use of a white pigment, and that oxid of zinc has gained recognition as in many cases appropriate as a white pigment, but denies that such recognition has come within the last twenty-five years; on the contrary, asserts it has been recognized and used for a period of thirty years. Admits that there are materials other than carbonate of lead and oxid of zinc used in connection with the latter or instead of them, but denies their equal efficiency; on the contrary, alleges that tests and experiments have not determined or demonstrated the value and usefulness of such materials, and further alleges that their use and value have not progressed beyond the experimental stage. That about one half of the leading manufacturers entirely reject them, or reject them because, upon test, they have proved to be unsatisfactory and inefficient, and others, that time has not yet demonstrated their value. Admits that zinc made from Western ores is valuable and efficient as a pigment, provided sulphate of lead, incidental to its production, does not exceed in quality 5 per cent of its constituent elements, and alleges that the percentages of the sulphate of lead are widely different.

The answer to subparagraph "b" of paragraph 17 admits that in making the colored paints there mentioned it is necessary to employ some of the articles mentioned in connection with some pigment other than carbonate of lead, and that the latter would change or modify the exact shades sought to be produced. But it is alleged on information and belief that the aggregate of all mixed paints produced, sold, and consumed in *North Dakota, in the preparation [349] of which it is necessary to exclude carbonate of lead, and to include one or more of the substituted materials mentioned in the bill, does not exceed 25 per cent of the aggregate of all mixed paints which may be prepared and produced by the use alone of carbonate of lead and oxid of zinc as pigments. Save as to those admitted, the answer denies the efficiency of the materials mentioned, and avers that the general use of them is "to cheapen and adulterate the paints wherein they are employed," and, of all substances known, they are best adapted and lend themselves most readily and are commonly used as adulterants to cheapen mixed paints. It is further averred that 70 to 75 per cent of the paint used in the state are mixed paints, and that their adulteration has become and is a great evil. "That no other substances have been discovered or known, which, by their inherent qualities, lend themselves so readily to, or are so commonly employed for, such purpose of fraud and deception, as those described in said subparagraph 'b.'"

Mr. **Sigmund Zeisler** argued the cause, and, with Mr. Henry L. Stern, filed a brief for appellants:

Corporations are persons within the provisions of the 14th Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255.

The classification, though ostensibly between paints, is in reality between paint manufacturers.

Connolly v. Union Sewer Pipe Co. 184

U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The exercise of the police power must be reasonable. The question of the reasonableness of a state statute ostensibly passed in the exercise of the police power is a judicial question.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; Dobbins v. Los Angeles, 195 U. S. 223, 235, 237, 239, 49 L. ed. 169, 174–176, 25 Sup. Ct. Rep. 18; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Holden v. Hardy, 169 U. S. 366, 395, 42 L. ed. 780, 792, 18 Sup. Ct. Rep. 383; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4.

While every intendment is to be made in favor of the lawfulness of the exercise of this power, the courts will not imagine the existence of some undisclosed and unknown reason for its exercise. The simple decision of the legislature cannot be held to constitute such reason.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 699, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565; Dobbins v. Los Angeles, 195 U. S. 223, 237, 238, 49 L. ed. 169, 175, 176, 25 Sup. Ct. Rep. 18; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Lochner v. New York, 198 U. S. 45, 56, 57, 49 L. ed. 937, 941, 942, 25 Sup. Ct. Rep. 539.

A statute ostensibly passed in the exercise of the police power must be judged by its natural effect, and not by its proclaimed purpose.

Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539; Mugler v. Kansas, supra; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341.

A statute which restrains the liberty or property rights of individuals, though ostensibly passed in the exercise of the police power, cannot be held valid unless it has a real or substantial relation to some legitimate object of the police power which its provisions reasonably tend to accomplish.

Mugler v. Kansas, supra; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341; Lochner v. New York, supra; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Even if a statute is fairly referable to the police power of the state, still, if it impairs or destroys a right secured by the Federal Constitution, it is invalid.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

It is conceded that, in making regulations, providing penalties, or imposing liabilities in the exercise of the police power, the legislature has the right to make classifications. But classification must have some reasonable basis. The differences which will support class legislation must be such as, in the nature of things, furnish a reason for separate laws. The differences must bear a reasonable relation to the purpose of the statute. Arbitrary designation or selection is not classification. When burdens are placed upon some and not upon others similarly situated with respect to the purpose for which such burdens are imposed, the classification is arbitrary and illegal.

Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Gulf, C. & S. F. R. Co. v. Ellis, supra; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443. 31 S. W. 781; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

The liberty guaranteed by the 14th Amendment embraces the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

To enjoy the privilege of pursuing an ordinary calling or trade upon terms of equality with all others in similar circumstances is an essential part of the rights of liberty and property as guaranteed by the 14th Amendment.

Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Bailey v. People, 190 Ill. 35, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98.

Any law which, without a valid reason, annihilates the value of property, restricts its use, or takes away any of its essential attributes by imposing onerous conditions upon the right to hold or sell it, deprives its owner of property without due process of law.

People v. Hawkins, supra.

To require a label upon some mixed paints, while exempting others, is not only to burden them with peculiar expense, but also to require them to bear a badge of inferiority which diminishes their value and impairs their selling qualities.

Ibid.

To restrict one's freedom of competition upon equal terms with others in the same business is prohibition.

Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

The 14th Amendment forbids that any impediment be interposed by a state statute to the pursuits of anyone except as applied to the same pursuits by others standing in the same relation to the purpose of the statute.

Barbier v. Connolly, supra; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 357; Connolly v. Union Sewer Pipe Co.; Gulf, C. & S. F. R. Co. v. Ellis; and Cotting v. Kansas City Stock Yards Co.,—supra.

It is not necessary that the character of the discrimination or the attendant circumstances should justify an inference of malice, ill will, or corrupt favoritism on the part of the legislature, to condemn class legislation. It is enough that no rational basis for the discrimination can be discerned.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 112, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30.

Classification must rest upon naturally existing distinctions. The legislature may not create classes by its fiat.

State ex rel. Wyatt v. Ashbrook and State v. Julow, supra.

The 14th Amendment is violated when there is no fair reason for a statute that would not require, with equal force, its extension to others whom it leaves untouched.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638.

Where the enforcement of an unconstitutional law or ordinance would lead to a multiplicity of suits or destroy property rights, injunction to restrain its enforcement is the proper remedy.

Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Mr. **John S. Watson** argued the cause, and, with Messrs. T. F. McCue and Ball, Watson, Young, & Hardy, filed a brief for appellee:

The police power may be exercised for the general well-being of the community; it embraces regulations designed to promote the public convenience or the general welfare as well as to promote the public health or public morals, or the public safety.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. Rep. 126.

The 14th Amendment does not deprive the states of the police power reserved to them at the time of the adoption of the Constitution.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

The validity of a police regulation must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. Is the legislation assailed in this action properly described, in the light of the record, as arbitrary, unreasonable, and capricious, or did its enactment involve the exercise of legislative judgment and discretion? Is the classification based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection?

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

A legislature is assumed to have acted within constitutional limitations upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole; and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its powers.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

It is enough if the law has some tendency to accomplish the desired end.

Powell v. Pennsylvania, supra.

It has never been intimated that all possible forms of mercantile fraud must be dealt with, or none; it has always been characteristic of English legislation to proceed tentatively, step by step, and many important reforms could have been accomplished in no other way.

Freund, Pol. Power, p. 755.

The police power of the state embraces its whole system of internal regulation, and is as broad and plenary in its effect as the taxing power itself. It embraces all regulations designed to promote the public convenience or the general prosperity, as well as those intended to promote the public health or the public morals or the public safety.

Cooley, Const. Lim. 7th ed. p. 829; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Chicago, B. & Q. R. Co. v. Illinois, supra; Crossman v. Lurman, 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097; Schollenberger v. Pennsylvania (Paul v. Pennsylvania) 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The police power will be upheld for the prevention of fraud or deception upon the public and to promote fair dealings.

Schollenberger v. Pennsylvania, supra; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Stolz v. Thompson, 44 Minn. 271, 46 N. W. 410; People v. Webster, 17 Misc. 410, 40 N. Y. Supp. 1135; State v. Snow, 81 Iowa, 642, 11 L.R.A. 355, 47 N. W. 777; State v. Aslesen, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220; State v. Hanson, 84 Minn. 42, 54 L. R.A. 468, 86 N. W. 768; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Atchison, T. & S. F. R. Co. v. Matthews, supra.

Mr. Justice **McKenna** delivered the opinion of the court:

It appears from the evidence that the statute which is assailed by appellants was one, among others, passed to prevent the adulteration of articles or to provide for the publication of their composition. That both purposes are within the competency of the state can hardly be denied. A discrimination is, however, asserted to have been made in the exercise of the power, with the following results: (1) The imposition of the burden of analyzing and labeling the ingredients of mixed paints, from which burden the manufacturers of paste paint and manufacturers of mixed paints containing only the ingredients specified in the act are to be free. (2) Holding up to the prejudice of dealers in and users of mixed paints containing ingredients other than those specified, branding them as suspicious or adulterated, and rendering them unsalable or less salable than mixed paints containing the statutory ingredients, though more efficient than the latter for certain purposes. We can see that expense will be cast on the manufacturers of mixed paint not containing ingredients enumerated in the statute, but that such paint will be branded as adulterated is not easy to accept, and seems to be opposed by other allegations in the *bill. It is averred that the [354] complainants have a yearly increasing trade in the state of North Dakota, which has attained to many thousands of dollars per annum, and that, by the high quality of their goods and by advertising, they have attained an enviable reputation for them. How the firmness and profit of that trade, how the excellence and degree of that reputation, can be affected by revealing the composition of the goods, is not by us discernible. Manufacturers who use inferior materials because they are so, or from a mistaken opinion of their quality, though they have statutory sanction, would be more affected than complainants. Consumers of paint, we may assume, like the consumers of other kinds of goods, seek excellence in them, and, where excellence is demonstrated by use, will care little of what pigments it is composed. This, however, is anticipating somewhat, and we will pass to the statute, consider its purpose, and see whether its classification is justified by that purpose.

We will omit from citation the cases in which this court has passed upon the power of the states to classify objects for the purpose of government. A review of them is not necessary in this case. Counsel have collected and analyzed them, applied or rejected them as they have thought they supported or opposed their respective contentions. We have declared many times, and illustrated the declaration, that classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in "ill-advised, unequal, and oppressive legislation." Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238. And this necessarily on account of the complex problems which are presented to the government. Evils must be met as they arise and according to the manner in which they arise. The right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, exact wisdom and nice adaptation of remedies are [355]not required by *the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it.

Keeping these principles in mind, let us examine the North Dakota statute. Its purpose, as expressed in the title, is "to prevent the adulteration of, and deception in the sale of, white lead and mixed paints." It attempts to accomplish this purpose by the following requirements: (1) All white lead and compounds intended for use as a substitute therefor must be labeled to clearly show the per cent of each mineral therein. (2) All mixed paints must show their true composition, unless made of pure linseed oil, carbonate of lead, or oxid of zinc, turpentine, Japan dryer, and pure colors. (3) All substitutes for linseed oil in the preparation of paints must be clearly shown on the label.

The second and third divisions we are concerned with in this case, and it is insisted their requirements work a discrimination between mixed paints which contain and those which do not contain any ingredients other than those specified. It will be observed that the manufacture for sale and the selling of the first kind is made a misdemeanor unless the paint be labeled as required by the statute. The manufacture or sale of the other kind is free from such consequence or condition. It is also charged that the statute discriminates between mixed paints and paste paints, it being asserted that the latter, no matter what their ingredients, need not be labeled. To this charge we may immediately answer that it is open to contest whether the act exempts paste paint from its requirements, and the executive officers of the state have construed it as not exempting them. But be this as it may, there is a distinction between the paints, and the evils to which the statute was addressed may not exist or be as flagrant in one as in the other. There indeed may be a degree of competition between them, but other circumstances and conditions may have directed the legislative discretion. This record certainly does not present any *data* to make it certain that the discretion was arbitrarily exercised. Legislation which regulates business *may[356] well make distinctions depend upon the degrees of evil without being arbitrary or unreasonable. Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, ante, 195, 28 Sup. Ct. Rep. 89.

2. The argument which attacks the discrimination between mixed paints is an elaboration of paragraph 17 of the bill. It is able, circumstantial, and variously illustrated. It has been given careful consideration, but it would extend this opinion too much to answer it in detail or review its specifications. It is ultimately grounded on the contention that the pigments enumerated in the statute, and hence denominated statutory pigments, are not more efficient, —may be not as efficient to the manufacture of paint, either in themselves or as depending upon the particular use to which paint may be put, the proportion of ingredients varying with such use, or even with the fancy or taste of the user, or the atmospheric conditions to which paint may be exposed, as the pigments mentioned in subparagraphs "A" and "B" of paragraph 17, and hence called class "A" and class "B" pigments. And it is contended that there is "neither a standard of purity nor general or widely accepted standard of purity;" and that the statute, by making a standard of some ingredients and excluding others "useful, efficient, harmless, and in some cases most essential," is an arbitrary discrimination and an improper exercise of the police power of the state, not justified by the comparative newness of the excluded ingredients, or because they are not used by unprogressive manufacturers, or used by unscrupulous ones in excessive proportions to cheapen their products. And this, it is urged, is all that is established against such ingredients. Besides, it is further urged, the charge that they are used to cheapen paint is true of one of the statutory ingredients.

The claims for class "A" and "B" pigments are controverted, and if they are sustained at all are sustained upon the balancing of, and the judgment between, the testimony of experts, certain publications and exhibits. But a problem of a different kind was presented to the legislature of North Dakota. It was not what scientific men might find out by chemical and laboratory *tests, or progressive men might discover by[357] practical experiments, but what the people of the state could find out or be justified in accepting as established. It was the experience of the people, not the acts of some progressive manufacturers, which directed the legislation, and it was to protect the people, when following the opinions formed from that experience, from deception, that the statute was enacted. It may be that the purpose could have been accomplished better in some other way. It may be that it would have been more entirely adequate, let us say, even more entirely just, to have required that all paint should be labeled; the statute nevertheless cannot be brought under the condemnation of the 14th Amendment. Legislatures, as we have seen, have the constitutional power to make unwise classifications. But we may be going too far in concession to the argument of appellants. The legislature of North Dakota may have met the evils which exist as best it could, and there is a strong presumption that it did. At any rate, a fair question was presented, whether to take as a standard the ingredients that years of use had demonstrated as excellent or make regulation universal. We think it would be limiting the power of the state too much to say that a judgment exercised under such circumstances must be condemned as denying the equal protection of the laws, or that the liberty assured by the Constitution of the United States in the 14th Amendment gives a right to either progressive or conservative tendencies in legislation.

Appellants not only attack the standard adopted by the statute, but attack the use made of it. They assert that the standard is of "purely negative character," in that it fails to "require all allowable ingredients essential for efficiency to be used, and its failure to prescribe maximum and minimum percentages," and, therefore, it is insisted, "permits of the manufacture and sale under the special sanction of the law of that which is inefficient, useless, and a fraud upon the purchaser." It is besides asserted that the statute enumerates among the allowable ingredients a material which [358] cannot be used, to wit, *pure carbonate of lead, and it is asked whether a statute having these effects can be a valid exercise of the police power of the state. The answer is ready enough. The enumeration of "pure carbonate of lead" may be corrected into commercial carbonate by a perfectly allowable exercise of construction; and as to the other charge, the inefficiency of the statutory ingredients on account of the failure to define the proportions in which they must be used goes to the defect or incompleteness of the legislation, not to its legality. Were the proportions ever so exactly defined, the relation of mixed paints to the resultant product or its liberty of sale or power of competition would not be lessened.

There is a special and earnest criticism of the provision of the statute requiring varnish when used as a thinning material to be specified, and a like criticism of the term "pure colors" to designate one of the statutory ingredients. "The exclusion of varnish," it is said, "from the list of allowable ingredients is indefensible and undefended." The bill alleges, and it is not denied, that there is a very large demand for certain mixed paints, which are enumerated, that are capable of producing a high gloss for decorative purposes and have high resisting power to moisture, and that varnish is the "only thinning material now known which may appropriately be used as an ingredient of mixed paint to produce said effects." "Notwithstanding these admitted facts," counsel's comment is, "varnish is branded as an adulterant by the statute."

The term "pure colors," it is alleged, is intended to refer to coloring material used by paint manufacturers in powdered form, and is known in trade as "dry colors;" that the term "pure colors" neither has a definite meaning nor is "it capable of an exact or even approximately exact definition;" that some dry colors are regarded as "pure" and others "impure" by individual manufacturers, but there is "nothing approaching a consensus of opinion," and "no rational classification on the subject has ever been attempted." The standard "applied to dry colors is not purity, but efficiency."

*We regard these criticisms answered by [359] our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. It must not be forgotten, however, that inaccuracies of definition may be removed in the administration of the law. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used,—a burden, maybe, but irremediable by the courts,—may be inevitable, in legislation directed against the adulteration of articles, or to secure a true representation of their character or composition.

Decree affirmed.

VANDALIA RAILROAD COMPANY, Plff. in Err., v. STATE OF INDIANA EX REL. CITY OF SOUTH BEND.

(See S. C. Reporter's ed. 359–368.)

Error to state court — Federal question — decision on non-Federal ground.

The decision of a state court that the Federal questions alleged to be involved in mandamus proceedings were entirely put out of the case by the facts set forth in the return to the alternative writ, presenting a question obviously not of a Federal character, will not be reviewed by the Federal Supreme Court, where there is nothing in the case to justify a suspicion that the Federal questions were sought to be avoided, or were avoided by giving an unreasonable construction to the pleadings.

[No. 26.]

Argued October 18, 1907. Decided December 16, 1907.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of St. Joseph County, in that state, awarding a peremptory writ of mandamus to compel a railroad company to improve a street crossing. Dismissed for want of jurisdiction.

See same case below, 166 Ind. 219, 76 N. E. 980.

The facts are stated in the opinion.

Mr. **Samuel Parker** argued the cause, and, with Messrs. John G. Williams and Anderson, Parker, & Crabill, filed a brief for plaintiff in error:

This court has jurisdiction of a cause in which it appears from the record that the highest state court failed to give proper effect to a decree of a circuit court of the United States.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

The state supreme court declared that the return to the alternative writ was based upon the theory that the contract between the railway company and the city of South Bend, relator, was a bar to the action for the mandate, and having so declared, held, using its own words, that this conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised. Under the authorities, this amounts to, and in effect is, a decision against the Federal right and immunity claimed.

Minneapolis & St. L. R. Co. v. Gardner, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. Rep. 656; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, 205; Mitchell v. Clark, 110 U. S. 633, 645, 28 L. ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup Ct. Rep. 341.

Messrs. **L. T. Michener** and **Harry R. Wair** argued the cause, and, with Messrs. Frank H. Dunnahoo and W. W. Dudley, filed a brief for defendant in error:

The decision of the state court was placed upon an independent ground, not involving in any way a Federal question, and that ground is sufficient to sustain the judgment.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111; Beaupré v. Noyes, 138 U. S. 397, 401, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77, 80; Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Mr. Justice **Brewer** delivered the opinion of the court:

This action was commenced by the defendant in error in the circuit court of St. Joseph county, Indiana, to compel the Terre Haute & Logansport Railway Company to open its tracks and yards within Calvert street in South Bend, to *make the roadbed [363] conform to the street grade, to plank the crossing of the same, and to make that crossing safe and convenient for the passage of persons and vehicles. While the action was pending in the state courts the Terre Haute company and certain other

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NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Federal Supreme Court, see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

companies consolidated and formed a new corporation under the name of the Vandalia Railroad Company, which succeeded to all the rights and duties of the original defendant, carried on the further litigation, and is the plaintiff in error.

Upon the complaint an alternative writ of mandamus was issued. To this writ and the complaint the railroad company demurred, and the demurrer was overruled. The company then filed its return to the alternative writ, and a demurrer of the plaintiff thereto was sustained. The railway company refusing to plead further, a peremptory writ of mandamus was issued as prayed for. On appeal to the supreme court of the state the decision of the circuit court was affirmed. 166 Ind. 219, 76 N. E. 980. Thereupon this writ of error was sued out.

To fully understand the questions presented a statement of the matters set forth in the complaint and return is necessary.

The complaint alleges that on November 10, 1884, the city granted a franchise to the railway company to cross the streets and alleys of the city on the express condition that when it did so the roadbed should be made to conform strictly to the grade of the street or alley it crossed, and that the defendant should so construct and maintain its road at such crossing as to cause the least possible obstruction to the passage of persons and vehicles over it; that the railway company accepted said franchise and had ever since acted under it.

It further described that portion of the street whose grade had been established and which was occupied by the defendant, and which it had been notified to plank and improve.

The demurrer to the writ raised the question whether the action was not founded alone upon the contract created by the franchise, and asserted that the duties of a corporation, springing wholly out of contract, [364] cannot be enforced by writs *of mandamus; also whether the plaintiff could not of itself have constructed the crossing, and brought an action for the cost thereof and the penalty, as provided in the ordinance, and thereby secured adequate redress without resorting to the extraordinary remedy of mandamus. But obviously these matters are of a local nature, and present no question under the Federal Constitution.

The return of the defendant alleged that at the time the original franchise was granted the place at which the improvement of the crossing was sought to be compelled by this action was outside the limits of the city of South Bend; that in 1887 it was taken into the corporate limits of the town of Myler, and thereafter, in 1892, said town of Myler was annexed to and became a part of the city of South Bend; that before this annexation, and while the town of Myler existed, certain parties filed with the board of trustees of that town a petition for the establishment of a street, at first called Elmira, but afterwards Calvert, street, over the ground where the plaintiff now claims said street is located; that the Terre Haute & Logansport Railroad Company, then the owner of the real estate, had no notice of the proceedings had for the establishment of said street and took no part therein; neither did it receive any compensation on account thereof; that prior thereto that company had placed a trust deed on the property, which, after the attempted establishment of the street, was foreclosed, by suit in the United States circuit court for the state and district of Indiana, and the property purchased by one Joshua T. Brooks, who directed a conveyance to the Terre Haute & Logansport Railway Company, the defendant herein; that neither the trustee in said trust deed nor any holder of bonds secured by it was a party to the proceedings for the establishment of said street, nor was any notice of said proceedings given to said trustee or any bondholder, nor did either have any knowledge thereof; that no damages for the opening of the street were assessed or tendered to either, and that, at the time of the purchase of the property and the payment of the *pur-[365]chase price, neither the purchaser nor the railroad company nor the defendant had any knowledge of the proceedings to locate and open the said street. A violation of the 14th Amendment was in terms claimed, in that an appropriation of its property acquired by the proceedings in the Federal court was sought to be made without compensation. The return further set forth that, springing out of these facts, there was a dispute between the railroad company and the city of South Bend as to the validity of the proceedings for the opening of said street, and that "on January 17, 1902, for the purpose of adjusting and settling the said conflicting claims of the relator and the defendant, the relator, acting by its then board of public works, made and entered into a contract whereby the defendant agreed to construct a steel viaduct above and across its tracks at said Elmira street where claimed by the relator, and the relator agreed to construct the approaches thereto, and each agreed to perform the other agreements set forth in said contract, which is in writing and which was reported to the common council of said city of South Bend, which, by ordinance duly passed and enacted, ratified and approved said contract. Said ordinance and said contract are in the following words and figures, to wit: 'Ordinance. An ordinance ratifying a contract between the department of public works and the Terre Haute & Logansport Railway. Be it ordained by the common council of the city of South Bend, that the within contract, made on the 17th day of January, 1902, between the department of public works and the Terre Haute & Logansport Railway Company, is hereby ratified and approved. This agreement made this 17th day of January, 1902, between the city of South Bend, by and through its board of public works, and the Terre Haute & Logansport Railway Company, witnesseth,'" etc. The return further averred that the defendant was ready at all times to construct the said viaduct according to said contract and ordinance, but the city had not performed any of the agreements con- [366] tained *in said contract, to be performed by it, and that it had not given to the defendant any written or other notice to construct the viaduct according to the provisions of said contract.

In reference to this return the supreme court, in its opinion, made this statement of the contention of the parties:

"Appellant's counsel assert and argue an insufficiency of the notice and return of service in the special proceedings of the board of trustees of the town of Myler for the establishment of Elmira street; a want of notice to the mortgagee of the property to be appropriated; and, in consequence, a taking of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

"Appellee's counsel insist that the only question presented to and considered by the circuit court upon the demurrer to the return was the validity of the agreement therein pleaded."

It declared that the appellee's view was the correct one, and that the only question to be considered was the validity of the agreement therein pleaded. It then proceeded to discuss its validity, holding that it was beyond the power of the city, saying: "The agreement entered into between the relator and the railway company was, on the part of the city, an unwarranted surrender of legislative power and control over the crossing, and an unauthorized assumption of the burdens of another, and is invalid and void."

It is now contended on the part of the defendant in error that no Federal question was passed upon by the supreme court of the state and that, therefore, the writ of error should be dismissed; while the plaintiff in error insists that there are two Federal questions: First, whether the state court gave due effect to the proceedings of the Federal court in the foreclosure and sale of the property under the trust deed; and, second, whether the proceedings for the opening of the street were had without notice to the defendant and its predecessor, and so operated to take private property without compensation. This involves a consideration of the meaning and scope *of the [367] return. It is true that in that return it is alleged that no notice was given to the railroad company or its predecessor or the trustee in the trust deed or any bondholder, and that therefore there was no valid appropriation of the property of the railroad company to street purposes. It is also stated that by the foreclosure proceedings in the Federal court the full title to the property passed to the defendant,—a title which in its origin antedated the attempt to open the street. But the supreme court held that these were merely matters of inducement leading up to the making of the contract for a viaduct; that they were only presented for the purpose of showing the state of the controversy, which was settled between the parties by the making of this alleged contract. In other words, it did not pass upon the Federal questions, but held that they were put entirely out of the case by facts set forth in the return, presenting a question obviously not of a Federal character.

Now, the construction of a pleading, the meaning to be given to its various allegations, and the determination of the validity of a contract made by parties in reference to real estate in the state, are, as a rule, local questions. Doubtless this court is not concluded by the ruling of the state court, and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment. Newport Light Co. v. Newport, 151 U. S. 527, 536, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429, and cases cited in the opinion. A case may arise in which it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings, but that is not this case. Even if it be conceded that the conclusion of the supreme court of the state is not free from doubt, there is nothing to justify a suspicion that there was any intent to avoid the Federal questions. The construction placed by that court upon the pleading was a reasonable one. It said in reference to the matter:

"The manifest theory of the pleader was to show that a reasonable and bona fide con- [368]troversy existed as to the validity *of the proceedings for the establishment of Elmira street by the board of trustees of the town of Myler, as an inducement to and consideration for entering into the compromise agreement pleaded, and that said contract having been legally executed and not rescinded, the railway company was thereby absolved from the duty declared upon, to construct and maintain a grade crossing at the point in controversy. 'A single paragraph of answer cannot perform the double function of denying the cause of action, and of confessing and avoiding it. It must be one thing or the other, but it cannot be both; and its character, in this respect, must be determined from the general scope of its averments.' Kimble v. Christie, 55 Ind. 140, 144. [In our opinion] the return under consideration was intended to confess and avoid the duty sought to be enforced, and its sufficiency must be determined upon that theory. This conclusion forbids a discussion of the legality of the various steps taken in the proceedings to establish Elmira street, as well as the constitutional question raised."

We think it must be held that the decision by the Supreme Court of the state was placed upon a sufficient non-Federal ground, and therefore the writ of error is dismissed.

JOSÉ PARAISO, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 368–372.)

Error to supreme court of Philippine Islands — Federal question — when raised in time.

1. The denial of a motion for rehearing by the supreme court of the Philippine Islands cannot serve to bring Federal questions into the record, so as to sustain a writ of error from the Supreme Court of the United States.

Error to supreme court of Philippine Islands — Federal question — how raised.

2. A conviction of falsification of documents under P. I. Pen. Code, art. 300, clauses 4, 7, is not reviewable in the Federal Supreme Court as involving the denial of the protection afforded by the Philippine Bill of Rights, where the most that can be gathered from the record is that the accused contended that the complaint was bad by the rules of criminal pleading.

Criminal complaint — sufficiency.

3. The requirement of the Philippine Bill of Rights, that the accused be advised of the nature and cause of the accusation against him, is satisfied where such complaint, however open it may be to criticism on demurrer, supposing the strict rules of the old common law to be applied, leaves no doubt in the mind of a person of rudimentary intelligence that it means to charge the accused with falsification of documents, contrary to the Philippine Penal Code.

Appeal and error — questions reviewable.

4. Errors not assigned will not be considered by the Federal Supreme Court on writ of error.

[No. 23.]

Submitted December 2, 1907. Decided December 16, 1907.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction of falsification of documents in the Court of First Instance of the Province of Laguna. Dismissed for want of jurisdiction.

See same case below, 5 Philippine, 149.

The facts are stated in the opinion.

Messrs. **Aldis B. Browne** and **Alex. Britton** submitted the cause for plaintiff in error.

Solicitor General **Hoyt** and Assistant Attorney General **Russell** submitted the cause for defendant in error:

The constitutional or other Federal claim must be real and substantial in order to give jurisdiction to this court; and the bare averment of a Federal question is not sufficient; there must be at least color of ground therefor.

Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; St. Louis, C. G. & Ft. S. R. Co. v. Missouri, 156 U. S. 483, 39 L. ed. 504, 15 Sup. Ct. Rep. 443; Clarke v. McDade, 165 U. S. 172, 41 L. ed. 674, 17 Sup. Ct. Rep. 284; Wilson v. North Carolina, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; American R. Co.

v. Castro, 204 U. S. 453, 51 L. ed. 564, 27 Sup. Ct. Rep. 466.

Further, the claim must be seasonable; it must be made at the proper time, in the proper way; that is, in the trial court, or at least, in state cases, before final judgment in the highest court of the state.

Lawler v. Walker, 14 How. 149, 14 L. ed. 364; Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Morrison v. Watson, 154 U. S. 115, 38 L. ed. 111, 14 Sup. Ct. Rep. 995; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 88; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 658, 41 L. ed. 1152, 17 Sup. Ct. Rep. 709; Citizens' Sav. Bank v. Owensboro, 173 U. S. 643, 43 L. ed. 843, 19 Sup. Ct. Rep. 530, 571; Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84.

A constitutional question giving jurisdiction to this court is not presented by a record which merely shows that the question is contained in the specifications of error, made for the purposes of appeal, and was not presented to the trial court.

Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Osborne v. Clark, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319; Serra v. Mortiga, 204 U. S. 470, 51 L. ed. 571, 27 Sup. Ct. Rep. 343.

In the present case the record shows that plaintiff did not raise the question until he applied for a rehearing to the Philippine supreme court. It has been held directly that a privilege of immunity under the Constitution cannot be set up in this court when suggested for the first time in a petition for rehearing after judgment.

Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Sayward v. Denny, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777.

Mr. Justice **Holmes** delivered the opinion of the court:

The plaintiff in error was convicted of falsification of documents, under article 300, subdivisions 4, 7, of the Philippine Penal Code. He brings the case here as one in which a statute of the United States is involved, under the act of July 1, 1902, chap. 1369, § 10. 32 Stat. at L. 695, U. S. Comp. Stat. Supp. 1907, p. 214. By the article mentioned a public official is subjected to imprisonment and fine if he commits a falsification, clause 4, "by perverting the truth in the narration of facts," or, clause 7, "by giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original." It is assigned as error that the plaintiff in error was required to answer without being advised of the nature and cause of the accusation against him, and that he was convicted without due process of law. It is argued further, although not assigned as error, that the sentence inflicted a cruel and unusual punishment, by reason of the amount of the fine and the length of the term of imprisonment; and still further, that the fine was greater than that which the statute imposed, all contrary to the Philippine Bill of Rights. Act of July 1, 1902, chap. 1369, § 5. 32 Stat. at L. 691, 692.

There is no suggestion in the record that any of these questions *were raised at any [370] stage below, except in an agreement of counsel that the full record showed that before any evidence was received the plaintiff in error asked leave to withdraw his plea of not guilty and substitute the statement that he did not know how to plead, which was denied, and that he objected to the reception of any evidence in support of the complaint, because it was incapable of being sustained by evidence, which objection was overruled. There was a motion for rehearing, on the grounds set out in the assignment of error, but, as the motion was denied, that cannot be relied upon here. See McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533. It would be going far in allowance for different habits of thought and action, to treat what was done as equivalent to a demurrer. The court below does not so interpret it, but says that no exception was taken to the sufficiency of the complaint. It would be going farther to treat it as setting up the Philippine Bill of Rights in analogy to a claim of constitutional rights in a circuit court of the United States. If a case is brought up from the circuit court on the ground that it involves the construction or application of the Constitution of the United States, the record must show that the question was raised for the consideration of the court below. Carey v. Houston & T. C. R. Co. 150 U. S. 170, 181, 37 L. ed. 1041, 1044, 14 Sup. Ct. Rep. 63; Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Cornell v. Green, 163 U. S. 75, 78, 41 L. ed. 76, 77, 16 Sup. Ct. Rep. 969; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 619, 620, 44 L. ed. 911–913, 20 Sup. Ct. Rep. 822; Arkansas v. Schlierholz, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229. The most that could be gathered from this record is that the plaintiff in error contended that the complaint was bad by the rules of criminal pleading. See Cornell v. Green, 163 U. S. 75, 79, 41 L. ed. 76, 77, 16 Sup. Ct. Rep. 969. There was no hint that he relied on the Bill of Rights or contended that the complaint would not satisfy that. The Bill of Rights, in all probability, was an afterthought when everything else had failed.

Our consideration of the case properly might stop here. But, as the rule laid down probably was not well known, we will add that we find nothing in the errors as-[371]signed. The complaint, *however open it might be to criticism on demurrer, supposing the strict rules of the old common law should be applied, would leave no doubt in the mind of any person of rudimentary intelligence that it meant to charge the defendant with falsely entering on the stubs of certain specified tax certificates smaller sums than those shown by the certificates and actually received by him, and with altering such stubs to lower sums, with intent of gain; that is to say, with intent to settle his accounts as a public officer on the showing that less was due than was due in fact, contrary to article 300, clauses 4, 6, and 7, of the Penal Code.† If the Philippine Code had sanctioned *this form,[372] it is extravagant to contend that the enactment would have been void under the laws of the United States. Yet that is a test. See Missouri v. Dockery, 191 U. S. 165, 171, 48 L. ed. 133, 134, 24 Sup. Ct. Rep. 53. The Bill of Rights for the Philippines, giving the accused the right to demand the nature and cause of the accusation against him, does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.

We do not feel called upon to consider errors not assigned. See O'Neil v. Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 Sup. Ct. Rep. 693.

Writ of error dismissed.

Mr. Justice **Harlan** dissents.

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†The complaint is as follows, omitting the title, signature, and verification:

The undersigned accuses José Paraiso of the crime of falsification, committed as follows: That the said José Paraiso, in his capacity as municipal treasurer of Lumbang, entered upon registration tax certificate No. 481,054, issued at Lumbang the 31st of May, 1904, to one Pedro Robie, the amount of $6.00, and erased from the stub thereof the figures written thereon, with the exception of the two 00, leaving traces of the figure thus erased, there appearing, however, upon the same stub, written in pencil by the accused, the figures 2.00, this being the amount shown on the abstract submitted to the provincial treasurer, all of this with intent of gain.

That on registration tax certificate No. 481,052, issued at Lumbang on the 31st day of May, 1904, to Francisco Guimoc, he entered the amount of $4 as the price of the said certificate, whereas on the stub thereof he only entered the amount of $2, thereby committing the crime of falsification of a document, provided for and penalized under paragraphs 4, 6, and 7 of § 300 of the Penal Code. It further appears from the abstract submitted by him that the amount received was $2.00, thus defrauding the government to his personal advantage and gain.

That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he issued registration tax certificates to the following persons under the following numbers:

Eduardo Llantos, No. 481,053; Damaso Garcia, No. 481,044; Apolinario Almario, No. 339,727; Cenon Labra, No. 339,899; Pablo Cristobal, No. 339,897; Luis Abi, No. 339,877; Leon Mondes, No. 339.852; Luis Valdomora, No. 339,848; Gregorio Mulingbayan, No. 339,846; Filemon Mercado, No. 339,840; Pablo Samonte, No. 339,795; Mariano Magano, No. 339,785; Vicente Valdeavella, No. 339,783; Juan Wadis, No. 339,763; Mateo Laguartilla, No. 339,744; Faustino Rosales, No. 339,707; Deogracias Babia, No. 339,701; Dionisio Abad, No. 339,694; Eduardo Ramillosa, No. 339,673; Monico Abad, No. 339,660; Conrado Lagunda, No. 339,632; Juan Tablico, No. 339,605; Ubaldo Mercado, No. 339,541; Juan Pühauan, No. 339,510; Antonio Eborda, No. 339,379; Cirilia del Castillo, No. 339,375; Valeriano de Ramos, No. 339,341; Mateo Pacoma, No. 339,313; Mariano Valdeavella, No. 339,491; Benedicto Valdeavella, No. 339,490; Juan Mercado, No. 339,477; Epifanio Vellestro, No. 339,445; Marcelino Cabalsa, No. 339,499; Marcelo Tabirao, No. 339,905; Placido Macadagay, No. 339,837; Juan Valeavella, No. 339,604; Bernabe Yamballa, No. 339,558; Léon Abi, No. 339,540; upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes, and alterations, all of which said acts are punishable under paragraphs 4, 6, and 7 of § 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain.

JOHN M. FLEMISTER, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 372–375.)

Appeal — in criminal cases — increasing sentence in appellate tribunal.

1. The supreme court of the Philippine Islands, upon reversing a judgment of the court below in a criminal case on an appeal taken by the accused, has jurisdiction to convict him, on the same facts, of a different offense, carrying an increased sentence.

Criminal law — former jeopardy — conviction of higher crime on appeal.

2. An accused is not placed twice in jeopardy for the same offense within the meaning of the act of July 1, 1902 (32 Stat. at L. 692, chap. 1369), § 5, because the supreme court of the Philippine Islands, upon reversing judgment below in a criminal case, on an appeal taken by the accused, convicted him, on the same facts, of a different offense, carrying an increased sentence.

Criminal law — former jeopardy — distinct offenses.

3. Treating as two different offenses assaults on two different individuals does not place the accused twice in jeopardy for the same offense, within the meaning of the act of July 1, 1902, § 5, even if these assaults occurred very near each other, in one continuing attempt to defy the law.

[No. 70.]

Submitted December 5, 1907. Decided December 16, 1907.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which reversed a conviction in the Court of First Instance at Manila for resisting arrest, and convicted him of a criminal attempt against an agent of the authorities, and increased the sentence. Affirmed.

See same case below, 5 Philippine, 650.

The facts are stated in the opinion.

Mr. **E. J. Bowers** submitted the cause for plaintiff in error:

While more than one offense may result from the same act, and the prosecution may carve out of the transaction any one of the several specific offenses, yet the prosecution can take only one slice.

1 Bishop, Crim. Law, §§ 804, 891.

There is really but one offense, and to punish this plaintiff in error again would be to punish him twice for the same offense.

Fiddler v. State, 7 Humph. 508.

By appeal from the judgment of the court of first instance of the city of Manila the accused did not waive his immunity from second jeopardy on the charge of the commission of the offense embraced in art. 249 of the Penal Code.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; People v. Dowling, 84 N. Y. 478; Guenther v. People, 24 N. Y. 100; People v. Cignarale, 110 N. Y. 30, 17 N. E. 135; Stuart v. Com. 28 Gratt. 950; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Hill, 30 Wis. 416; State v. Belden, 33 Wis. 120, 14 Am. Rep. 748; Slaughter v. State, 6 Humph. 410; Brennan v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325; Sipple v. People, 10 Ill. App. 144; Morris v. State, 8 Smedes & M. 762; Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154; State v. Tweedy, 11 Iowa, 350; State v.

NOTE.—Former jeopardy in retrial on higher charge after setting aside verdict for lower charge.

In Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121,—the holding in which, that an accused is not placed twice in jeopardy for the same offense, within the meaning of the act of July 1, 1902, § 5, because the supreme court of the Philippine Islands, upon an appeal taken by the accused, convicts him upon the same facts of a different offense carrying an increase sentence, is reaffirmed in FLEMISTER v. UNITED STATES,—the court, after noting an earlier decision to the effect that the statutory provision referred to is to be construed as the same phrase would be construed in the Constitution of the United States, from which it was originally taken, says that the question may be regarded as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and, upon an appeal from that judgment by the accused, a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court; and states that this question has given rise to much diversity of opinion in the various state courts.

The discussion of this question in the case referred to is so complete as to render any annotation, further than a few supplemental citations, unnecessary.

To the cases referred to in the dissenting opinion of Mr. Justice McKenna, as holding that the accused cannot be retried for any higher offense than that of which he was convicted, the following may be added: United States v. Owens, 2 Alaska, 480; Huntington v. Superior Court (Cal. App.) 90 Pac. 141; Sipple v. People, 10 Ill. App. 144; State v. Smith, 132 Iowa, 645, 109 N.

Ross, 29 Mo. 32; State v. Kattlemann, 35 Mo. 105; Johnson v. State, 27 Fla. 245, 9 So. 208; Golding v. State, 31 Fla. 262, 12 So. 525; State v. Dennison, 31 La. Ann. 847; State v. Murphy, 13 Wash. 229, 43 Pac. 44; Bell v. State, 48 Ala. 684, 17 Am. Rep. 40; Berry v. State, 65 Ala. 117; Brown v. United States, 2 Ind. Terr. 582, 52 S. W. 56; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; State v. Steeves, 29 Or. 85, 43 Pac. 947; People v. Knapp, 26 Mich. 113; People v. Comstock, 55 Mich. 407, 21 N. W. 384; George v. State, 59 Neb. 163, 80 N. W. 486; State v. Kittle, 2 Tyler (Vt.) 472.

Solicitor General **Hoyt** and Assistant Attorney General **Russell** submitted the cause for defendant in error:

While the acts charged in the municipal court and in the court of first instance grew out of the same occurrences, they were different offenses in fact, and, under the well-settled test, they were distinct in point of law, one requiring certain evidence which the other did not.

1 Bishop, Crim. Law, § 1051; Wilson v. State, 24 Conn. 57; Burton v. United States, 202 U. S. 344, 381, 50 L. ed. 1057, 1071, 26 Sup. Ct. Rep. 688.

A plea of *autrefois acquit* must be upon a prosecution for the same identical offense.

4 Bl. Com. 336.

It must appear that the offense charged was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.

Com. v. Roby, 12 Pick. 504; State v. Nash, 86 N. C. 651, 41 Am. Rep. 472.

The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes.

Morey v. Com. 108 Mass. 433.

The fact that both charges related to and grew out of one transaction made no difference.

Carter v. McClaughry, 183 U. S. 365, 394, 46 L. ed. 236, 250, 22 Sup. Ct. Rep. 181.

In Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, this court held that defendant could not plead his acquittal upon the charge of having received forbidden compensation from Mahaney, an officer of a certain company, in bar of a prosecution upon the charge of having received such compensation from the company itself.

The same acts may constitute an offense against each of two sovereignties exercising jurisdiction over the same territory, and a prosecution brought by one does not necessarily bar a prosecution brought by the other.

United States v. Chan Cun Chay, 4 Off. Gaz. 42; State v. Taylor, 133 N. C. 760, 46 S. E. 5; Moore v. Illinois, 14 How. 17, 14 L. ed. 307; Fox v. Ohio, 5 How. 432, 12 L. ed. 222; United States v. Marigold, 9 How. 560, 13 L. ed. 257; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Barnhart, 10 Sawy. 491, 22 Fed. 285.

Mr. Justice **Holmes** delivered the opinion of the court:

The plaintiff in error was convicted of a criminal attempt against an agent of the authorities by striking one Feliciano *Celimin, [374] a policeman, who was trying to arrest

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W. 115; State v. Walker, 133 Iowa, 489, 110 N. W. 925; State v. Joseph, 40 La. Ann. 5, 3 So. 405; People v. Farrell, 146 Mich. 264, 109 N. W. 440; Rolls v. State, 52 Miss. 391; State v. Pitts, 57 Mo. 85; Robinson v. State, 21 Tex. App. 160, 17 S. W. 632; Smith v. State, 22 Tex. App. 316, 3 S. W. 684; Coleman v. State (Tex. Crim. App.) 65 S. W. 90.

The contrary view, with which the majority opinion in Trono v. United States, supra, is in accord, is upheld in the following cases:

Bailey v. State, 26 Ga. 579; State v. McCord. 8 Kan. 232, 12 Am. Rep. 469; State v. Miller, 35 Kan. 328, 10 Pac. 865; State v. Morrison, 67 Kan. 144, 72 Pac. 554; Bohanan v. State, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390; State v. Behimer. 20 Ohio St. 572; State v. Matthews. 142 N. C. 621, 55 S. E. 342; State v. Gillis, 73 S. C. 318, 5 L.R.A.(N.S.)571, 53 S. E. 487; State v. Bradley, 67 Vt. 465, 32 Atl. 238, in which last case it is said that the verdict of guilty in a lesser degree is only an implied acquittal in the greater degree, and, if the verdict from which the inference is drawn is set aside, nothing remains to sustain the inference, and the verdict and its incidents fall together, and the indictment is left to stand as though there had been no trial.

So also in Turner v. Territory, 15 Okla. 557, 82 Pac. 650, and State v. Kessler, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293, it is held, independently of the statutory provision that the granting of a new trial places the parties in the same position as if no trial had been had, that, when a defendant is found guilty of a lower grade of crime than the highest charged in the indictment, and a new trial is granted on his motion, its effect is to set aside the whole verdict, and leave the case for trial upon the same issues as upon the first trial.

A more extended discussion of this question, including cases turning upon constitutional and statutory provisions, may be found in the case note to State v. Gillis, 5 L.R.A.(N.S.) 571.

him, and by using vile, abusive, and threatening language to the same officer, contrary to article 249, clause 2, of the Penal Code of the Philippines. He was sentenced under article 250, which provides the punishment for such attempts. He was convicted in the court of first instance of the same facts, but was sentenced under article 252, which punishes those who, without being included in article 249, should resist the authorities or their agents. He then appealed, whereupon the supreme court decided that the offense fell within article 249, and increased the sentence. The errors assigned are that the supreme court had no jurisdiction to increase the sentence, this being stated in various forms, and that "the decision of the court places the accused in jeopardy for the same offense according to the corresponding provisions of § 5 of the act of Congress of July 1, 1902 [32 Stat. at L. 692, chap. 1369]." There is also the usual averment that the decision deprives the accused of his liberty without due process of law; but that may be passed over, as there is nothing in the record to justify it. It is not necessary to consider what would amount to denial of due process of law. The plaintiff in error was convicted after a full trial, with all the usual forms, upon a specific and definite complaint and evidence warranting the result.

The objection to the power of the supreme court to increase the sentence is disposed of by the recent decision in Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121. The only assignment of error that needs a word is that which was intended to rely upon a previous conviction that was pleaded and put in evidence. This was a conviction by a municipal court of a violation of ordinances of the city of Manila by disorderly conduct, a breach of the peace, and the assault upon one Domingo Salvador at the same time and place as the assault alleged in the complaint before us. Perhaps it should be added that a second complaint under the ordinances for slanderous, threatening, and abusive language to Captain José Crame of the Manila police department was dismissed by [375] the municipal judge on the *ground that the offense could not be split up. None of the acts alleged in these complaints was the assault upon Celimin, relied upon in the present case, and it does not appear that the assault upon Celimin was relied on or proved as part of the disorderly conduct for which the plaintiff in error was punished in the municipal court. It is unnecessary to consider whether the same conduct could be punished at the same time on the same grounds by both a superior and subordinate authority in the same jurisdiction. There is nothing in the Philippine Bill of Rights that forbids assaults on two individuals being treated as two offenses, even if they occur very near each other, in one continuing attempt to defy the law. We cannot revise the finding of the courts below that the two offenses were distinct.

Judgment affirmed.

Mr. Justice **Harlan** dissents.

EMIL WERCKMEISTER, Plff. in Err.,
v.
AMERICAN TOBACCO COMPANY.

(See S. C. Reporter's ed. 375-384.)

Action — successive suits — copyright infringement.

A separate action to recover the penalty prescribed by U. S. Rev. Stat. § 4965, U. S. Comp. Stat. 1901, p. 3414, for every infringing copy of a copyrighted painting found in the infringer's possession or sold by him, cannot be maintained after judgment of forfeiture of the infringing copies provided for by that section has already been recovered, since such section contemplates but a single action in the nature of replevin, in which may be had both a forfeiture and a recovery of penalties.

[No. 29.]

Argued October 30, 1907. Decided December 16, 1907.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing, on the merits, a complaint in an action to recover the statutory penalty for infringing copies of a copyrighted painting found in the possession of the infringer. Affirmed.

See same case below, 74 C. C. A. 682, 144 Fed. 1023.

The facts are stated in the opinion.

Mr. **Antonio Knauth** argued the cause and filed a brief for plaintiff in error:

The forfeitures provided by the statute are cumulative.

Thornton v. Schreiber, 124 U. S. 612, 31 L. ed. 577, 8 Sup. Ct. Rep. 618; Bolles v. Outing Co. 46 L.R.A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 968, 175 U. S. 262, 266, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; Hegeman v. Springer, 49 C. C. A. 86, 110 Fed. 374; Springer Lithographing Co. v. Falk, 8 C. C. A. 224, 20 U. S. App. 296, 59 Fed. 707; Falk v. Curtis Pub. Co. 98 Fed. 991, 100 Fed. 77.

The action for the recovery of the forfeited articles is an action *in rem.* The property in the articles remains in the owner until it is seized, and then, by the seizure, the title relates back to the time of the forfeiture.

Clark v. Protection Ins. Co. 1 Story, 134, Fed. Cas. No. 2,832; United States v. 1,960 Bags of Coffee, 8 Cranch, 398, 3 L. ed. 602; Gelston v. Hoyt, 3 Wheat. 246, 311, 4 L. ed. 381, 397; United States v. Baker, 5 Ben. 28, Fed. Cas. No. 14,500; Fontaine v. Phœnix Ins. Co. 11 Johns. 293; Amory v. M'Gregor, 15 Johns. 24, 8 Am. Dec. 205; Henderson's Distilled Spirits (United States v. Henderson) 14 Wall. 44, 56, 20 L. ed. 815, 816; Thacher's Distilled Spirits (Thatcher v. United States) 103 U. S. 679, 682, 26 L. ed. 535, 536; The Mary Celeste, 2 Low. Dec. 356, Fed. Cas. No. 9,202; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 53 L. ed. 178, 9 Sup. Ct. Rep. 781; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

On the other hand, the action to be brought for the recovery of the money penalty is a personal action, and can be maintained only when the defendant is personally found within the jurisdiction of the court. The term "forfeit," as applied to a money penalty, means only that the offender shall be made to pay the amount. It means a fine, a mulct.

Re Levy, L. R. 30 Ch. Div. 119; Merchants' Bank v. Bliss, 21 How. Pr. 370; Ex parte Alexander, 39 Mo. App. 108; People v. Nedrow, 122 Ill. 367, 13 N. E. 533; Com. v. Avery, 14 Bush, 638, 29 Am. Rep. 429; Taylor v. The Marcella, 1 Woods, 304, Fed. Cas. No. 13,797.

The fiction that the title to forfeited property dates back to the time of the commission of the wrong is applied because convenience and justice require its application.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 208, 50 L. ed. 150, 155, 26 Sup. Ct. Rep. 36.

Mr. **William A. Jenner** argued the cause and filed a brief for defendant in error.

[379] *Mr. Justice **Day** delivered the opinion of the court:

This case was argued and submitted with American Tobacco Co. v. Werckmeister, decided December 2, 1907, 207 U. S. 284, ante, 208, 28 Sup. Ct. Rep. 72.

The present action was brought to recover, under § 4965 of the copyright act (U. S. Comp. Stat. 1901, p. 3414), the penalties of $10 each, for 1,196 sheets of the alleged infringing publications claimed to have been found in the defendant's possession and seized by the United States marshals, under the two writs of replevin described in that suit.

Plaintiff in error, Werckmeister, offered in evidence the judgment roll in the former suit, with the pleadings and judgment, and also offered in evidence the writs and returns of the marshals for the southern and western districts of New York, respectively, showing seizures of 203 copies and 993 copies; the court excluded these writs as immaterial. No other evidence being offered, the court instructed the jury to render a verdict for the defendant, and judgment was afterwards rendered accordingly upon the verdict. 138 Fed. 162. On writ of error to the circuit court of appeals the judgment below was affirmed (74 C. C. A. 682, 144 Fed. 1023), and this writ of error is prosecuted to reverse the judgment of the circuit court of appeals.

This action requires the construction of § 4965, Rev. Stat., as amended (U. S. Comp. Stat. 1901, p. 3414), which is as follows:

"Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, *work, copy, print, publish, dramatize, trans- [380] late, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale: Provided, however, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars: And, provided further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

As with the sections of the copyright act under consideration in American Tobacco Co. v. Werckmeister, supra, this section has been the subject of consideration in the Federal courts, with different conclusions as to its purport and meaning. While the statute provides for the forfeiture of the plates and sheets and for the sum of $10 in case of a painting, for every copy found in the offending person's possession or sold by him, it is silent as to the kind of action to be brought, and we are left to discover the meaning of the act in this re-[381]spect from a consideration of the *language used, read in the light of the objects and purposes to be effected.

Obviously the statute does not provide a proceeding *in rem*, as is sometimes done in the revenue laws, for the act is leveled against *any person* who shall, contrary to its provisions, without consent, etc., engrave, work, copy, print, etc., forfeit to the proprietor the plates and sheets and a sum of money for each sheet, etc., found in his possession. This section of the statute is penal, and there should be especial care to work no extension of its provisions by construction. Statutory provisions similar to those above cited have been the subject of consideration in a number of cases in this court. In Backus v. Gould, 7 How. 798, 12 L. ed. 919, it was held that there could be no recovery for publishing sheets, copyright matter, etc., unless the same were found in the possession of the defendant. In Stevens v. Cady, 2 Curt. 200, Fed. Cas. No. 13,395, Mr. Justice Curtis, sitting at the circuit, held there could be no accounting for the penalties in an action in equity, and that the proprietor of the copyright was left by the act to his remedy at law by trover or replevin. In Thornton v. Schreiber, 124 U. S. 612, 31 L. ed. 577, 8 Sup. Ct. Rep. 618, it was held that action would not lie against Thornton, who was the business manager of Sharpless & Son, of Philadelphia, in whose store the prints in question in that case were found, and, in speaking for the court, Mr. Justice Miller, who delivered the opinion in that case, said (p. 620):

"Counsel for defendants in error, Schreiber & Sons, insist that the words 'found in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit $1 for each sheet so ascertained to have been in his possession. We, however, think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

This language was held in Falk v. Curtis Pub. Co. 102 Fed. 967-971, *affirmed by the [382] circuit court of appeals for the third circuit in 46 C. C. A. 201, 107 Fed. 128, to mean that before the action for the penalty would lie there must be a finding of the articles in the possession of the defendant by means of a proceeding instituted for the express purpose of condemnation and forfeiture, and that an action of assumpsit brought at the same time with the action of replevin was premature.

In the case of Bolles v. Outing Co. 46 L.R.A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966, Judge Wallace, who spoke for the court of appeals in that case, said (p. 968):

"The statute is apparently framed to give the party whose copyright has been invaded complete relief by an action in which he can procure a condemnation of the infringing sheets, and at the same time recover, by way of compensation, a penalty for every sheet which he is entitled to condemn. The words 'found in his possession' aptly refer to a finding for the purposes of forfeiture and condemnation. The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process; and where, as here, the forfeiture declared is against property of the 'offender,' it is only appropriate when it can be seized in his hands. The section contemplates two remedies, enforceable in a single suit, each of which depends upon the same state of facts. The aggrieved party may, at his election, pursue either one or both remedies. But it does not contemplate a recovery of penalties, except in respect to the sheets which can be condemned."

And in Bolles v. Outing Co. 175 U. S. 262-266, 44 L. ed. 156-158, 20 Sup. Ct. Rep. 94, 95, this court, speaking by Mr. Justice Brown, observed:

"No remedy is provided by the act, although by § 4970 (U. S. Comp. Stat. 1901, p. 3416), a bill in equity will lie for an injunction, but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and in addition to the confiscation of the copies, for a recovery of $1 for every copy so seized or found in the possession of the defendant."

[383] *And in that case the view expressed in the circuit court of appeals for the second circuit was approved (175 U. S. 268); and while the point was not necessarily involved, we think the indication in Bolles v. Outing Co., that a single action in the nature of replevin for the recovery of plates and copies and a penalty for copies found, is correct.

We agree with the circuit court of appeals for the second circuit that the language in Thornton v. Schreiber, above quoted, was not intended to indicate that an action declaring the forfeiture was required by the statute before the adjudication of the articles to the plaintiff as is generally necessary in actions of forfeiture (Cooley, Const. Lim. 518), but that the true construction of the statute, and the one intended to be indicated by Mr. Justice Miller, is that before the penalty can be recovered it is necessary that the sheets be actually found in the possession of the defendant. As we have said, this section of the statute is highly penal (Bolles v. Outing Co. supra), and there is nothing in its terms to indicate that the offender is to be subjected to more than one action; on the contrary, the provisions of the section seem to point clearly to the conclusion that when the offender is brought into court, under this section, he shall forfeit to the proprietor the plates on which the articles shall be copied and every sheet thereof, whether copied or printed, "and shall further forfeit one dollar for every sheet of the same found in his possession, . . . and in case of a painting," etc., "he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

There is nothing in this section which seems to contemplate the method of procedure pursued in this case, namely, a separate action for the money penalty, upon the theory that it arose only in case of actual finding and judgment of condemnation, but the statute contemplates the bringing of the offender into court in one suit, in which the plates and sheets shall be seized and forfeited and the penalty recovered.

If it had been the intention of Congress [384] to provide two actions, *one for the forfeiture of the plates, sheets, etc., and another for the recovery of the money penalty, it would have been easy to have said so. Likewise, had it been the intention of Congress to permit a recovery for the money penalty only after judgment of forfeiture had gone in favor of the plaintiff, it would have been equally as easy to have made such provision.

Until Congress shall provide otherwise, and this section might well be made more specific as to the nature and character of the remedy given, we think this section intended to provide, in a single action, all the remedy which is within its scope, and that to construe it as requiring two actions would be extending a penal act beyond the provisions incorporated in its terms.

In reaching this conclusion we have not overlooked the fact that one half of the penalties go to the proprietors of the copyright and one half to the United States. There is no requirement that the United States shall be a party to the action, and we think the purpose of the statute was to make the proprietor of the copyright accountable to the United States for one half of the money penalty recovered.

Upon this construction of the statute the plaintiff in error had exhausted his remedy in the judgment rendered in the first suit; and as the action is wholly statutory and no second action is given as we construe the act, the court was without power to award the second judgment in the separate action for the money penalty, and the circuit court properly directed the verdict for the defendant below.

The judgment of the United States Circuit Court of Appeals for the Second Circuit is affirmed.

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*WATER, LIGHT, & GAS COMPANY OF HUTCHINSON, KANSAS, Appt., [385]
v.
CITY OF HUTCHINSON et al. (No. 53.)

WATER, LIGHT, & GAS COMPANY OF HUTCHINSON, KANSAS, Appt.,
v.
CITY OF HUTCHINSON et al. (No. 54.)

(See S. C. Reporter's ed. 385–398.)

Municipal corporations — powers — grant of exclusive franchise.

Municipal power to grant an exclusive franchise cannot be deduced from provisions of the Kansas statutes conferring, *inter alia*, power to provide for the general welfare, and to enable the municipality to construct water and lighting plants of its own, or to make contracts with any person or company for such purposes, and giving such person or company the privilege of furnishing light for streets, lanes, or alleys for any length of time not exceeding twenty-one years,—especially where the section most relied upon as conferring this power had been so amended before its attempted exercise as to omit the words "the exclusive privilege."

[Nos. 53, 54.]

Argued November 13, 1907. Decided December 23, 1907.

APPEALS from the Circuit Court of the United States for the District of Kansas to review decrees dismissing, on demurrer, bills to enjoin a city from interfering with an alleged exclusive lighting, heating, and waterworks franchise. Affirmed.

See same case below, 144 Fed. 256.

Statement by Mr. Justice **McKenna**:

The ultimate question in these cases is the validity of ordinance No. 402 of the city of Hutchinson, which took effect March 17, 1897, and by which the Water, Light, & Gas Company claims to have, for the period of twenty years from such date, the exclusive right and privilege of supplying the city and its inhabitants with water, and with light, heat, and power by means of electricity and gas.

On the 19th of December, 1905, the city enacted and published ordinance No. 651, granting permits to Emerson Carey and others, their successors and assigns, to construct and operate a street railway in and along the streets of the city, and to construct and operate electric and gas plants for the purposes for which electricity may be used.

These suits were brought to command the city and those claiming under ordinance No. [386]651, to "desist from doing any *acts or exercising any pretenses of right to act" under the ordinance which will in anywise affect the exclusive right of the Water, Light, & Gas Company "to furnish the city and its inhabitants with electric or gas light for lighting and heating purposes or power, except for street cars and electric railways, and also from making or proceeding to make any contract for furnishing light or gas to said city and its inhabitants" until the expiration of the "franchises and contracts" of that company.

The cases went off on demurrers to the bills. The circuit court, assuming that ordinance No. 402 was exclusive in its terms and was intended to be so by the city, held that the city did not possess the power, either inherent or under the law of its creation, to make a contract binding and exclusive of all others, and entered decrees dismissing the bills. 144 Fed. 256.

The facts are: In 1885 the city granted to the Holly Manufacturing Company, its successors and assigns, an exclusive right to build and operate waterworks for twenty years. The company erected and operated the works until the subsequent assignment of its rights.

In the same year the city granted to the Interstate Gas Company the right to erect and maintain gas works for the period of twenty-one years; and in 1886 granted to Drake and Orton the right for the period of twenty years to construct and operate an electric light plant. The latter right, and those granted to the two companies, passed by successive assignments, with the knowledge and consent of the city, to the Water, Light, & Power Company, and existed in that company at the time of the passage of ordinance No. 402.

The various companies expended in the aggregate on the construction of their plants and equipment $400,000, to secure which the Hutchinson Water, Light, & Power Company executed a mortgage upon all the water, light, and gas rights and franchises and properties.

Subsequently, the city became financially embarrassed, so *that before the year 1897[387] it had become indebted for hydrant rentals in the sum of $12,800 in excess of its ability to pay.

On account of this default of the city the company became embarrassed and hindered in the payment of interest on its mortgage, and its mortgage bondholders took possession of its property, and operated the plant during the year 1896 and until the readjustment of its affairs in the spring of 1897, resulting in the passage of ordinance No. 402.

By reason of its embarrassment the company found it expedient to scale down its bonded indebtedness and secure a new franchise from the city, and in consideration of securing the same, and the readjustment of the contract obligations between the company and the city, the bondholders agreed to reduce and scale down their mortgage indebtedness from $400,000 to $212,500.

On March 5, 1897, at the earnest and repeated solicitation of the city, and in consideration of its inability to discharge its past indebtedness to the company and to pay the current indebtedness thereafter, the company agreed with the city to remit one half of the indebtedness then due; that is, to scale it down to $6,400, and to reduce the sum thereafter annually payable for hydrant rental from $12,800 to $6,000 for the years of the contract, and to reduce the rental for hydrants thereafter located from $60 to $36, and reduce the number of hydrants from twelve to ten per mile. These concessions and abatements were made on the condition of a renewal and extension of the franchise and contract rights of the company. And the city was to have, what it did not have before, the right to purchase or otherwise acquire the light and gas properties at any time after ten years from the date of the renewal and adjustment. In view of these considerations and in pursuance of them the city passed ordinance No. 402, to take effect March 17, 1897, and by that ordinance "granted to the company, its successors and assigns, for the period of twenty years from said date, the exclusive privilege of supplying the city and its in- [388] habitants with the public utilities of *water, light, heat, and power by means of electric current and gas." But it was agreed that the right for furnishing electric current or power should not be exclusive as to or for the operation of street railways, nor exclusive as to any person residing in the city, or any company doing business therein manufacturing gas or electricity for his or its own use for light or fuel. A copy of the ordinance was attached to and made part of the bill. The concessions and abatements would not have been made by the company except for the consideration of the exclusive rights and privileges granted; and the total of the reductions of monetary demands made for what was due and to become due for the period the water franchise had to run amounted to $65,240, which the company remitted from its contract rights and demands against the city. The mortgage bondholders of the Water, Light, & Power Company, for the purpose of effectuating the promises and agreements between the company and the city contained in ordinance No. 402, scaled down their indebtedness from $400,000 to $212,500, and canceled their mortgage, and accepted a substitute mortgage on the property, franchise, and contracts and on its income of $212,500.

The Water, Light, & Power Company, on the 4th of October, 1902, sold and transferred to the Water, Light, & Gas Company, the complainant, all of its property rights and franchise, and complainant has since that date been in possession of the same, and in the fulfilment of the duties and obligations imposed on it by its purchase and said ordinance liabilities with the consent of the city, and the city has ratified and approved the same, and contracted and dealt with the complainant as the successor of the Water, Light, & Power Company. The Water, Light, & Gas Company has, since its purchase, expended large sums of money in the improvement and enlargement of its properties and the service rendered by it, and has, under the direction and order of the city, extended its water mains and placed hydrants upon such extensions, and, as agreed by it, has reduced the number of hy- 39] drants on *its extended mains from twelve to ten per mile, and generally has complied with the orders and requests of the city, whether or not under the ordinance No. 402 it was required to comply with such orders, all of which was done in reliance on the obligations of the city and its good faith in carrying out all the terms and conditions and provisions of ordinance No. 402; but the city, notwithstanding, through its mayor and councilmen, on or about the 19th of December, 1905, enacted and published ordinance No. 651, by which it assumed to grant to Emerson Cary and others the right and privilege, for the term of twenty years thereafter, of establishing and operating in the city a plant and appliances for the manufacture and sale to the city and its inhabitants of electric light and power and manufactured and natural gas, with the right and privilege to lay and construct gas mains and pipes and erect poles and wires and all other things necessary to the maintenance of said public service in the streets, alleys, and public places of the city, in opposition to the business of complainant.

It is alleged that ordinance No. 402 constitutes a contract between the city and the complainant in respect to all the rights secured, and in particular in respect to the exclusive rights and privileges thereby conferred, and that the city, by and through ordinance No. 651, illegally and inequitably impairs the same, in violation of the provisions of the Constitution of the United States, which forbids the impairment of the obligation of contracts by the several states of the Union.

Neither the city nor any of the grantees in ordinance No. 651 have paid or tendered complainant the monetary abatement, or the reductions and concessions paid or secured to the city in consideration of the enactment of ordinance No. 402, or to secure complainant from loss from the competition of the rival public service association or company. At the time the public service enterprises were undertaken by the grantors of complainant the city of Hutchinson had about 5,000 inhabitants, and, at the time complainant succeeded to their rights, about 10,000; and at both of said times it would have been *impossible, and is now impossi- [390] ble, to maintain rival or competing companies in the city so as to enable either to earn a fair and reasonable income on the cost of their respective properties, and at none of the times when the complainant or its grantors undertook the work of furnishing said public necessities would it or they have done so without being secured in the enforcement thereof for a reasonable time against the competition of rival companies, nor could the large sums of money have been obtained therefor except under like security. The company has not, up to this time, and will not for many years to come, have secured the repayment of the purchase price of said public service and the cost of the betterments, extensions, and improvements.

The company alleges that it does not seek to prevent the granting by the city of a franchise or contract for the erection and maintenance of an electric railway in the city or elsewhere.

An injunction was prayed against the doing or exercising any pretenses of right under ordinance No. 651 which would in any way affect the exclusive rights of the company to furnish electricity and gas for lighting and heating purposes.

Messrs. **John F. Dillon** and **Frank Doster** argued the cause, and, with Messrs. Harry Hubbard, Houston Whiteside, and Howard S. Lewis, filed a brief for appellant:

The furnishing of light to a city and its inhabitants is an exercise of the police power.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; Crawfordsville v. Braden, 130 Ind. 149, 14 L.R.A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; New York ex rel. Liberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Safety Insulated Wire & Cable Co. v. Baltimore, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1.

Statutes delegating the power to furnish light in cities are to be liberally construed, and are so construed in Kansas.

Port Huron v. McCall, 46 Mich. 565, 10 N. W. 23; State v. Topeka, 68 Kan. 177, 74 Pac. 647; State v. Hiawatha, 53 Kan. 477, 36 Pac. 1119; United States v. Hartwell, 6 Wall. 395, 18 L. ed. 832; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Andrews v. National Foundry & Pipe Works, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 782.

The statutes of Kansas authorized the city of Hutchinson to make the exclusive contract in question to light the streets.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; State v. Topeka, supra; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Omaha Water Co. v. Omaha, supra; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

Under the general welfare clauses and the general power to contract, the city had the power to confer an exclusive right to furnish light to its inhabitants as well as to light the streets.

Eureka Light & Ice Co. v. Eureka, 5 Kan. App. 676, 48 Pac. 935; Cherryvale Water Co. v. Cherryvale, 65 Kan. 228, 69 Pac. 176; Manley v. Emlen, 46 Kan. 655, 27 Pac. 844; Wood v. National Waterworks Co. 33 Kan. 597, 7 Pac. 233; Burlington Waterworks Co. v. Burlington, 43 Kan. 728. 23 Pac. 1068; Columbus Waterworks Co. v. Columbus, 46 Kan. 666, 26 Pac. 1046, 48 Kan. 99, 15 L.R.A. 354, 28 Pac. 1097; Ellinwood v. Reedsburg, 91 Wis. 131, 64 N. W. 885; Greenville v. Greenville Waterworks Co. 125 Ala. 625, 27 So. 764; Grace v. Hawkinsville, 101 Ga. 553, 28 S. E. 1021; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; Aurora Water Co. v. Aurora, 129 Mo. 540, 31 S. W. 946; Rome v. Cabot, 28 Ga. 50; Heilbron v. Cuthbert, 96 Ga. 312, 23 S. E. 206; Newport v. Newport Light Co. 84 Ky. 166.

The municipal power to furnish light carries with it the obligation to enter into all contracts and to exercise all subsidiary powers which the circumstances of the case require.

Quincy v. Bull, 106 Ill. 337; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; Memphis v. Memphis Water Co. 5 Heisk. 495; Eddy, Combinations, § 28; Porter v. Vinzant, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607; Reg. v. Train, 2 Best & S. 640; Elliott, Roads & Streets, § 761; Citizens Coach Co. v. Camden Horse R. Co. 33 N. J. Eq. 267, 36 Am. Rep. 542.

There are special features in these cases and special equities possessed by appellant which require that its contract with the city be upheld.

Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 18

L. ed. 137; Walla Walla v. Walla Walla Water Co. 172 U. S. 1–18, 43 L. ed. 341–348, 19 Sup. Ct. Rep. 77; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683–698, 29 L. ed. 510–515, 6 Sup. Ct. Rep. 265; Columbus Waterworks Co. v. Columbus, supra; Brown v. Atchison, 39 Kan. 54, 7 Am. St. Rep. 515, 17 Pac. 465; Cherryvale Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176.

The power to provide for light is one essentially and peculiarly pertaining to municipal rule and regulation.

1 Dill. Mun. Corp. § 3a; Fawcett v. Mt. Airy, 134 N. C. 125, 63 L.R.A. 870, 101 Am. St. Rep. 825, 45 S. E. 1029.

The ordinary police and welfare clauses in a charter are sufficient, without more, to give a municipality power to procure a supply of water and light, and to do this, where the mode is not expressly restricted, by erecting works of its own, or by contract with others, in the discretion of the municipality.

1 Dill. Mun. Corp. §§ 146, 443, 568, note; Ellinwood v. Reedsburg, 91 Wis. 131, 64 N. W. 885; Com. ex rel. Philadelphia Police Pension Fund Asso. v. Walton, 182 Pa. 373, 61 Am. St. Rep. 712, 38 Atl. 790.

In view of the imperative necessity of a water and light supply, the power to provide water, when expressly conferred, is liberally expounded as to the mode of its exercise, in order to secure the object to be attained.

Sioux Falls v. Farmers' Loan & T. Co. 136 Fed. 721; State v. Hiawatha, 53 Kan. 477, 36 Pac. 1119; State v. Topeka, 68 Kan. 182, 74 Pac. 647; Elliott, Mun. Corp. § 146; Gadsden v. Mitchell, 145 Ala. 137, 6 L.R.A. (N.S.) 781, 117 Am. St. Rep. 20, 40 So. 557; Abbott, Mun. Corp. § 146B; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 3, 43 L. ed. 341, 342, 19 Sup. Ct. Rep. 77.

This is emphatically a case where the following two great principles of justice, declared by this court, are especially applicable:

1. "Square dealing;" municipalities not immune from moral obligation.

Zabriskie v. Cleveland, C. & C. R. Co. 23 How. 381, 16 L. ed. 488; Bissell v. Jeffersonville, 24 How. 287, 16 L. ed. 664; National L. Ins. Co. v. Board of Education, 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778; Hitchcock v. Galveston, 96 U. S. 351, 24 L. ed. 662; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 316; Hackett v. Ottawa, 99 U. S. 86, 96, 25 L. ed. 363, 365; Columbus Waterworks Co. v. Columbus, supra; Green's Brice, Ultra Vires, 372. note A; Aurora Water Co. v. Aurora, 129 Mo. 584, 31 S. W. 946; Baxter Springs v. Baxter Springs Light & P. Co. 64 Kan. 598, 68 Pac. 63; Bass Foundry & Mach. Works v. Parke County, 115 Ind. 244, 17 N. E. 593; Brown v. Atchison and Hitchcock v. Galveston, supra.

2. Practical construction.

Van Hostrup v. Madison City, 1 Wall. 291, 17 L. ed. 538; Meyer v. Muscatine, 1 Wall. 384, 391, 17 L. ed. 564, 566; Dill. Mun. Corp. 4th ed. § 94, p. 151; Washington County v. Williams, 49 C. C. A. 621, 111 Fed. 801; Keith County v. Citizens' Sav. & L. Asso. 53 C. C. A. 525, 116 Fed. 13; Wetzell v. Paducah, 117 Fed. 647; Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049; Washington County v. David, 2 Neb. (Unof.) 649, 89 N. W. 737.

Messrs. **C. M. Williams** and **A. C. Malloy** argued the cause, and, with Mr. **F. F. Prig**, filed a brief for appellees:

A city charter will give it no rights other than those expressly or by necessary implication conferred; and courts are not disposed to extend or enlarge the powers of municipalities by implication, but have generally, as a rule, applied to their charter powers the same strict construction as in case of private corporations; and the presumption exists that the state has expressly, in terms, granted all that it designed to grant, and ambiguities will be resolved in favor of the public. . . . Therefore a city which is invested with no exclusive rights, franchises, or privileges cannot confer exclusive privileges upon one electric light company in the use of its streets.

1 Joyce, Electric Law, §§ 163, 254A.

The power to make an exclusive contract for electric lighting resides in the state; and where the state Constitution confers no such power upon its cities, but merely empowers the legislative branch of the state to organize cities under general laws, and to restrict their powers, a city which has no delegation of power for that purpose, either expressly or by implication, cannot, by contract, grant an exclusive right for a term of years to a corporation to supply electricity to a city and occupy the city's streets for that purpose, so as to prevent the city from contracting with others for such supply, or from further exercising its powers in that respect.

1 Joyce, Electric Law, §§ 164, 254A, 371.

Statutes conferring municipal powers are to be strictly interpreted.

Black, Constr. & Interpretation of Laws, p. 315; Cooley, Const. Lim. 6th ed. p. 486; 1 Abbott, Mun. Corp. § 113; Paine v. Spratley, 5 Kan. 545; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; Coffeyville Min. &

Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 178, 40 Pac. 326.

Resort cannot be had to so-called general welfare statutes for authority to justify a municipality, under the laws of the state of Kansas, in granting an exclusive franchise or privilege.

3 Abbott, Mun. Corp. §§ 924, 925; Dill. Mun. Corp. 4th ed. pp. 392, 393.

The making of this contract with appellant by the defendant city was not the exercise of its police power, but was the exercise of a power to contract, which must depend upon authority expressly given by the legislature of the state.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 664, 29 L. ed. 521, 6 Sup. Ct. Rep. 252; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341.

The claim of appellant of special equities in its favor cannot be considered in the determination of the legal question here involved. These considerations might be urged against a claim that the grant was absolutely void.

Columbus Waterworks Co. v. Columbus. 48 Kan. 100, 15 L.R.A. 354, 28 Pac. 1097; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 179, 40 U. S. App. 257, 76 Fed. 271.

Mr. **Max Pam** also argued the cause for appellees.

Mr. Justice **McKenna** delivered the opinion of the court:

The circuit court assumed that ordinance No. 402 was in terms exclusive and was intended to be made so by the city. We shall assume the same thing. Indeed, it would be impossible to decide otherwise. It recites that the Hutchinson Water, Light, & Power Company "is the owner of certain exclusive franchises and contracts with the city of Hutchinson," under which it has expended large sums of money, and that the city "is desirous of modifying and changing said franchise and contracts to the advantage of said city of Hutchinson, without canceling or *abridging* any of the *rights* or *privileges* vested in said company," and that, therefore, in consideration of the surrender of all existing contracts and franchises, except as therein specified, "there is hereby given and granted" to the company, "its successors or assigns, the *exclusive right and privileges* for the term of twenty years from the date of the passage and approval of this [393] ordinance, of *supplying the city of Hutchinson, Reno county, Kansas, and the inhabitants thereof, by a system of waterworks, with water . . . with electric current for electric light and power, and for all other purposes for which electric current may be used, except power for the operation of street railways." The city, it is clear, in express terms and for consideration received, granted exclusive rights. The power of the city to do this is denied, and this makes the question in the case. The circuit court ruled against the existence of the power, applying to the statutes conferring power upon the municipalities of the state the rule of strict construction. The ruling is challenged by appellants, and it is contended that the general welfare clause and "the municipal power to furnish light carries with it the obligation to enter into all contracts and to exercise all subsidiary powers which the circumstances of the case require." And it is further contended that, in Kansas, statutes delegating to cities the power to furnish light and water have been liberally construed by the supreme court of the state.

That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction, was announced by this court in Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority. See also Dill. Mun. Corp. 4th ed. § 80. The case was concerned with a grant to a street railway, and, in the argument of the cases at bar, a distinction is asserted between an exclusive privilege to occupy the surface of streets and interfere with "a matter of common right," and a privilege to use the streets below the surface "as incidental only and subsidiary to the performance of a contract pertaining to another matter;" and on this distinction, it is argued, the "first must show an express grant of authority" to make the right exclusive, *but that the second is [394] not limited by such requirement. The distinction is only one of degree, and has not been considered as varying the application of the rule of construction announced. In Freeport Water Co. v. Freeport, 180 U. S. 598, 45 L. ed. 688, 21 Sup. Ct. Rep. 497, a statute of Illinois was considered which gave power to cities and villages to provide for the supply of water at such rates as might be fixed by ordinance and for a period not exceeding thirty years. And passing upon these provisions as constituting a contract precluding a change of rates from time to time, we said: "The rule which governs interpretation in such cases has often been declared. We expressed it, following many prior decisions, in Detroit Citizens' Street R. Co. v. Detroit R. Co. supra, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them." See also Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43, and cases cited; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82. The doctrine was recognized as existing in Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, and in Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660. In the two latter cases the power of the respective cities to make a contract precluding them from building waterworks and operating their own water systems was declared. In the Vicksburg case it was pointed out that the power of the city to exclude itself from building waterworks of its own was recognized to exist by the supreme court of Mississippi.

In Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, a contract of the city, fixing a maximum rate, was sustained upon the authority of the decisions of the supreme court of the state, holding that, under a broad grant of power conferring, without restriction or limitation upon the city, the right to make a contract for a supply of the water, it was within the right of the city council, in the exercise of that power, to make a binding contract fixing the maximum [395] rate at which the water *should be supplied to the inhabitants of the city for a limited term of years.

This case is especially relied on by appellant as establishing a right in the city of Hutchinson to grant an exclusive franchise under the statutes of the state, both from their letter and as construed by the supreme court of the state. A consideration of the statutes and decisions, therefore, becomes necessary. Those quoted by the circuit court in its opinion are inserted in the margin.† They confer power to provide for the general welfare, and enable a city to construct water and lighting plants of its own or "to make contracts with any person or company for such purposes," and give such person or company "the privilege of furnishing light for the streets, lanes, or alleys of said city for any length of time not exceeding twenty-one years."

In addition to these sections, appellant cites others, which give to the city the power to make all contracts in relation to its property and affairs necessary to the exercise of its corporate* or administrative pow- [396] ers, the power to open and improve streets, purchase or condemn land for hospital and waterworks, to make regulations to secure the general health of the city, to enact ordinances for any of the above-mentioned purposes, and "for maintaining the peace, good government, and welfare of the city, and its trade and commerce." Also a section which gives to gas and water companies the power to manufacture and furnish gas and water and to lay down pipes and mains in the streets "with the consent of the municipal authorities thereof and under such regulations as may be prescribed," and a section giving power to such authorities "to contract with any such corporation for the lighting or supplying with water the streets, lots, lanes, squares, and public places in any such city, town, or village."

It is from these provisions that the water company deduces the power of the city to make the privilege granted exclusive, and special stress is put upon the provision of § 65, which we have quoted. Counsel say: "Language more explicitly expressing an absolute measure of power could hardly be framed. The power is given to light the streets, to make contracts for the lighting of the streets, and to confer the privilege of lighting the streets for a specific term of years." And, further, counsel say: "It will be observed that the grant of power is to confer 'the privilege of furnishing light.' The definite article 'the' is used. Power to confer the privilege implies *ex vi termini*, the exclusive privilege, not a fractional or communal privilege. The privilege conferred exists as a concrete and integral whole, and therefore when conferred must pass in its entirety. The city possessed the privilege of lighting its own streets as a function of its municipal authority. It was that privilege in its integral and exclusive form which the legislature authorized the city to confer." We cannot concur. The kind of privilege is de-

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†Sec. 35. The mayor and council of each city governed by this act shall have the care, management, and control of the city and its finances, and shall have power to enact, ordain, alter, or repeal any and all ordinances not repugnant to the Constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules, and regulations as may be necessary to carry such power into effect.

Sec. 65. The council may provide for and fined, not the extent of it. It is exclusive of some persons, but not of all. It is exclusive of those who have not a grant from proper authority. There are privileges which may exist in their full entirety in more [397] than one person, and the privilege *or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases and their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit—explicit in the letter of the grant—or, if inferred from other powers or purposes, to be not only convenient to them, but indispensable to them. And these conditions are imperative,—too firm of authority to be disregarded upon the petition of equities, however strong.

It is, however, contended that the statutes of Kansas fulfil the rule by the construction put upon them by the supreme court of the state, and the case is therefore brought, it is further contended, within the rule of Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762. The Kansas cases relied on are Eureka Light & Ice Co. v. Eureka, 5 Kan. App. 669, 48 Pac. 935; State v. Topeka, 68 Kan. 177, 74 Pac. 647; Cherryvale Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176. In those cases the court did say, in determining what duties were imposed or powers conferred upon the city, that the statute should be liberally construed to effectuate the general purpose of the legislature, but the powers under consideration were different from the powers herein involved, otherwise those cases would not be reconcilable with Paine v. Spratley, 5 Kan. 545, and Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 178, 40 Pac. 326. In Paine v. Spratley the general principles respecting the power of municipal corporations were said to be those which we have expressed. In Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. one of the companies, claiming an exclusive right, sought to test the validity of two city ordinances, granting the other the use of the streets, and to restrict it from using the privileges granted. For this purpose the court said the plaintiff company clearly had no standing in court, because the city authorities alone were charged with the duty of preventing encroachment on the *streets,[398] and they, alone, could test the validity of the ordinance. The court said further: "The city did not, in terms, attempt to give the plaintiff company a right to the exclusive use of the streets and alleys for the purpose of laying its pipes. If it had attempted to do so it could not, for want of power."

The conclusion from these cases is reinforced by a change in the statutes conferring power upon the cities of the state. Section 65, supra, was § 30 of the statutes of 1868, and as such gave to a city the power to make the contracts therein expressed, and give "the exclusive privilege of furnishing gas to light the streets, lanes, and alleys of said city for any length of time, not exceeding twenty-one years." This provision was repeated in § 59 of the statutes of 1872. But in 1885 that section was amended, so as to omit the words "the exclusive privilege." Statutes 1885, p. 147, § 7. And as thus amended it was re-enacted in 1901. Statutes 1901, § 1000.

Decrees affirmed.

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†OLD DOMINION STEAMSHIP COMPANY, Owner of the Steamship Hamilton, Petitioner,

v.

PRIMUS GILMORE, Administrator of the Estate of Alfred Gilmore, Deceased, et al.

(See S. C. Reporter's ed. 398–407.)

Commerce — admiralty — exclusiveness of Federal power — validity of state statute governing action for marine tort.

1. Applying to a claim for a death on the high seas, due to a tortious collision of two vessels belonging to Delaware corporations, the provision of Del. act of January 26, 1886, as amended by the act of March 9, 1901, authorizing personal representatives to maintain an action and recover damages for a death occasioned by unlawful violence or negligence, does not render such provision

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regulate the lighting of the streets, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers, and the council shall have power to make contracts with any person, company, or association for such purposes, and give such person, company, or association the privilege of furnishing light for the streets, lanes, or alleys of said city for any length of time not exceeding twenty-one years.

Sec. 83. That cities of the second class of the state of Kansas are hereby granted full power and authority, on behalf of said cities, to purchase, procure, provide, and contract for the construction of and construct waterworks, electric light and gas plants for the purpose of supplying such cities and the inhabitants thereof with water, light, and gas for domestic use and any and all other purposes.

†This case is reported by the official Reporter under the title of "The Hamilton."

repugnant to either the commerce or admiralty clauses of the Federal Constitution, where Congress has not legislated upon the subject.

Admiralty — state law as rule of decision.

2. The liability created by Del. act of January 26, 1886, as amended by the act of March 9, 1901, in favor of personal representatives of a person whose death is caused by violence or negligence, will be enforced in a proceeding in admiralty for the limitation of liability arising out of a tortious collision on the high seas of vessels belonging to Delaware corporations.

Shipping — limiting liability — claims for death.

3. Personal representatives of a passenger and of members of a crew who were drowned as the result of the collision of their vessel with another vessel on the high seas may recover in full in proceedings for the limitation of liability of such other vessel the liability created by Del. act of January 26, 1886, as amended by the act of March 9, 1901, in favor of the personal representatives of a person whose death is caused by violence or negligence.

[No. 71.]

Argued December 13, 1907. Decided December 23, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, allowing claims for loss of life in proceedings for limitation of liability of a vessel for a collision on the high seas. Affirmed.

See same case below, 77 C. C. A. 150, 146 Fed. 724.

The facts are stated in the opinion.

Mr. **Harrington Putnam** argued the cause, and, with Messrs. Henry E. Mattison and Wing, Putnam, & Burlingham, filed a brief for petitioner:

There is no presumption that the relations of the parties are to be fixed by the laws of any one state when an injury accrues on the high seas through a pure marine tort.

Rundell v. La Compagnie Generale Transatlantique, 94 Fed. 366, Affirmed in 49 L. R.A. 92, 40 C. C. A. 625, 100 Fed. 655.

The origin of the fiction that a merchant ship may be regarded as a floating portion of a country, or, as the doctrine is sometimes expressed, that it is a continuation or prolongation of the national territory, is as recent as 1752. Modern writers treat this fiction as having only a limited application.

Hall, International Law (Oxford), 1904.

The doctrine of "territoriality" is rather a limit on rights of search, and protection against aggression, than one that confers new rights of action for tort.

Walker, Science of International Law, pp. 130, 131.

The theory applicable to merchant vessels must be one of contract. It was early settled in England that the law of the flag determines the power of the master to deal with cargo, and measures the scope of the master's authority to bind the owner by his contracts.

Lloyd v. Guibert, L. R. 1 Q. B. 115.

This was further amplified as to cargo in 1882.

The Gaetano & Maria, L. R. 7 Prob. Div. 146.

The doctrine that merchant ships are part of the territory, if applicable to collisions, would also govern salvage on the high seas. Such attempts to impose foreign laws have often been made, but have never been successful in the United States courts.

Anderson v. The Edam, 13 Fed. 139.

It is also clear that the territorial fiction depends on contracts, because publicists recognize that it is only when the crew are on board that the doctrine of territoriality applies. Once the contracting members of the ship's company leave the vessel, the fiction vanishes.

Woolsey International Law, 6th ed. p. 72.

Statutes providing for the survivorship of rights of action and recovery in case of loss of life have been enacted in varying forms, not only by the states of the Union, but also by foreign countries with which the United States has intimate relations,—especially by England and the Canadian provinces. The system of law on the continent of Europe in some form also gives a recovery for loss of life. Yet in no case have the courts of Great Britain or the United States regarded the law of the flag upon the high seas as authorizing such a recovery in the admiralty courts. Even in Canada the admiralty has no jurisdiction for loss of life.

Monaghan v. Horn, 7 Can. S. C. 409.

The same rule was reached in England (notwithstanding Lord Campbell's act) that admiralty has no jurisdiction for loss of life.

The Vera Cruz, L. R. 10 App. Cas. 59.

In The Corsair (Barton v. Brown) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949, the collision occurred in the Mississippi river, about 10 miles above the city of New Orleans. The libel *in rem* was followed by an amended libel *in personam*, but both libels were dismissed upon the ground that the statute of Louisiana did not authorize an admiralty suit *in rem*, and the subsequent amendment to the libel *in personam* was improper, as the libel did not aver facts sufficient to establish a cause of action.

There is nothing in the Delaware statute showing an intent by the state of Delaware to assert jurisdiction outside its own territorial limits. Such acts of a state are to be presumed to be limited within its power of legislation, which is co-extensive with its territory.

United States v. Bevans, 3 Wheat. 336, 386, 4 L. ed. 404, 416.

The real basis for the fiction of the territoriality of merchant ships in time of peace rests in the supposed power of a country to make laws to bind its own citizens abroad when they may come to be judged by the courts of their own country.

Story, Confl. L. 8th ed. §§ 21, 22; Queen v. Keyn. L. R. 2 Exch. Div. 63.

By virtue of this power, a foreign state, like France, could impose on its citizens abroad the liability to pay damages for death occurring on the high seas, and enforce such right in the courts of France. Whether our Federal courts would enforce this right depends on considerations of the nature of the liability thus imposed, obligations of comity, and the relation of such a foreign right to our entire system of maritime jurisprudence.

But this argument entirely fails in the case of one of the states of the Union, which has ceded away all such rights to bind its citizens on the high seas. It cannot, therefore, claim that, on the unenclosed waters of the ocean, vessels of the United States, subject to the Federal laws, are under the domain of any suppletory state legislation as to maritime torts.

The judgment in Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430, sustained a title derived from the insolvency laws of Massachusetts as operative on a New Bedford ship, then on the high seas, so as to prevail over an attaching creditor in New York. This, however, was merely as to the transfer and devolution of property. This court discriminated the cases of admiralty jurisdiction which are no longer under the power of Massachusetts. This court has held that Massachusetts remains a sovereign state as to rights of property and as to regulating local fisheries (Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559), but not as to maritime torts.

The evident tendency of the decisions and weight of authority is that cases of tort arising upon the high seas, in the admiralty courts of the United States, will be governed by the law of the forum, which is the general maritime law as administered in these courts.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; The Belgenland (The Belgenland v. Jensen) 114 U. S. 355, 29 L. ed. 132, 5 Sup. Ct. Rep. 860; The Brantford City, 29 Fed. 373.

Under the common law there was no survival of actions for injuries resulting in death. By Lord Campbell's act this rule of the common law was changed, although it was later decided that Lord Campbell's act had no application whatever in the admiralty law.

The Vera Cruz, L. R. 9 Prob. Div. 88, L. R. 10 App. Cas. 59.

Our courts have also declared that, in the absence of a statute changing it, the rule in admiralty is the same as provided at the common law.

The Harrisburg (The Harrisburg v. Richards) 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140.

A state cannot, therefore, destroy the symmetry of the maritime law by creating maritime rights or conferring jurisdiction in any particular upon an admiralty court.

Crapo v. Allen, 1 Sprague, 184, Fed. Cas. No. 3,360; The Manhasset, 18 Fed. 922; Welsh v. The North Cambria, 40 Fed. 656; The Lyndhurst, 48 Fed. 841; Workman v. New York, 179 U. S. 558, 45 L. ed. 319, 21 Sup. Ct. Rep. 212.

There is no uniformity in the Federal courts at present in dealing with death in the admiralty.

Where loss of life occurs within state waters, the Federal decisions in the lower courts are irreconcilable.

Welsh v. The North Cambria, 40 Fed. 655; The Glendale, 26 C. C. A. 500, 42 U. S. App. 546, 81 Fed. 633; The Willamette, 31 L.R.A. 715, 18 C. C. A. 366, 44 U. S. App. 26, 70 Fed. 874; The Dauntless, 121 Fed. 420, 64 C. C. A. 243, 129 Fed. 715; The St. Nicholas, 49 Fed. 671; Robinson v. Detroit & C. Steam Nav. Co. 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883; Burrell v. Fleming, 47 C. C. A. 598, 109 Fed. 489; Quinette v. Bisso, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825; Alaska Commercial Co. v. Williams, 63 C. C. A. 92, 128 Fed. 362.

Where death has occurred on the high seas, there is a wide difference in applying the terms of state statutes.

The Robert Graham Dun, 17 C. C. A. 90, 33 U. S. App. 297, 70 Fed. 270; Rundell v. La Compagnie Generale Transatlantique, 49 L.R.A. 92, 40 C. C. A. 625, 100 Fed. 655; Oleson v. The Ida Campbell, 34 Fed. 432; The Jane Grey, 95 Fed. 693.

The officer of the watch was a fellow servant with the other navigating officers who were engaged in running the vessel at this improper speed. His representatives are, therefore, debarred from any recovery.

Robinson v. Detroit & C. Steam Nav. Co.

supra; The A. W. Thompson, 39 Fed. 115; The Queen, 40 Fed. 694.

The seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483.

As the claim against the Clyde Company is not valid, the claim against The Hamilton cannot be maintained for its full face, but The Hamilton remains answerable only for half of all such losses.

The City of New York, 25 Fed. 151; The Queen, supra; Stahl v. The Niagara, 77 Fed. 336.

The decrees below have departed from the maritime law and have given an extraterritorial force to state statutes.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 558, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612.

Mr. **J. Parker Kirlin** argued the cause, and, with Messrs. John M. Woolsey and Howard M. Long, filed a brief for respondents:

There is a quasi-territorial jurisdiction over merchant vessels on the high seas, inhering in the state to whose citizens they belong.

1 Le Droit des Gens, Pradier-Fodéré's ed. Paris, 1863, Livre 1, chap. 19, § 216; 1 Kent, Com. 27; Dana's Wheaton, International Law, p. 169, § 109; Wharton, Confl. L. § 356; Bluntschli, Le Droit International Codifié, Livre 4, subd. 4, §§ 317, 318; Heffter, Das Europäische Volkerreicht, § 78; 1 Leo, p. 496; Calvo, 1 Le Droit International, p. 552; Droit International Public, 3d ed. Paris, 1905, p. 518, chap. 4, subd. 2, §§ 427, 428; Bonfils, 3d ed. Paris, 1901, chap. 2 § 607; Hall, International Law (Oxford), 1904, pp. 253, 254; Hall, Foreign Jurisdiction of British Crown, Oxford, 1894, p. 246; Lawrence, Principles of International Law, p. 206; Taylor, International Pub. Law, §§ 262, 263, pp. 307, 308; Woolsey, International Law, 2d ed. § 58, p. 71; 1 Moore, International Law, § 174, p. 930; Crapo v. Kelly, 16 Wall. 610, 631, 21 L. ed. 430, 438; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; The Scotia (Sears v. The Scotia) 14 Wall. 170, 184, 20 L. ed. 824; St. Clair v. United States, 154 U. S. 134, 152, 38 L. ed. 936, 943, 14 Sup. Ct. Rep. 1002; Re Ah Sing, 13 Fed. 289; Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 12, 30 L. ed. 565, 567, 7 Sup. Ct. Rep. 385; Re Moncan, 14 Fed. 48; The E. B. Ward, 17 Fed. 459; Ex parte Byers, 32 Fed. 410; The Lamington, 87 Fed. 754; Lindstrom v. International Nav. Co. 117 Fed. 171, 60 C. C. A. 649, 123 Fed. 476; La Bourgogne, 71 C. C. A. 489, 139 Fed. 439; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664.

In the eyes of the law, the tort by which the claimants met their death was consummated within the territorial jurisdiction of the state of Delaware.

Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 421, 50 L. ed. 1082, 1086, 26 Sup. Ct. Rep. 679; Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686; The Havana, 12 C. C. A. 361, 26 U. S. App. 231, 64 Fed. 496; International Nav. Co. v. Lindstrom, 60 C. C. A. 649, 123 Fed. 475; The Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237; Scudder v. Calais S. B. Co. 1 Cliff. 370, Fed. Cas. No. 12,565; The Grapeshot (The Grapeshot v. Wallerstein) 9 Wall. 129, 19 L. ed. 651; The Kalorama (Pendergast v. The Kalorama) 10 Wall. 205, 212, 19 L. ed. 941, 943; The Roanoke, 189 U. S. 185, 193, 47 L. ed. 770, 772, 23 Sup. Ct. Rep. 491; The Golden Rod, 80 C. C. A. 246, 151 Fed. 6; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192.

There is no constitutional objection to the enforcement, by an admiralty court, of a right of action for death, which survives under the provisions of the Delaware statute.

Panama R. Co. v. Napier Shipping Co. 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572.

In the absence of congressional legislation on the subject, a state statute of the kind in question here is valid and enforceable in the Federal courts.

American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; The Corsair (Barton v. Brown) 145 U. S. 335, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; The H. E. Willard, 52 Fed. 387; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; The Transfer No. 4, 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. 367; International Nav. Co. v. Lindstrom, 60 C. C. A. 649, 123 Fed. 475; La Bourgogne, supra; The Glendale, 26 C. C. A. 500, 42 U. S. App. 546, 81 Fed. 633; Burrell v. Fleming, 47 C. C. A. 598, 109 Fed. 489; Quinette v. Bisso, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825; Robinson v. Detroit & C. Steam Nav. Co. 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 883;

Humboldt Lumber Mfrs. Asso. v. Christopherson, 46 L.R.A. 264, 19 C. C. A. 481, 44 U. S. App. 434, 73 Fed. 239; Alaska Commercial Co. v. Williams, 63 C. C. A. 92, 128 Fed. 362.

The objection by counsel for the petitioner that to enforce such statutes allowing recovery for death, perhaps slightly different in form in the different states, would impair the uniformity of maritime law, is conclusively answered by the remarks of Mr. Justice Bradley in the case of The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 572, 22 L. ed. 654, 661. See also the John G. Stevens, 170 U. S. 113, 126, 42 L. ed. 969, 974, 18 Sup. Ct. Rep. 544.

The law of England is now settled that an action *in personam* for injuries resulting in death on the high seas is maintainable in the court of admiralty.

The Bernina, L. R. 12 Prob. Div. 58, L. R. 13 App. Cas. 1; The Orwell, L. R. 13 Prob. Div. 80; Davidsson v. Hill [1901] 2 K. B. 606.

In limitation proceedings, jurisdiction to apply the state statutes seems to be clear.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; The Albert Dumois, 177 U. S. 240, 259, 44 L. ed. 751, 761, 20 Sup. Ct. Rep. 595.

If it were impossible to enforce claims for death on the high seas in limitation proceedings, by reason of the fact that the court of admiralty is without jurisdiction to entertain them, a shipowner could not limit his liability in respect of such claims.

Ex parte Phenix Ins. Co. 118 U. S. 610, 618, 626, 30 L. ed. 274, 278, 280, 7 Sup. Ct. Rep. 25.

The negligence of Captain Tunnell is not imputable to the other members of the Saginaw's crew.

Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Farley v. Wilmington & N. C. Electric R. Co. 3 Penn. (Del.) 581, 52 Atl. 543; The Bernina, supra.

Where an action is brought by a servant against a person other than his master, the fact that the fellow servant of the plaintiff may have been negligent, and that such negligence may have contributed to the accident, is not a defense to the third person against whom suit is brought. The case against him stands or falls on the finding as to his own negligence. He is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 702, 27 L. ed. 266, 267, 1 Sup. Ct. Rep. 493; Chicago, St. P. & K. C. R. Co. v. Chambers, 15 C. C. A. 327, 32 U. S. App. 253, 68 Fed. 153.

Innocent parties suffering damage in a collision may recover all their damages from either vessel, and the question of contribution comes up merely as between the two vessels.

The Atlas (Phœnix Ins. Co. v. The Atlas) 93 U. S. 302, 23 L. ed. 863; The Albert Dumois, 177 U. S. 240, 243, 260, 44 L. ed. 751, 754, 762, 20 Sup. Ct. Rep. 595; The Juniata (United States v. The Juniata) 93 U. S. 337, 23 L. ed. 930; The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 22, 27 L. ed. 91, 93, 1 Sup. Ct. Rep. 41; The Chattahoochee, 173 U. S. 540, 549, 43 L. ed. 801, 805, 19 Sup. Ct. Rep. 491; The New York, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67; Ex parte Union S. B. Co. 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904; The Conemaugh (Union S. B. Co. v. Erie & W. Transp. Co.) 189 U. S. 363, 47 L. ed. 854, 23 Sup. Ct. Rep. 504.

Mr. **George Whitefield Betts, Jr.**, also argued the cause, and, with Messrs. Hunt, Hill, & Betts, filed a brief for respondents:

Since Congress has not legislated with reference to the subject, the statute of the state of Delaware, as a sovereign state, allowing damages for death, is binding and effective on its vessels when on the high seas.

The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 580, 22 L. ed. 654, 663; The Glide, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; Cooley v. Port Wardens, 12 How. 299, 318, 13 L. ed. 996, 1004; American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

The "Hamilton" and "Saginaw," for the purposes of this proceeding, were parts of the territory of the state of Delaware, and subject to its laws.

Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; The Lamington, 87 Fed. 752; Hall, International Law, 1895 ed. §§ 75, 77, p. 262.

The weight of all well-considered judicial authority supports the jurisdiction exercised by the lower courts in this case.

Lindstrom v. International Nav. Co. 117 Fed. 170; La Bourgogne, 71 C. C. A. 489, 139 Fed. 433; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Re Clyde S. S. Co. 134 Fed. 95.

There is no logical reason why damages should be allowed when there is a contract between the decedent and the vessel, and refused when no such contract exists.

The Albert Dumois, 177 U. S. 240, 44 L. ed. 751, 20 Sup. Ct. Rep. 595.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding for the limitation of liability of the steamship Hamilton in respect of a collision on the high seas with the steamship Saginaw, in which the Saginaw was sunk and her chief mate and some of her crew and passengers were drowned. It is found, and not disputed, that both vessels were to blame. Both vessels belonged to corporations of the state of Delaware. A statute of that state, after enacting that actions for injuries to the person shall not abate by reason of the plaintiff's death, provides that, "whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow or widower of any such deceased person, or, if there be no widow or widower, the personal representatives, may maintain an action for and recover damages for the death and loss thus occasioned." Act of January [403] 26, 1886, as amended *by act of March 9, 1901. Delaware Laws 1901, vol. 31, p. 500. On the strength of this statute the representatives of a passenger and of three of the crew filed claims, and the claims were allowed by the district court (see 134 Fed. 95, 139 Fed. 906) and afterwards by the circuit court of appeals (77 C. C. A. 150, 146 Fed. 724). A certiorari was granted by this court to settle the question, as stated by the petitioner, whether the Delaware statute applies to a claim for death on the high seas, arising purely from tort, in proceedings in admiralty. Incidentally the right of representatives of the crew of the Saginaw to recover their claims in full against the Hamilton also has been discussed.

Apart from the subordination of the state of Delaware to the Constitution of the United States, there is no doubt that it would have had power to make its statute applicable to this case. When so applied, the statute governs the reciprocal liabilities of two corporations, existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the state, it is true, but within no other territorial jurisdiction. If confined to corporations, the state would have power to enforce its law to the extent of their property in every case. But the same authority would exist as to citizens domiciled within the state, even when personally on the high seas, and not only could be enforced by the state in case of their return, which their domicil by its very meaning promised, but, in proper cases, would be recognized in other jurisdictions by the courts of other states. In short, the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the state, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas.

The first question, then, is narrowed to whether there is anything in the structure of the national government and under the Constitution of the United States that takes away *or qualifies the authority that otherwise [404] Delaware would possess,—a question that seems to have been considered doubtful in Butler v. Boston & S. S. S. Co. 130 U. S. 527, 558, 32 L. ed. 1017, 1024, 9 Sup. Ct. Rep. 612. It has two branches: First, whether the state law is valid for any purpose; and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2. 130 U. S. 557. The doubt in this case arises as to the power of the states where Congress has remained silent.

That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 [1 Stat. at L. 77, chap. 20, § 9], "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it" (Rev. Stat. § 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. Martin v. Hunter, 1 Wheat. 304, 337, 4 L. ed. 97, 105; The Hine v. Trevor (The Ad. Hine v. Trevor) 4 Wall. 555, 571, 18 L. ed. 451, 456; Leon v. Galceran, 11 Wall. 185, 20 L. ed. 74; Manchester v. Massachusetts, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the state where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in McDonald v. [405] *Mallory, 77 N. Y. 546, 33 Am. Rep. 664, where the death occurred on the high seas. Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, reinforces Chase's Case, and answers any argument based on the power of Congress over commerce, as to which we hardly need refer also to Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; and Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831, concerning state pilotage laws.

The jurisdiction commonly expressed in the formula that a vessel at sea is regarded as part of the territory of the state was held, upon much consideration, to belong to Massachusetts, so far as to give preference to a judicial assignment in insolvency of such a vessel over an attachment levied immediately upon her arrival at New York, in Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430. That decision was regarded as necessitating the conclusion reached in McDonald v. Mallory, supra. Other instances of state regulation are mentioned in The City of Norwalk, 55 Fed. 98, 106; but without further recapitulation of the authorities, we are of opinion that the statute is valid. See Workman v. New York, 179 U. S. 552, 563, 45 L. ed. 314, 321, 21 Sup. Ct. Rep. 212. We should add, what has been assumed thus far, as it had to be assumed in order to raise the question discussed, that we construe the statute as intended to govern all cases which it is competent to govern, or, at least, not to be confined to deaths occasioned on land. McDonald v. Mallory, supra. If it touches any case at sea, it controls this. See The Belgenland (The Belgenland v. Jensen) 114 U. S. 355, 370, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860. Whether it is to be taken to offer a similar liability of Delaware owners to foreign subjects (Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386) need not be determined now.

We pass to the other branch of the first question,—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligatio*,—a personal liability of the owner of the Hamilton to the claimants. Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. Ex parte McNiel, 13 Wall. 236, 243, 20 L. ed. 624, 626. *It might [406] not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. The Corsair (Barton v. Brown) 145 U. S. 335, 347, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit. But we are not concerned with these considerations. In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle (Andrews v. Wall, 3 How. 568, 573, 11 L. ed. 729, 731; The J. E. Rumbell, 148 U. S. 1, 15, 37 L. ed. 345, 348, 13 Sup. Ct. Rep. 498; admiralty rule 43; The Galam, 2 Moore P. C. C. N. S. 216, 236), but is the result of the statute which provides for, as well as limits, the liability, and allows it to be proved against the fund (The Albert Dumois, 177 U. S. 240, 260, 44 L. ed. 751, 762, 20 Sup. Ct. Rep. 595. See Workman v. New York, 179 U. S. 552, 563, 45 L. ed. 314, 321, 21 Sup. Ct. Rep. 212).

The second question concerns the right of the representatives of the crew to recover their claims in full. There is a faint suggestion that the mate of the Saginaw was negligent; but on this point we shall not go behind the findings below. The main objection is that the statute allows a recovery beyond the maintenance and support which were declared in The Osceola, 189 U. S. 158, 175, 47 L. ed. 760, 764, 23 Sup. Ct. Rep. 483, to be the limit of a seaman's rights against his own vessel when injured by the negligence of the master or a fellow servant on his ship. But the question here regards the liability of the Hamilton, another vessel. The contract between the seaman and the owners of the Saginaw does not affect the case. Erie R. Co. v. Erie & W. Transp. Co. 204 U. S. 220, 226, 51 L. ed. 450, 453, 27 Sup. Ct. Rep. 246. Neither does the Harter act, even if its terms could be extended to personal injuries and loss of life. The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup Ct. Rep. 491. *Neither does the negli- [407] gence of the Saginaw. The Atlas (Phœnix Ins. Co. v. The Atlas) 93 U. S. 302, 23 L. ed. 863.

We are of opinion that all the claimants are entitled to the full benefits of a statute "granting the right to relief where otherwise it could not be administered by a maritime court." Workman v. New York, 179 U. S. 552, 563, 45 L. ed. 314, 321, 21 Sup. Ct. Rep. 212.

Decree affirmed.

AMELIA M. HOLT, Appt.,
v.
SAMUEL MURPHY, Anton H. Classen, Frank M. Riley, et al.

(See S. C. Reporter's ed. 407–415.)

Public lands — application during time for appeal from rejection of prior entry.

1. A soldier's declaratory statement filed during the time allowed for an appeal to the Secretary of the Interior from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant, where, by a rule of the Land Department in force when a patent for the land is finally issued, no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been canceled from the records of the local office.

Resulting trust — waiver — laches.

2. The waiver of a preferential right of entry under a decision in a contest in the Land Department, filed before the patent was finally issued, coupled with a delay of four years in attempting to enforce such preferential right, defeats any right to charge the patentee and his grantees with a resulting trust.

[No. 61.]

Argued December 6, 1907. Decided January 6, 1908.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Oklahoma County, in that territory, in favor of defendants in a suit to establish a resulting trust. Affirmed.

See same case below, 15 Okla. 12, 79 Pac. 265.

Statement by Mr. Justice **Brewer**:

This was a suit commenced in the district court of Oklahoma county, Oklahoma, by appellant, praying that the appellees, the holders of the legal title to a tract of land in Oklahoma county, be decreed to hold that title in trust for her benefit. The district court entered a decree in favor of the defendants, which was affirmed by the supreme court of the *territory (15 Okla. 12, 79 Pac. [408] 265), from whose decision this appeal was taken.

These facts are undisputed: On April 23, 1889, Ewers White made a homestead entry of the land. Subsequently two other parties, C. J. Blanchard and Vestal S. Cook, attempted to enter the same land. On July 16, 1889, in a contest before the local land officers, they held that all the claimants were disqualified because of entering the territory in violation of the President's proclamation. On appeal the Commissioners of the General Land Office, on March 7, 1890, affirmed their ruling, dismissed the contests of both Blanchard and Cook, and held the entry of White for cancelation. From this decision White prosecuted an appeal to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. 13 Land Dec. 66. During the time allowed for appeal to the Secretary from the Commissioner, and on March 11, 1890, Levi Holt, by his attorney in fact, filed a soldier's declaratory statement for the land, which was suspended by the register and receiver pending final action on the appeal. Thereafter and on November 29, 1890, before the decision by the Secretary of his appeal, White filed a relinquishment of his entry and all rights thereunder, and the defendant Samuel Murphy immediately thereafter made a homestead entry thereon.

In addition it was charged by plaintiff that after a decision by the Secretary of the Interior, in a contest between Murphy and Holt in favor of Holt, or rather in favor of his widow (as he had died in the meantime), a contract was entered into between plaintiff's attorney and the defendant Samuel Murphy, by which her attorney should deceive her as to her right in the land, and, for a pecuniary consideration received from Murphy, should file a waiver of her right of entry, and thus permit him to acquire a patent, all of which was done; that Anton H. Classen (the present holder of the legal title) and the other defendants were fully aware of what was thus wrongfully done; that the entry of Murphy appearing on the record as being unchallenged, a patent was, on January 19, 1898, issued *to him. Sub- [409] sequently the title to most of the land passed to defendant Classen, who, at the time of the filing of the waiver by plaintiff's attorney, was receiver of the land office of the district in which the tract in controversy is situated, and who claimed in his answer, among other things, that he was a bona fide purchaser and without notice of any equities of the plaintiff.

Sections 2304 and 2309, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1413 and 1418), provide for homestead entries by soldiers and officers who served in the Army of the United States. By § 2309 the declaratory statement of such soldier or officer may be made by an agent as well as personally, and he is allowed six months thereafter to begin settlement and improvement, whereas, in ordinary cases, the entryman must make affidavit of his right to enter before the register or receiver, and must commence his residence and cultivation of the land immediately after the filing of the affidavit.

Messrs. **William Frye White** and **John S. Jenkins** argued the cause, and, with Mr. John B. Cotton, filed a brief for appellant.

Mr. **J. H. Everest** argued the cause and filed a brief for appellees.

[411] *Mr. Justice **Brewer** delivered the opinion of the court:

The plaintiff alleges in her petition that the land is worth $100,000. It appears that she has never been in Oklahoma; that neither she nor her husband ever entered upon or cultivated the land; and yet she asks the court to give her this valuable property, taking it away from those who, at least by their presence and occupation of the tract, have assisted in building up a state having more than a million inhabitants.

Another matter is worthy of notice. According to a report of the register of the local land office to the General Land Office, at Washington, on May 12, 1897, the attorney for the plaintiff was notified of the decision in her favor by the Commissioner of the General Land Office, and on June 16 of that year that attorney filed the waiver of the preference rights thus awarded to her. The patent to Murphy was issued on January 19, 1898, and recorded in the office of the register of deeds in Oklahoma county on January 25, 1898. This suit was commenced on September 16, 1901. It therefore appears that the plaintiff took no action until more than four years after the waiver by her attorney of her preference rights and three and a half years after the issue of the patent and its record in the county in which the land is situate. It is true that she claims to have been ignorant of the decision in her favor, and that she relied upon her attorney, whom she charges was engaged in a conspiracy to defraud her. Although this reliance, so far as it was reasonable and in fact controlled her, may, to some extent, at least, have excused her inaction, yet it must also be remembered that not improbably her inaction may have influenced some of the defendants to deal with the land in reliance upon the title passing by the patent to Murphy.

The decree in the district court finds that the plaintiff "has failed to sustain the material allegations of her petition," and holds that neither she nor any of the heirs of Levi Holt "have any right, equity, or interest in and to said tract of land above *described or [412] any part thereof," and quiets the title of defendants against all their claims, while the supreme court, in its opinion, says that the district court was warranted in finding that the "allegations of fraud in the petition were not sustained by the evidence."

The supreme court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land, that tract is segregated from the mass of public land subject to entry until the existing entry is disposed of.

Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt, in view of the many rulings of the Land Department and the decision of this court (Hodges v. Colcord, 193, U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433; McMichael v. Murphy, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460, the latter a case involving the land in controversy), but they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling, dismissed the contests of Blanchard and Cook, and held the entry of White for cancelation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been, in fact, taken from the decision of the Commissioner to the Secretary of the Interior. In other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not, there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land, to take effect if White should not appeal from the decision of the Commissioner, or if, on appeal, that decision should be sustained. In that way Holt would have been given priority over all subsequent entries. Counsel further say that such was then the ruling of the Department, citing especially McMichael v. *Murphy, 20 Land Dec. 147, and that [413] although that decision has been overruled, yet that it was the law of the Land Department, as then established by its practice, and should be recognized as controlling the rights of the parties. The case in which, as they concede, the doctrine of McMichael v.

Murphy was overruled, is Cowles v. Huff, 24 Land Dec. 81, decided in January, 1897, —a year before the issue of the patent in this case.

The difference in the ruling is disclosed by the two cases of Re Gauger, 10 Land Dec. 221, and Allen v. Price, 15 Land Dec. 424. In the former it was held:

"An application to enter may be received during the time allowed for appeal from a judgment of cancelation, subject to such appeal, but should not be made of record until the rights of the former entryman are finally determined."

In the latter the Secretary said (p. 426):

"The act of May 14, 1880 (21 Stat. at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392), granting to a successful contestant the preference right of entry, and the act of July 26, 1892 (27 Stat. at L. 270, chap. 251, U. S. Comp. Stat. 1901, p. 1393), granting to his heirs the same rights, it must be admitted, conferred a right upon such party, and when we consider that this right must be exercised within the limited period of thirty days, and that it can only be exercised upon a specified and limited tract of land, is it not reasonable to assume that it was the intention of such legislation to reserve from other appropriation, for the period specified, the designated tract of land, and thus enable the party intended to be benefited to reap the reward of his diligence in procuring the cancelation of the prior entry?

"Upon mature reflection, I am convinced that, to hold otherwise, is, by implication at least, to assume that Congress holds out inducements to a party to take certain action, but fails to protect him in the rights such action secures. To reserve the land for the time specified will certainly be in the line of protecting the contestant's rights, and no other party can be seriously prejudiced thereby."

In McMichael v. Murphy, 20 Land Dec. 147, he held that "one of the rules of this [414] Department, established by a number *of decisions, is, that a judgment of your office, holding an entry for cancelation, is final so far as that tribunal is concerned, and at once throws the land involved open to entry. That an application to enter, made after the date of said judgment, and within the time allowed for appeal, should be received, but not placed of record until the time for appeal has expired, or the rights of the entryman on appeal have been determined by this Department. In other words, that such an application shall be received subject to the rights of the entryman on appeal;" while in Cowles v. Huff, supra, it was decided that "an application to enter should not be received during the time allowed for appeal from a judgment canceling a prior entry of the land applied for; nor the land so involved held subject to entry, or application to enter, until the rights of the entryman have been finally determined."

In the course of his opinion the Secretary, after noticing the difference between the cases of Re Gauger and Allen v. Price, said:

"This summary shows, beyond any question, that there is, in some particulars, at least, an irreconcilable conflict between these cases. To the extent of such conflict one or the other of them must be overruled. From a careful examination of the subject I am convinced that the doctrine announced in Allen v. Price furnishes the better practice, and it will be followed. The case of Re Gauger, 10 Land Dec. 221, is therefore overruled. All other cases following it, in so far as they may be in conflict with the views herein expressed, are also hereby overruled."

See also Stewart v. Peterson, 28 Land Dec. 515, in which the Secretary held that "in order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office." (P. 519.) To fully appreciate the scope of this ruling it must be remembered that the local land officers *do not, except in [415] the case of a relinquishment by the entryman, on their own judgment cancel an entry of record in their office, and that it remains until the Commissioner of the General Land Office sends directions to the local land officers to cancel it; and, further, that the Commissioner, even after his decision against the validity of the entry, sends down no order for its cancelation until after the time has expired for appeal from his decision, or until an appeal, if had, is finally disposed of by the Secretary. (P. 517.) Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

But, further, it appears that a waiver in proper form of appellant's right of entry was filed in the Land Department after the decision in the contest case in her favor, and before the patent was issued to Murphy. Indeed, after that decision and after notice to her attorney she failed to take any action looking to an entry within the prescribed time.

As, by the findings of both the trial and supreme court of the territory, all charges of fraud and misconduct may be put one side, there was nothing to prevent the waiver receiving operative force, and that, together with the delay on her part in attempting to enforce her preference rights, left the land free for Murphy's entry and the patent thereon.

The decision of the Oklahoma courts was right, and it is affirmed.

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[416] *D. SULLIVAN, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 416–425.)

Error to state court — which is highest court of state.

1. The court of civil appeals of the state of Texas is the highest court of the state for the purpose of a review in the Federal Supreme Court in a case in which the supreme court of the state has dismissed, for want of jurisdiction, an application to review the judgment of the court of civil appeals.

Error to state court — Federal question — when raised in time.

2. A Federal question was raised in time to sustain a writ of error from the Supreme Court of the United States to a state court, where it was distinctly presented in a petition to the state court for a rehearing, was considered by that court, and was decided adversely to the plaintiff in error.

Constitutional law — impairing contract obligations.

3. The substantial elements of a contract between the claimant under a Mexican land grant by metes and bounds and the state, which is alleged to arise out of Tex. act of February 10, 1852, confirming such grant and imposing upon the claimant the duty of having the land surveyed by the district or county surveyor of the county in which it is situated, and of returning the field notes to the land office, which is then required to issue a patent, are so far lacking as to defeat the contention that contract obligations are unconstitutionally impaired by the subsequent act of September 3, 1901, § 11, under which the state has recovered from such claimant a portion of the land which, though called for by the survey, is outside the boundaries of the original Mexican grant.

[No. 91.]

Argued December 20, 1907. Decided January 6, 1908.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Travis County, in that state, for the recovery by the state of lands claimed under a Mexican grant which the court found to be outside the boundaries of such grant. Affirmed.

See same case below (Tex. Civ. App.) 95 S. W. 645.

Statement by Mr. Justice **Brewer:**

This case comes to us from a state court and our jurisdiction is invoked on the ground of a law of the state charged to work an impairment of the obligation of a contract. The facts are that in 1834 the Mexican state of Tamaulipas granted to Pedro de la Garza a tract of land. The grant, signed by the governor, recited that the grantee had paid the appraised value, $204; that the grant contained "6½ leagues of pasture land for large cattle, comprehended in the boundaries, angles, and demarcations which appear in the attached map, countersigned with the seal of this government, signed with a rubric by my secretary, which, for greater distinctness, *are set out in the present title in the fol- [417]
lowing mode: El Alcatraz and San Antonio of the waterfall, east to west on the north side; San Antonio and the Sacramento, north to south on the west; Sacramento and San Francisco, west to east on the south; San Francisco, San Pedro, and El Alcatraz, south to north on the east. The pasture land is bounded on the north by Los Olmos creek, and on the rest of the sides by vacant lands."

Accompanying the grant was a plat showing an irregular hexagon and a survey made by Antonio Canales, as follows:

The inclination to the southeast of the Olmos creek figured in the survey of the irregular hexagon, which appears depicted, which contains 6 leagues of pasture land for large cattle and 20,782,500 square varas according to the units fixed by the law of the state for agrarian measures. The angular boundaries and most notable places which were defined were the following: A, boundary of the Alcatraz; B, boundary of San Antonio of the waterfall; C, boundary of Sacramento; D, boundary of San Francisco; r, lateral boundary of this pasture

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Note.—As to when writ of error may run to inferior state court—see note to Kentucky v. Powers, 50 L. ed. U. S. 633.

As to when Federal question is raised in time to sustain appellate jurisdiction of Federal Supreme Court over state courts—see notes to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414, and Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 39.

and angular of the Santa Rosa de Abajo, called San Pedro; e, lake of the sheep pen; m, n, ponds and heights of the waterfall; o, the little pond. The rectangle h, i, g, l was ceded to this pasture by citizen Pedro Villareal, of which it was defined in the terms which appear in the file of this survey, A. M. B., the Olmos creek. The survey was made with the greatest exactness, remeasuring the cord every half league and correcting the 10 leagues of declination to the northeast, which the compass needle has in these lands. This pasture is bounded on the north by the creek, on the east by the pasture of Paistle, and on the rest by vacant lands.

Carmargo, Dec. 5th, 1832.
Antonio Canales.

Thereafter Tamaulipas became a part of Texas, and that state, on February 10, 1852, passed an act confirming this among other grants. The act of confirmation, so far as is material, provided by § 1 "that the state [418] of Texas hereby relinquishes *all her right and interest in the following-described lands to the original grantees thereof, their heirs and legal assigns, to wit: County of Starr . . . (103) Pedro de la Garza, 6½ leagues, called 'Santa Rosa' . . ." Section 2 of the act is as follows:

"Sec. 2. That it shall be the duty of those claiming any of the lands named in this act to have the same surveyed by the district or county surveyor of the county in which the same may be situated, and, upon the return of the field notes thereof to the General Land Office, the Commissioner is hereby authorized and required to have the same plotted on the maps of his office, and issue patents for the same in accordance with existing laws; provided, that no patent shall issue for a less amount than the original grant. That the owners of said lands shall be required to pay the taxes due on the same, from the date of the organization of the respective counties herein mentioned; which taxes shall be paid and legal vouchers for the same exhibited to the Commissioner of the General Land Office before the patent to the same shall issue."

In May, 1859, Felix A. Blucher, a deputy district surveyor of the district, made a survey, the field notes and a plat of which were in August, 1869, filed in the General Land Office. The field notes commenced with the statement:

"Field notes of a survey of 8 leagues and 12 labors of land made for Wm. G. Hale and F. J. Parker, the assignees of Pedro de la Garza, this being the quantity of land to which they are entitled by virtue of a grant from the state of Tamaulipas dated on the 3d day of July, A. D. 1834. Surveyed in accordance with an act of the legislature of the state of Texas, approved Feb'y 10th, 1852, and entitled 'An Act to Relinquish the Right of the State to Certain Lands Therein Named, This Being Part of Confirmation Numbered 103 for the County of Starr in Said Act.'"

This survey was not approved, and the field notes were indorsed by the Commissioner of the General Land Office in these words: "Closes partly all but the approximate area *found with apportioning errors [419] is 267,552,959 sq. vrs.—10 leagues, 17½ labors, or 55,252,959 sq. vrs. too much. Aug. 21, '69, Richardson, $2.00."

No patent was ever issued for the land or any part of it. On September 3, 1901, the legislature of the state of Texas passed an act, § 11 of which is as follows:

"Sec. 11. The attorney general of this state is hereby directed and required to institute and prosecute, in the name of the state of Texas, such suits as may be necessary to recover from the person or persons in possession thereof or claiming title thereto, all lands which are held or claimed under titles emanating from the Spanish or Mexican governments where no valid evidences of such grants are to be found in the records or among the files of the General Land Office; and also such suits as may be necessary to determine the exact location and boundaries of such lands, where the evidence on file in the General Land Office does not sufficiently identify the land claimed; and such suits shall be brought, prosecuted, and tried in the district court of Travis county, Texas."

In pursuance of this section this suit was brought, the original petition having been filed September 24, 1902.

The defendant holds title under the original grantee of the state of Tamaulipas, and was, and had been for many years, in possession of the entire tract of over 10 leagues surveyed by Blucher, claiming title to all in his possession. The state, conceding his title to 6½ leagues, contended that all in excess was still its property. The case was tried before the court without a jury and a judgment entered in behalf of the state for three tracts, which the court found to be outside the boundaries of the original Mexican grant. The court of civil appeals in and for the third supreme judicial district of the state affirmed this judgment. 95 S. W. 645. A petition for rehearing was filed, in which the protection of the contract clause of the Constitution of the United States was specially invoked. In denying the motion for a rehearing the court considered this constitutional question and decided it *adversely to the plaintiff in error. [420]

Thereupon a petition was presented to the supreme court of the state for a writ of error to review the judgment of the court of civil appeals, but that court dismissed the application for want of jurisdiction.

Mr. **Charles W. Ogden** argued the cause, and, with Mr. J. C. Sullivan, filed a brief for plaintiff in error:

This court will ascertain and determine for itself, in a case of this character, whether or not a contract existed, and, if so, its import, and whether it has been impaired by state legislation.

Muhlker v. New York & H. R. Co. 197 U. S. 571, 49 L. ed. 878, 25 Sup. Ct. Rep. 522; Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 239, 50 L. ed. 170, 26 Sup. Ct. Rep. 27; Houston & T. C. R. Co. v. Texas, 177 U. S. 76, 44 L. ed. 679, 20 Sup. Ct. Rep. 545; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 147, 45 L. ed. 791, 21 Sup. Ct. Rep. 575.

While it is a general rule that the construction given by state courts to state laws is binding and conclusive upon the Federal courts, this rule does not extend to cases in which this court is called upon to interpret a contract of the state, though it has been made in the form of a law, or by functionaries of the state, in pursuance of state laws. This court will, therefore, construe for itself the contract evidenced by the act of confirmation of 1852, and the acceptance thereof by the landowner, and will not be bound by the construction placed upon said contract by the state court.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279–293, 36 L. ed. 972–978, 13 Sup. Ct. Rep. 72; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486–492, 38 L. ed. 793–796, 14 Sup. Ct. Rep. 968; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; McCullough v. Virginia, 172 U. S. 102–109, 43 L. ed. 382–385, 19 Sup. Ct. Rep. 134.

An agreement for the settlement of boundaries to which the state is a party should be construed and enforced according to the well-established principles which regulate similar contracts between individuals.

State v. Cloudt (Tex. Civ. App.) 84 S. W. 416; Wilson v. Dillingham, 14 Tex. Civ. App. 628, 38 S. W. 651; United States v. California & O. Land Co. 148 U. S. 43, 37 L. ed. 360, 13 Sup. Ct. Rep. 458; Higuera v. United States, 5 Wall. 836, 18 L. ed. 471; Fristoe v. Blum, 92 Tex. 80, 45 S. W. 998; State v. Galveston City Co. 38 Tex. 28; Coleman v. Smith, 55 Tex. 259, Approved in Cooper v. Austin, 58 Tex. 501.

The act of February 10, 1852, confirming the grant in controversy, and providing for a settlement of its boundaries by an official survey, was a proposition made by the state to the landowner, which, upon acceptance, as evidenced by the survey at the request of the owner, and the return of the field notes to the general land office, ripened into a valid contract, which was binding upon both parties thereto.

When the survey is made and the field notes thereof are returned, as required by law, it is conclusive evidence against both the government and the claimant that the land granted by the confirmation of Congress was the same described and bounded by the survey. This consideration depends on the fact that the claimant and the United States were parties to the selection, and mutually bound and respectively estopped by it.

In such a case the patent is not necessary to perfect, nor does it add anything to, the title, but only serves as an evidence thereof.

In such a case the binding force and effect of the resurvey and the act of confirmation is not dependent upon, nor can it in any manner be affected by, an inquiry into the question as to whether or not the boundaries of the grant, as fixed by the resurvey, are an accurate reproduction of such boundaries, as established by the original grant from the former government.

Langdeau v. Hanes, 21 Wall. 521, 22 L. ed. 606; Clark v. Hills, 67 Tex. 141, 2 S. W. 356; Menard v. Massey, 8 How. 293, 12 L. ed. 1085; Guitard v. Stoddard, 16 How. 494, 14 L. ed. 1030; West v. Cochran, 17 How. 403, 15 L. ed. 110; Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807; Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; United States v. Roselius, 15 How. 34, 14 L. ed. 589; Arguello v. United States, 18 How. 539, 15 L. ed. 478; Forbes v. Withers, 71 Tex. 302, 9 S. W. 154; Com. v. Pejepscut, 10 Mass. 156; Rutherford v. Greene, 2 Wheat. 196, 4 L. ed. 218; Howard v. Britton, 71 Tex. 286, 9 S. W. 73; Hamilton v. Avery, 20 Tex. 635; Wright v. Hawkins, 28 Tex. 452.

In such a case the official survey can only be avoided by the Sovereign by timely allegations and proof of fraud, to which the claimant is a party.

White v. Burnley, 20 How. 247, 15 L. ed. 888; Maxey v. O'Connor, 23 Tex. 234; Smith v. Hughes, 23 Tex. 249; Elliott v. Mitchell, 28 Tex. 111; Galveston, H. & S. A. R. Co. v. State, 81 Tex. 602, 17 S. W. 67; Howard v. Colquhoun, 28 Tex. 134; Texas Land & Mortg. Co. v. State, 1 Tex. Civ. App. 621, 23 S. W. 258.

Section 11 of the act of September 23, 1901, when construed and enforced as it was in this case by the court of civil appeals, as authorizing the institution by the attorney general of this suit and the recovery herein of land to which the title of plaintiff in error and his predecessors had been perfected under the contract, as evidenced by the act of confirmation of 1852 and the resurvey thereunder and the return of the field notes to the general land office, impairs the obligation of said contract.

Houston & T. C. R. Co. v. Texas, 177 U. S. 76, 44 L. ed. 679, 20 Sup. Ct. Rep. 545; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 147, 45 L. ed. 791, 21 Sup. Ct. Rep. 575.

It is not too late to raise a Federal question on motion for rehearing, if the question is considered and passed upon by the state court.

Leigh v. Green, 193 U. S. 85, 48 L. ed. 626, 24 Sup. Ct. Rep. 390; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

Mr. **William E. Hawkins** argued the cause, and, with Mr. Robert Vance Davidson, filed a brief for defendant in error:

Whether considered by itself alone or in connection with the Blucher resurvey of the Santa Rosa de Arriba grant, the act of confirmation of February 10, 1852, by the legislature of the state of Texas, did not constitute a contract between the owners of said grant and said state concerning the lands which were awarded by the state courts to the defendant in error, the state of Texas.

Ryan v. Carter, 93 U. S. 82, 23 L. ed. 808; Langdeau v. Hanes, 21 Wall. 529, 22 L. ed. 608; Clark v. Hills, 67 Tex. 145, 2 S. W. 356; Corrigan v. State (Tex. Civ. App.) 94 S. W. 95; Love v. Barber, 17 Tex. 320; Welder v. Carroll, 29 Tex. 333.

Mr. Justice **Brewer** delivered the opinion of the court:

By the action of the supreme court of the state the judgment of the court of civil appeals became the judgment of the highest court in the state to which the case could be taken, and hence the writ of error properly ran to that court. The constitutional question, although not raised theretofore, was distinctly presented in the petition to the court of civil appeals for a rehearing, was considered by that court, and decided adversely to the plaintiff in error. This court, therefore, has jurisdiction. Mallett v. North Carolina, 181 U. S. 589, 592, 45 L. ed. 1015, 1017, 21 Sup. Ct. Rep. 730; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76.

Coming to the merits, it is obvious that the act of 1852 was simply a confirmation of grants made by the Mexican states. *There is nothing in it which suggests the **[423]** thought of new grants or of addition to old ones. The 1st section declares that the state "relinquishes all her right and interest in the following-described lands to the original grantees thereof," and names the amount of land included in this grant so relinquished,—6½ leagues. The 2d section makes it the duty of claimants to have surveys made of their existing grants. The third section makes provision in case of the loss of the "original title papers of lands claimed by this act," while § 5 speaks of "the confirmation herein extended to the lands mentioned in this act."

But it is contended that there was an existing Mexican land grant binding upon the state of Texas as the successor of the former government; that the act of 1852 not only confirmed the grant, but also by the 2d section provided for a settlement of its boundaries through an official survey; that this was a proposition made by the state to the claimant of the grant which, upon acceptance, as evidenced by the survey at the request of the owner and the return of the field notes to the land office, ripened into a valid contract; that when the survey was made and the field notes returned, as required by law, it became conclusive evidence against both the state and the claimant that the land surveyed was that granted by the Mexican state and confirmed by the legislature of Texas. This argument makes the survey the pivotal fact upon which the question of contract turns. Of course, whether there was or was not a contract is a question which, in a case like the present, this court must determine for itself. Jefferson Branch Bank v. Skelly, 1 Black, 436–443, 17 L. ed. 173–177; McCullough v. Virginia, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Muhlker v. New York & H. R. Co. 197 U. S. 544, 570, 49 L. ed. 872, 877, 25 Sup. Ct. Rep. 522.

It will be perceived that § 2 does not name the individual to act for the state, but only designates certain officials, any one of whom may make the survey, and imposes a duty upon the claimant of causing the survey to be made. It does not *prescribe **[424]** the time within which the survey must be made. In fact, it was not made until seven years after the passage of the act, and the field notes were not filed until ten years after that. The purpose of the act was to enable the claimant to acquire a patent as better evidence of title, with a more accurate description of boundaries. The surveyor is not named as an agent of the state. On the contrary, an official act, that of survey, was authorized to be made at the instance of the claimant, but a mere surveyor is not, by virtue of his office, empowered to change boundaries. Those were given in the original Mexican grant, and his function was simply to resurvey, making the description more definite and certain. It could not have been within the contemplation of the legislature that this surveyor, picked out by the claimant, should have power to bind the state, by the mere matter of survey, to a grant nearly double the size of that which it confirmed by this statute of relinquishment. It must be borne in mind that the original grant was not a float,—that is, a grant of so many acres, to be located inside of a larger tract, in which the surveyor might have a discretion in selecting the particular tract,—but it was a grant by metes and bounds, and the sole function of the surveyor was ministerial,—to locate the tract and more fully describe those metes and bounds.

In all these proceedings the substantial elements of a contract are lacking. The state of Texas, succeeding to the sovereignty of the former government, recognized all that might, under any circumstances, be considered its international obligation, and confirmed the title which had been made. It made no grant of additional land. It simply relinquished all claims to that which had been granted by the former sovereign and confirmed the title made by that grant. It received no consideration. As the description in the original survey was defective, it provided means for perfecting that description and authorized a patent, which is the highest evidence of title. On the other hand, the grantee, holding a grant from the state of Tamaulipas, received from [425] the state of Texas no grant or *promise of additional land, but simply a declaration of its willingness to recognize and confirm the Mexican grant. He paid nothing to the state, but was only accorded by it the means of making his title definite and certain and the boundaries of his grant beyond question. In short, it was simply a proceeding established by the law of the state for making clear and certain the boundaries of grants which the state was willing to recognize, and in that proceeding a certain official of the state was charged with the ministerial duty of making a survey. He was given no authority to enlarge or diminish the grant, but only to ascertain what the real boundaries were. Further, the state has never given a patent, although this suit was not commenced for fifty years after the act of relinquishment, forty-three years after the survey, and thirty-three years after the filing of the field notes in the state land office.

The decision of the Court of Civil Appeals was right, and its judgment is affirmed.

JOHN NEWTON WILLIAMSON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 425–462.)

Error to circuit court — frivolousness of Federal question.

1. The contention that the constitutional privilege of a congressman from arrest embraces arrest and punishment for a criminal offense while Congress is not in session is not so frivolous as not to sustain a direct writ of error from the Supreme Court of the United States to a circuit court.

Error to circuit court — frivolousness of Federal question.

2. A writ of error from the Federal Supreme Court to review the conviction of a congressman in a circuit court, presenting a question respecting his alleged constitutional privilege from arrest, will not be dis-

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NOTE.—As to evidence of other crimes in criminal case—see note to People v. Molineux, 62 L.R.A. 193.

Privilege of members of Congress from suit.

In § 6, article 1, of the Constitution of the United States, it is provided that senators and representatives "shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same."

Such privilege has been held to extend to a delegate from a territory as well as to members from states. Doty v. Strong, 1 Pinney (Wis.) 84.

It will not avail a member of Congress to prevent his arrest on a warrant charging that there is probable cause to believe that he is about to commit a breach of the peace by fighting a duel. United States v. Wise, 1 Hayw. & H. 82, Fed. Cas. No. 16,746a.

As to whether such privilege extends to service of summons in a civil suit, there is a difference of opinion, the decided preponderance of authority, however, being that it does not. Merrick v. Giddings, MacArth. & M. 55 (in which the question is very fully discussed); Howard v. Citizens' Bank & T. Co. 12 App. D. C. 222; Worth v. Norton, 56 S. C. 56, 45 L.R.A. 563, 76 Am. St. Rep. 524, 33 S. E. 792; Kimberly v. Butler, Fed. Cas. No. 7,777.

And in Bartlett v. Blair, 68 N. H. 232,

missed because the Congress of which the accused was a member has ceased to exist, since, even if the question has thus become a mere abstraction, jurisdiction of the writ of error depends upon the existence of a constitutional question when the writ was sued out, and carries with it the duty of reviewing the whole case.

Writ and process — congressional privilege from arrest — criminal offense.

3. All criminal offenses are comprehended by the terms "treason, felony, and breach of the peace," as used in U. S. Const. art. 1, § 6, cl. 1, excepting these cases from the operation of the privilege from arrest therein conferred upon senators and representatives during their attendance at the sessions of their respective houses, and in going to and returning from the same.

Conspiracy — to suborn perjury.

4. A conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is punishable under the criminal laws of the United States, even though it be conceded that an attempt by one person to suborn another to commit perjury may not be so punishable, since under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, it is clearly criminal for two or more persons to conspire to commit any offense against the United States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy.

Indictment — conspiracy — sufficiency.

5. An indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and of perjury.

Indictment — conspiracy — sufficiency.

6. The object of the conspiracy is sufficiently charged in an indictment for conspiracy to suborn perjury, where its allegations plainly import that the unlawful agreement contemplates a future solicitation of unnamed individuals to enter public lands under the timber and stone act, who in so doing will necessarily knowingly state and subscribe under oath, before a named person, stated to be a United States commissioner of the district of Oregon, material false statements as to their purpose in respect to entering the land, known to be such by the conspirators.

Conspiracy — to suborn perjury.

7. The precise persons to be suborned, or the time and place of such suborning, need not be agreed upon in the minds of the conspirators, in order to constitute the crime of conspiracy to suborn perjury in proceedings for the purchase of public land under the timber and stone act.

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38 Atl. 1004, a motion to quash the writ and service thereof in a civil action, which writ was returnable during the session of Congress, was denied in the absence of any adjudication by the Supreme Court of the United States, extending the privilege to the service of a summons or like civil process.

On the other hand, in Doty v. Strong, supra, it is held that such privilege should be liberally construed as applicable to civil suits, on the ground that "it is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution."

In Miner v. Markham, 28 Fed. 387, which was a Federal case in Wisconsin, the court followed the construction placed upon the term "arrest" by the Wisconsin courts, and held that a member of Congress was exempt from civil process as well as arrest on his journey to and from a session, and was entitled to reasonable time. This was on the ground that "it has been the law in this jurisdiction from territorial times that the privilege in such a case as that at bar extends to exemption from civil process with or without actual arrest."

The attendance upon Congress by a member does not entitle him, as a matter of right, to have his suit postponed. Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10,290.

And a member of Congress is not exempt from the service of a subpœna in a criminal case. United States v. Cooper, 4 Dall. 341, 1 L. ed. 859, Fed. Cas. No. 14,861; Respublica v. Duane, 4 Yeates, 347.

The privilege from arrest of a member of Congress does not extend to forty days before and after a session, but is limited to a reasonable time for going and coming. Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597.

And in Lewis v. Elmendorf, 2 Johns. Cas. 222, it was held that the benefit of the privilege only applied while attending Congress, or actually on his journey going to or returning from the seat of government.

A member of Congress not in attendance or going to or returning from its session, but absent on leave during the session, on private business, is not within the constitutional privilege. Worth v. Norton, supra.

But one who goes to Washington to represent a state in Congress is privileged from arrest, though not entitled to a seat, and delay in returning through lack of funds will not affect the privilege. Dunton v. Halstead, 2 Clark (Pa.) 450.

In Coxe v. M'Clenachan, 3 Dall. 478, 1 L. ed. 687, where a member of Congress was surrendered by his bail and demanded discharge as privileged, the matter was compromised by the bail agreeing to surrender him within four days after the session of Congress.

As to a similar privilege enjoyed by members of state legislatures, see note in Rhodes v. Walsh, 23 L.R.A. 632.

Evidence — motive or intent.

8. Evidence as to how the entrymen of timber and stone lands understood their arrangement with one of the defendants charged with a conspiracy to suborn perjury, and of their purpose in applying for the land, is admissible where no formal contracts were executed between the alleged conspirators and the proposed entrymen, the alleged understandings being of an ambiguous nature, and proof of the conspiracy depending upon a variety of circumstances tending to show motive or intent.

Evidence — motive.

9. Testimony as to the character, in respect to suitability for grazing purposes, of land sought to be acquired under the timber and stone act, is admissible on a trial for conspiracy to suborn perjury in the proceedings, where it is insisted that the motive which impelled the formation of the alleged conspiracy was the desire to acquire a large tract of land for sheep-grazing purposes, which acquisition had become necessary by reason of the fact that a rival had obtained a leasehold interest in a considerable portion of the land which the alleged conspirators had theretofore used in their sheep-raising business.

Evidence — criminal knowledge or intent.

10. Evidence of an attempt to acquire, and of the acquisition, by like unlawful methods, of state school lands, is admissible on a trial for conspiring to suborn perjury in proceedings for the purchase of public land under the timber and stone act, as tending to establish guilty intent, purpose, design, or knowledge on the part of the alleged conspirators.

Appeal — prejudicial error — admitting evidence of other crimes.

11. One accused of conspiring to suborn perjury in proceedings for the purchase of public lands under the timber and stone act is not prejudiced by admitting evidence of an attempt to acquire and of the acquisition, by like unlawful methods, of state school lands, because it tends to show the commission of crimes other than those charged in the indictment,—especially where the trial judge in his charge carefully limited the application of the testimony so as to prevent any improper use.

Appeal — review of verdict — effect of failure to request instructions to acquit.

12. The rule that a conviction will be reversed where it plainly appears that there was no evidence whatever justifying such conviction, even though no request was made to instruct the jury on the whole evidence to return a verdict of not guilty, will not be applied where it is not certified that the bill of exceptions contains the entire evidence, and the appellate court is not otherwise satisfied that it does, and it is recited in the bill of exceptions that the plaintiff offered evidence during the trial sufficient to go to the jury, tending to prove each and every material allegation of the indictment.

Appeal — refusal of requested instructions — when not prejudicial error.

13. The refusal of requested instructions in a criminal case, concerning motive and intent, and the effect of advice of counsel, cannot prejudice the accused, where the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right.

Indictment — construction of ambiguous allegations.

14. Any doubt as to whether the allegations of an indictment charging a conspiracy to suborn the commission of perjury in proceedings to purchase public land under the timber and stone act embrace a conspiracy to suborn perjury in respect to the making of final proofs, as well as in making the original applications, must be resolved in favor of the accused.

Public lands — timber and stone lands — final proof — necessity of statement of bona fides.

15. The omission in the timber and stone act of June 3, 1878, § 3 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), exacting on the final application some of the requirements made necessary on the original application for the purchase of land under that act, of any reiteration of the requirements of the statute regarding a speculative purpose on the part of the applicant, his bona fides, and his intent to acquire the land for himself alone, is equivalent to an express declaration by Congress that these requirements shall not be exacted at the final hearing.

Public lands — regulation by Land Department.

16. The authority of the Commissioner of the General Land Office under the timber and stone act of June 3, 1878, § 3, to prescribe regulations to carry out the provisions of that act, does not embrace the power to require an applicant to make oath on final hearing of his bona fides and of the absence of contract or agreement in respect to the title, which Congress has in that act, by express intendment, excluded from the requirements to be observed on such final hearing.

Evidence — motive.

17. Evidence of the motive of the entryman under the timber and stone act of June 3, 1878, at the time of final hearing, which, under that act, cannot defeat his right to a patent, is inadmissible, on a trial for conspiring to suborn perjury in the proceedings to acquire the land, to show motive in making the original application.

[No. 96.]

Argued December 5, 6, 1907. Decided January 6, 1908.

IN ERROR to the Circuit Court of the United States for the District of Oregon to review a conviction for conspiring to suborn perjury in proceedings to purchase public land under the timber and stone act. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Charles A. Keigwin** and **Charles A. Douglas** argued the cause, and, with Messrs. W. B. Matthews and E. B. Sherrill, filed a brief for plaintiff in error:

A conspiracy is always, and necessarily, an agreement between two or more persons to do some act or acts in the future. It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

2 Bishop, Crim. Law, § 171.

The common law is not a source of jurisdiction in the Federal courts, and therefore an offense, to become the subject of an indictment in the courts of the United States, must be an offense created and defined by an act of Congress.

United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 563, 14 L. ed. 268; United States v. Britton, 108 U. S. 193, 27 L. ed. 701, 2 Sup. Ct. Rep. 526.

An indictment under the first clause of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, must, to be valid, allege, as the object of the conspiracy, some offense that is made by statute a crime against the United States.

United States v. Payne, 22 Fed. 426; Re Wolf, 27 Fed. 611; United States v. Adler, 49 Fed. 736; United States v. Taffe, 86 Fed. 113; United States v. Melfi, 118 Fed. 899; United States v. Britton, supra.

At common law, subornation of perjury is the offense of procuring a man to take a false oath, amounting to perjury, who actually takes such oath.

1 Hawk. P. C. Curwood ed. p. 435; 2 Bishop, Crim. Law, § 1197.

The offense against the United States is identical with the common-law crime of subornation of perjury. It is essential, as at the common law, that perjury shall in fact have been committed.

United States v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947; United States v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; United States v. Evans, 10 Sawy. 132, 19 Fed. 912; United States v. Howard, 132 Fed. 325; United States v. Cobban, 134 Fed. 290.

While, at the common law, subornation of perjury was not committed unless the person suborned actually committed perjury, an unsuccessful incitement or solicitation to commit perjury was punishable as an indictable attempt.

2 Bishop, Crim. Law, § 1192; Bishop, Directions & Forms, §§ 966, 967; 2 Wharton, Crim. Law, 1329; 1 Hawk. P. C. Curwood ed. p. 435.

On a charge of subornation of perjury, the indictment must set out, not only all the facts requisite to constitute the suborning, but as well those facts which are essential to make the suborned testimony amount to perjury.

United States v. Dennee, 3 Woods, 41, Fed. Cas. No. 14,947; United States v. Evans, supra; Com. v. Douglass, 5 Met. 244; People v. Ross, 103 Cal. 425, 37 Pac. 379; United States v. Wilcox, supra.

So, where the charge is conspiracy to commit an offense, the indictment must not only aver the fact of conspiring on the part of the defendants, but set out the things intended to be done, in such way as to show that the alleged purpose, if effected, would amount to the offense specified.

Scudder v. State, 62 Ind. 13; Smith v. State, 93 Ind. 67; Landringham v. State, 49 Ind. 186; State v. McKinstry, 50 Ind. 465; State v. Keach, 40 Vt. 113; State v. Roberts, 34 Me. 320; Com. v. Prius, 9 Gray, 127; Hartmann v. Com. 5 Pa. 66; Com. v. Hunt, 4 Met. 126, 38 Am. Dec. 346; State v. Hewett, 31 Me. 399; Com. v. Eastman, 1 Cush. 189, 48 Am. Dec. 596; King v. Turner, 13 East, 228; State v. Rickey, 9 N. J. L. 293; United States v. Melfi; United States v. Taffe; and United States v. Howard,—supra; United States v. Milner, 36 Fed. 890; United States v. Watson, 17 Fed. 145; Re Wolf, 27 Fed. 606; United States v. Peuschel, 116 Fed. 642; United States v. Britton, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512; United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

An officer, having by statute power to prescribe regulations for the conduct of his official business, may enforce the same in any way possible by the exercise of his official authority; but he cannot, by such power, make the disregard of his requirements a criminal offense, and no indictment will lie for violating an official regulation.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Manion, 44 Fed. 800; United States v. Bedgood, 49 Fed. 54; United States v. Blasingame, 116 Fed. 654; United States v. Maid, 116 Fed. 650; United States v. Howard, 37 Fed. 666.

An executive officer, empowered to make regulations for the effective execution of a law, cannot, by such regulations, add to or limit the provisions of the law.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

In the absence of some express statutory inhibition, any right or claim under the public-land laws is assignable at any stage of its development.

Thredgill v. Pintard, 12 How. 24, 13 L. ed. 877; Sparrow v. Strong, 3 Wall. 97, 18 L. ed. 49; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759.

A prohibition against such assignment will not be extended by construction to apply at a later stage of the proceeding than is made necessary by the words of the statute.

Myers v. Croft, 13 Wall. 291, 20 L. ed. 562.

Nor can such a prohibition in another act *in pari materia* be read into an act in which no such prohibition is inserted by the legislature.

French v. Spencer, 21 How. 228, 16 L. ed. 97; Maxwell v. Moore, 22 How. 185, 16 L. ed. 251.

The right to make a soldier's additional homestead entry is assignable, although an original homestead is not.

Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; Barnes v. Poirier, 12 C. C. A. 9, 27 U. S. App. 500, 64 Fed. 14.

This principle has been recently applied by this court in the construction, respecting this point, of the timber-culture act.

Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512.

If evidence is material to the transaction stated in the indictment, it is no objection to such evidence that it tends also to prove the commission of some other offense. But in such a case care must be taken to see that the defendant is tried only for the act with which he is charged, and is not prejudiced by the incidental proof of other wrongdoing.

Reg. v. Trueman, 8 Car. & P. 727; Pointer v. United States, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410.

Evidence of facts not directly involved in the transaction to be tried is admissible only where the transaction is of doubtful complexion, and only for the sake of resolving an ambiguity appearing on the face of the transaction itself.

Wood v. United States, 16 Pet. 342, 10 L. ed. 987; Castle v. Bullard, 23 How. 172, 16 L. ed. 424; Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; Bottomley v. United States, 1 Story, 135, Fed. Cas. No. 1,689; People v. Molineux, 168 N. Y. 297, 62 L.R.A. 193, 61 N. E. 286.

The false swearing which constitutes perjury must be wilful. A bona fide belief in the truth of the facts stated excludes the requisite criminal intent. On any matter which involves conclusions of law, the advice of counsel is always relevant to the question of wilfulness, and, in many cases, the fact that such advice was taken and acted upon is conclusive of innocence.

Com. v. Clark, 157 Pa. 257, 27 Atl. 723; Hood v. State, 44 Ala. 81; State v. McKinney, 42 Iowa, 205; United States v. Stanley, 6 McLean, 409, Fed. Cas. No. 16,376; United States v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847; 2 Bishop, Crim. Law, § 1047.

The good faith of the defendants was especially relevant, and even more material, to the question of their guilt of conspiracy.

The bona fide belief of the parties and the advice of counsel are relevant, and, in order to justify a conviction, the jury must find that the accused did not act in good faith, but wilfully violated the statute.

State v. Flynn, 28 Iowa, 26; People v. Powell, 63 N. Y. 88.

Persons, in making entries of timber land, were guilty of nothing unlawful because they expected to convey their titles to Gesner, and were moved in the premises by his promise to buy the lands at a certain price.

United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575.

The impropriety of asking any witness to state his conclusion as to the legal effect of certain facts is so manifest as scarcely to warrant the citation of authority on the point.

Gentry v. Singleton, 63 C. C. A. 231, 128 Fed. 680; Re Weisenberg, 131 Fed. 524; Hewitt v. Clark, 91 Ill. 608; Crowell v. Western Reserve Bank, 3 Ohio St. 411; Shepard v. Pratt, 16 Kan. 211; Ives v. Hamlin, 5 Cush. 535; People v. Sharp, 107 N. Y. 461, 1 Am. St. Rep. 851, 14 N. E. 319; Foster v. Murphy & Co. 67 C. C. A. 521, 135 Fed. 51.

Where the record purports to set out the testimony of the several witnesses in succession, with entries showing adjournments and other steps in the progress of the trial, it will be inferred that the substance of all the evidence is imbodied in the bill of exceptions, although there is no affirmative averment to that effect.

Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390.

And this rule applies *a fortiori* in a criminal case.

Clyatt v. United States, 197 U. S. 207,

220, 49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429.

A bill of exceptions purporting to contain a recital of evidence, apparently full and in regular order of sequence, may be accepted as a complete statement, in substance, of the evidence.

Fields v. United States, 27 App. D. C. 447; Klopfer v. District of Columbia, 25 App. D. C. 41; McCaully v. United States, 25 App. D. C. 409; Rockwell v. Capital Traction Co. 25 App. D. C. 98; 3 Cyc. Law & Proc. p. 168.

Although no motion was made to direct a verdict of acquittal, and the sufficiency of the government's proof to warrant a conviction was not raised at the conclusion of the case, this court will, in a criminal proceeding, examine the record to determine whether the proof is adequate and competent to sustain a verdict of guilty.

Wiborg v. United States, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Allen v. United States, 52 C. C. A. 597, 115 Fed. 3; Benson v. Gerlach, 20 N. Y. S. R. 939, 4 N. Y. Supp. 273.

Upon an indictment for conspiracy, some overt act must be alleged as done in furtherance of the alleged unlawful scheme, and it is necessary to prove at least one of the overt acts alleged. Proof of other acts, however numerous and however calculated to further the purpose of the conspiracy, will not excuse the prosecution from proving the particular act or acts which are assigned in the indictment, and of which notice is communicated to the defendants.

Bannon v. United States, 156 U. S. 468, 39 L. ed. 496, 15 Sup. Ct. Rep. 467; United States v. Smith, 2 Bond, 323, Fed. Cas. No. 16,322; People v. Chase, 16 Barb. 495.

Felonies, in the sense of the Constitution and of Federal statutes, are only such offenses as were felonies at common law or are by statute declared to be felonies.

Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; Bannon v. United States, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467.

Conspiracy was a misdemeanor at common law, and is so under Federal statutes; the fact that it is an infamous offense not making it a felony.

Bannon v. United States, supra; Mackin v. United States, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935.

The phrase "breach of the peace" means only actual breaches of the peace,—offenses involving violence or public disturbance. In cases of other misdemeanors, the parliamentary privilege applies, as in libel.

King v. Wilkes, 2 Wils. 151; Ware v. Loveridge, 75 Mich. 488, 42 N. W. 997; Estes v. State, 2 Humph. 496.

According to the weight of authority, the privilege of members of Congress extends even to immunity from service of process in civil actions.

Holiday v. Pitt, 2 Strange, 985; Barnard v. Mordaunt, 1 Ld. Kenyon, 125; 1 Tidd, Pr. 196; Miner v. Markham, 28 Fed. 387; Juneau Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7,582; Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10,290; Lyell v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8,616; Bolton v. Martin, 1 Dall. 296, 1 L. ed. 144.

Attorney General **Bonaparte** and Mr. **William R. Harr** argued the cause, and, with Solicitor General Hoyt, filed a brief for defendant in error:

The mere assertion of a constitutional privilege, without color of ground to support it, is not sufficient to confer jurisdiction on this court to review the judgment of the circuit court. The claim must be real and substantial. A mere claim in words is not enough.

Lampasas v. Bell, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368.

The privilege extends to arrests in civil cases only.

1 Hatsell, Precedents, pp. 66, 278; Wilkinson v. Boulton, 1 Lev. 163; Wellesley v. Beaufort, 2 Russ. & M. 664; Rawlins v. Ellis, 10 Jur. 1039; Bl. Com. Lewis's p. 166; Bowyer, Const. Law of England, 2d ed. p. 84; May, Law of Parliament, p. 145; Story, Const. § 865; Paschal, Anno. Const. p. 89; Bullitt, Review of Constitution, p. 128; Potter's Dwarr. Stat. p. 644; Jefferson's Manuel, ¶ 3; Geyer v. Irwin, 4 Dall. 107, 1 L. ed. 762; 2 Bouvier's Law Dict. p. 640, note; 1 Words & Phrases Judicially Defined, p. 861; People v. Rounds, 67 Mich. 482, 35 N. W. 79; Davis v. Burgess, 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 542; Bishop, Crim. Law, 7th ed. § 945; Dunn v. Reg. 12 Q. B. 1039, note; O'Connell v. Queen, 11 Clark & F. 251.

The privilege, even in civil cases, is not continuing, but exists only during certain periods.

1 Hatsell, Precedents, p. 40, note; 2 Bouvier's Law Dict. Rawles's Rev. p. 75; Heath's Maxims, 279; 11 Vin. Abr. 2d ed. p. 36; 3 Stubb, Constitutional History of England, Oxford ed. 1880, p. 533; Lark's Case, Rot. Parl. 4, 357, 1 Hatsell, Precedents, p. 17; Clerke's Case, Rot. Parl. 5, 374, 1 Hatsell, Precedents, p. 34; Coxe v. M'Clenachan, 3 Dall. 478, 1 L. ed. 687.

The fact that the mere effort of the individual may not be unlawful is no reason why the concerted attempt of several to do such prohibited thing may not be declared to be an offense against the United States. The extent of the authority of Congress in this respect was recognized in Clune v. United States, 159 U. S. 595, 40 L. ed. 271, 16 Sup. Ct. Rep. 125.

In indictments for conspiracy to commit an offense against the United States it is not necessary to state the object of the conspiracy with the same strictness and certainty as is required in an indictment for the commission of the offense itself.

Ching v. United States, 55 C. C. A. 304, 118 Fed. 540; United States v. Stevens, 44 Fed. 141; United States v. Wilson, 60 Fed. 890.

When the object of the conspiracy is an act in itself unlawful, the means by which it was to be accomplished need not be set out in the indictment.

King v. Eccles, 1 Leach, C. L. 274; Thomas v. People, 113 Ill. 531; People v. Clark, 10 Mich. 310; People v. Bird, 126 Mich. 631, 86 N. W. 127; People v. Arnold, 46 Mich. 271, 9 N. W. 406; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542.

The timber and stone act does, in purpose and intent, prohibit an applicant, at any time before the completion of his entry, from making any contract or agreement by which the title he may acquire shall inure to the benefit of any other person.

United States v. Budd, 144 U. S. 163, 36 L. ed. 387, 12 Sup. Ct. Rep. 575.

The courts of the United States will take judicial notice of the rules and regulations of the Land Department regarding the sale and exchange of the public lands.

Caha v. United States, 152 U. S. 221, 38 L. ed. 419, 14 Sup. Ct. Rep. 513; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 309, 47 L. ed. 1070, 23 Sup. Ct. Rep. 692.

The intention and motive of the entryman was a proper subject of inquiry.

Olson v. United States, 67 C. C. A. 21, 133 Fed. 849.

Testimony as to character of timber lands applied for, and as to school lands, was admissible because of their bearing upon the motive, intent, or design of the defendants in entering into the alleged conspiracy.

Wolfson v. United States, 41 C. C. A. 422, 101 Fed. 434; United States v. Budd, supra; Moore v. United States, 150 U. S. 60, 37 L. ed. 997, 14 Sup. Ct. Rep. 26; Olson v. United States, supra; Holmes v. Goldsmith, 147 U. S. 164, 37 L. ed. 123, 13 Sup. Ct. Rep. 288; People v. Bentley, 75 Cal. 409, 17 Pac. 436; 8 Cyc. Law & Proc. p. 685; People v. Saunders, 25 Mich. 119.

Mr. Justice White delivered the opinion of the court:

This writ of error to review a criminal conviction is prosecuted directly from this court upon the assumption that rights under the Constitution are involved. The errors assigned, however, relate not only to such question, but also to many other subjects. If there be a constitutional question adequate to the exercise of jurisdiction, the duty exists to review the whole case. Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

The constitutional question relied on thus arose:

On February 11, 1905, Williamson, plaintiff in error, while a member of the House of Representatives of the United States, was indicted, with two other persons, for alleged violations of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, in conspiring to commit the crime of subornation of perjury in proceedings for the purchase of public land under the authority of the law commonly known as the timber and stone act. The defendants were found guilty in the month of September, 1905. On October 14, 1905, when the court was about to pronounce sentence, Williamson—whose term of office as a member of the House of Representatives did not expire until March 4, 1907—protested against the court passing sentence upon him, and especially to any sentence of imprisonment, on the ground that thereby *he would be deprived of his [433] constitutional right to go to, attend at, and return from the ensuing session of Congress. The objection was overruled, and Williamson was sentenced to pay a fine and to imprisonment for ten months. Exceptions were taken both to the overruling of the preliminary objection and to the sentence of imprisonment. Upon these exceptions, assignments of error are based, which, it is asserted, present a question as to the scope and meaning of that portion of article 1, § 6, clause 1, of the Constitution, relating to the privilege of senators and representatives from arrest during their attendance on the session of their respective houses, and in going to and returning from the same.

At the threshold it is insisted by the government that the writ of error should be dismissed for want of jurisdiction. This rests upon the proposition that the constitutional question urged is of such a frivolous character as not to furnish a basis for jurisdiction, or, if not frivolous at the time when the sentence was imposed, it is now so. The first proposition assumes that it is so clear that the constitutional privilege does not extend to the trial and punishment, during his term of office, of a congressman for crime, that any assertion to the contrary affords no basis for jurisdiction. It is not asserted that it has ever been finally settled by this court that the constitutional privilege does not prohibit the arrest and punishment of a member of Congress for the commission of any criminal offense. The contention must rest, therefore, upon the assumption that the text of the Constitution so plainly excludes all criminal prosecutions from the privilege which that instrument accords a congressman as to cause the contrary assertion to be frivolous. But this conflicts with Burton v. United States, supra, where, although the scope of the privilege was not passed upon, it was declared that a claim interposed by a senator of the United States, of immunity from arrest in consequence of a prosecution and conviction for a misdemeanor, involved a constitutional question of such a character as to give jurisdiction to this court by direct [434] writ *of error. It is said, however, that this case differs from the Burton Case because there the trial and conviction was had during a session of the Senate, while here, at the time of the trial, conviction, and sentence, Congress was not in session, and therefore to assert the protection of the constitutional provision is to reduce the claim "to the point of frivolousness." This, however, but assumes that, even if the constitutional privilege embraces the arrest and sentence of a member of Congress for a crime like the one here involved, it is frivolous to assert that the privilege could possibly apply to an arrest and sentence at any other time than during a session of Congress, even although the inevitable result of such arrest and sentence might be an imprisonment which would preclude the possibility of the member attending an approaching session. We cannot give our assent to the proposition. Indeed, we think, if it be conceded that the privilege which the Constitution creates extends to an arrest for any criminal offense, such privilege would embrace exemption from any exertion of power by way of arrest and prosecution for the commission of crime, the effect of which exertion of power would be to prevent a congressman from attending a future as well as a pending session of Congress. The contention that, although there may have been merit in the claim of privilege when asserted, it is now frivolous because of a change in the situation, is based upon the fact that at this time the Congress of which the accused was a member has ceased to exist, and therefore, even if the sentence was illegal when imposed, such illegality has been cured by the cessation of the constitutional privilege. But, even if the proposition be conceded, it affords no ground for dismissing the writ of error, since our jurisdiction depends upon the existence of a constitutional question at the time when the writ of error was sued out, and such jurisdiction, as we have previously said, carries with it the duty of reviewing any errors material to the determination of the validity of the conviction. It hence follows that, even if the constitutional question as asserted is now "a mere abstraction," that *fact would not avail to relieve us of the [435] duty of reviewing the whole case, and hence disposing of the assignments of error which are addressed to other than the constitutional question. Besides, we do not consider the proposition well founded, for, if at the time the sentence was imposed it was illegal because in conflict with the constitutional privilege of the accused, we fail to perceive how the mere expiration of the term of Congress for which the member was elected has operated to render that valid which was void because repugnant to the Constitution.

We come, then, to consider the clause of the Constitution relied upon, in order to determine whether the accused, because he was a member of Congress, was privileged from arrest and trial for the crime in question, or, upon conviction, was in any event privileged from sentence which would prevent his attendance at an existing or approaching session of Congress.

The full text of the 1st clause of § 6, article 1, of the Constitution, is this:

"Sec. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place."

If the words extending the privilege to all cases were unqualified, and therefore embraced the arrest of a member of Congress for the commission of any crime, we think, as we have previously said, they would not only include such an arrest as operated to prevent the member from going to and returning from a pending session, but would also extend to prohibiting a court during an interim of a session of Congress from imposing a sentence of imprisonment which would prevent him from attending a session of Congress in the future. But the question is not, What would be the scope of the words "all *cases" if those words embraced [436] all crimes? but is, What is the scope of the qualifying clause? that is, the exception from the privilege of "treason, felony, and breach of the peace." The conflicting contentions are substantially these: It is insisted by the plaintiff in error that the privilege applied because the offense in question is confessedly not technically the crime of treason or felony, and is not embraced within the words "breach of the peace," as found in the exception, because "the phrase 'breach of the peace' means only actual breaches of the peace, offenses involving violence or public disturbance." This restricted meaning, it is said, is necessary in order to give effect to the whole of the excepting clause, since, if the words "breach of the peace" be broadly interpreted so as to cause them to embrace all crimes, then the words "treason" and "felony" will become superfluous. On the other hand, the government insists that the words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore as in effect confining the parliamentary privilege exclusively to arrests in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony, and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution, and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well-understood and accepted meaning. If the premise upon which this argument proceeds be well founded, we think there can be no doubt of the correctness of the conclusion based upon it. Before, therefore, coming to elucidate the text by the ordinary principles of interpretation, we proceed to trace the origin of the phrase "treason, felony, and breach of the peace," as applied to parliamentary privilege, and to fix the meaning [437]*of those words as understood in this country and in England prior to and at the time of the adoption of the Constitution. In the Articles of Confederation (last clause of article 5) it was provided:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace."

In article 5 of "Mr. Charles Pinckney's Draft of a Federal Government" it was provided as follows (Elliott's Debates, p. 146):

"In each house a majority shall constitute a quorum to do business. Freedom of speech and debate in the legislature shall not be impeached or questioned, in any place out of it; and the members of both houses shall, in all cases except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it."

The propositions offered to the convention by Mr. Pinckney, with certain resolutions of the convention, were submitted to a committee of detail for the purpose of reporting a constitution. Section 5 of article 6 of the draft of constitution reported by this committe was as follows:

"Sec. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each house shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.".

The clause would seem not to have been the subject of debate. 3 Doc. Hist. of Constitution (Dept. of State, 1900), 500. In Elliott's Debates (p. 237) it is recited as follows:

"On the question to agree to the 5th section of the 6th article, as reported, it passed in the affirmative."

*And in the revised draft the section was [438] reported by the committee of revision exactly as it now appears.

The presence of the exact words of the exception as now found in the Constitution, in the Articles of Confederation, and the employment of the same words "treason, felony, and breach of the peace," without discussion, in all the proceedings of the convention relating to the subject of the privileges of members of Congress, demonstrate that those words were then well known as applied to parliamentary privilege, and had a general and well-understood meaning, which it was intended that they should continue to have. This follows, because it is impossible to suppose that exactly like words, without any change whatever, would have been applied by all those engaged in dealing with the subject of legislative privilege, unless all had a knowledge of those words as applied to the question in hand, and contemplated that they should continue to receive the meaning which it was understood they then had. A brief consideration of the subject of parliamentary privilege in England will, we think, show the source whence the expression "treason, felony, and breach of the peace" was drawn, and leave no doubt that the words were used in England for the very purpose of excluding all crimes from the operation of the parliamentary privilege, and therefore to leave that privilege to apply only to prosecutions of a civil nature. We say this, although the court of common pleas in 1763 (King v. Wilkes, 2 Wils. 151) held that a member of Parliament was entitled to assert his privilege from arrest upon a charge of publishing a seditious libel, the court ruling that it was not a breach of the peace. But, as will hereafter appear, Parliament promptly disavowed any right to assert the privilege in such cases.

In Potter's Dwarris on Statutes, p. 601, reference is made to expressions of Lord Mansfield, advocating in 1770 the passage of a bill—which ultimately became a law—whose provisions greatly facilitated the prosecution of civil actions against members of Parliament, and restrained only arrests [439] of their persons *in such actions. The remarks of Lord Mansfield having been made so shortly before the Revolution, and referring, as they undoubtedly did, to the decision in the Wilkes Case, supra, are of special significance. Among other things he said:

"It may not be popular to take away any of the privileges of Parliament, for I very well remember, and many of your Lordships may remember, that not long ago the popular cry was for an extension of privileges, and so far did they carry it at that time that it was said that privilege protected members from criminal actions, and such was the power of popular prejudice over weak minds that the very decisions of some of the courts were tinctured with that doctrine. . . . The laws of this country allow no place or employment as a sanctuary for crime, and where I have the honor to sit as judge neither royal favor nor popular applause shall ever protect the guilty. . . . Members of both houses should be free in their persons in cases of civil suits, for there may come a time when the safety and welfare of this whole empire may depend upon their attendance in Parliament. God forbid that I should advise any measure that would in future endanger the state. But this bill has no such tendency. It expressly secures the persons of members from arrest in all civil suits."

Blackstone, in 1765, discussing the subject of the privileges of Parliament, says (Lewis's ed. *165):

"Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of Parliament."

And, speaking of the writ of privilege, which was employed to deliver the party out of custody when arrested in a civil suit, he said (*166):

"It is to be observed that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. chap. 13, and that of King William (which remedy some inconveniences arising from privilege of Parliament), speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable *crimes; or, as it has been frequently ex- [440] pressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offense."

The first volume of Hatsell's Precedents, published in April, 1776, is entitled as "relating to privilege of Parliament; from the earliest records to the year 1628: with observations upon the reign of Car. I. from 1628 to 4 January 1641." The material there collected has been frequently employed in support of the statement that the terms "treason, felony, and breach of the peace" were employed by the Commons in a broad, and not in a restricted, sense. And in the concluding chapter (V.), after stating (4th ed. 205) "the principal view, which the House of Commons seems always to have had in the several declarations of their privileges," the author says (p. 206):

"Beyond this, they seem never to have attempted; there is not a single instance of a member's claiming the privilege of Parliament to withdraw himself from the criminal law of the land: for offenses against the public peace they always thought themselves amenable to the laws of their country: they were contented with being substantially secured from any violence from the Crown, or its ministers; but readily submitted themselves to the judicature of the King's Bench, the legal court of criminal jurisdiction; well knowing that 'Privilege which is allowed in case of public service for the Commonwealth must not be used for the danger of the Commonwealth;' or, as it is [441]*expressed in Mr. Glynn's Report of the 6th of January, 1641, 'They were far from any endeavor to protect any of their members. who should be, in due manner, prosecuted according to the Laws of the Realm, and the Rights and Privileges of Parliament, for treason, or any other misdemeanor; being sensible, that it equally imported them, as well to see justice done against them that are criminous, as to defend the just Rights and Liberties of the Subjects, and Parliament of England.'"

May, in his treatise on the Law, Privileges, Proceedings, and Usage of Parliament, first published in 1844, says (10th ed. p. 112):

"The privilege of freedom from arrest has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice. In Larke's Case, in 1429, the privilege was claimed, 'except for treason, felony, or breach of the peace;' and in Thorpe's Case the judges made exceptions to such cases as be 'for treason, or felony, or surety of the peace.' The privilege was thus explained by a resolution of the Lords, 18th April, 1626: 'That the privilege of this house is, that no peer of Parliament, sitting the Parliament, is to be imprisoned or restrained without sentence or order of the house, unless it be for treason or felony, or for refusing to give surety of the peace;' and again, by a resolution of the Commons, 20th May, 1675, 'that by the laws and usage of Parliament, privilege of Parliament belongs to every member of the House of Commons, in all cases except treason, felony, and breach of the peace.'

"On the 14th April, 1697, it was resolved, 'That no member of this house has any privilege in case of breach of the peace, or forcible entries, or forcible detainers;' and in Wilkes's Case, 29th November, 1763, although the court of common pleas had decided otherwise, it was resolved by both houses,

"'That privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of laws in [442]the speedy *and effectual prosecution of so heinous and dangerous an offense.'

"'Since that time,' said the committee of privileges in 1831, 'it has been considered as established generally, that privilege is not claimable for any indictable offense.'

"These being the general declarations of the law of Parliament, one case will be sufficient to show how little protection is practically afforded by privilege, in criminal offenses. In 1815, Lord Cochrane, a member, having been indicted and convicted of a conspiracy, was committed by the court of King's bench to the King's bench prison. Lord Cochrane escaped, and was arrested by the marshal, whilst he was sitting on the privy councilor's bench, in the House of Commons, on the right hand of the chair, at which time there was no member present, prayers not having been read. The case was referred to the committee of privileges, who reported that it was 'entirely of a novel nature, and that the privileges of Parliament did not appear to have been violated, so as to call for the interposition of the house, by any proceedings against the marshal of the King's bench.'"

See also Bowyer, Const. Law of England, 2d ed. p. 84.

In what is styled Mr. Long Wellesley's Case, decided in 1831, 2 Russ. & M. 639, the party named had been taken into custody for clandestinely removing his infant daughter, a ward of the court, from the place where such ward was residing under authority of the court. The question for decision arose upon a motion to discharge the order for commitment "on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament." As stated in the report of the case, the committee of privileges of the House of Commons, which had the matter of the arrest of Mr. Wellesley under consideration, decided, p. 644, "that Mr. Long Wellesley's claim to be discharged from imprisonment by reason of privilege of Parliament ought not to be admitted." On the subject of the extent of the privilege, counsel, *who as *amicus curiæ* contended that [443] the order of commitment was invalid, made an elaborate reference to authorities and pertinent statutes. Lord Chancellor Brougham, however, decided that privilege of Parliament was no protection against an attachment for what was in its nature a criminal contempt. Among other things he observed that upon principle members of Parliament could not be placed by privilege of Parliament above the law, and held (p. 665) "that he who has privilege of Parliament, in all civil matters, matters which, whatever may be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege."

And by text writers of authority in this country it has been recognized from the beginning that the convention which framed the Constitution, in adopting the words "treason, felony, and breach of peace" as applicable to the privileges of a parliamentary body, used those words in the sense which the identical words had been settled to mean in England.

Story, in his treatise on the Constitution, speaking of the subject, says:

"Sec. 859. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of Congress, and their going to and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange indeed if it were denied to the highest functionaries of the state in the discharge of their public duties. It belongs to Congress in common with all other legislative bodies which exist, or have existed in America since its first settlement, under every variety of government, and it has immemorially constituted a privilege of both houses of the British Parliament. It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.

. . . .

[444] *"Sec. 865. The exception to the privilege is that it shall not extend to 'treason, felony, or breach of the peace.' These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes) against the opinion of Lord Camden and the other judges of the court of common pleas, and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace."

Cushing, in his treatise—first published in 1856—on the elements of the law and practice of legislative assemblies in the United States, declared (9th ed. § 546) that the Commons never went "the length of claiming any exemption from the operation of the criminal laws;" and the author closed a discussion of the cases to which the privilege of Parliament was applicable (§§ 559-563) by expressing an opinion "in favor of the board rule which withdraws the protection of parliamentary privilege from offenses and criminal proceedings of every description." And, considering the privilege as affected by the Constitution of the United States and of the several states, he said:

"567. In the greater number of the constitutions it is expressly provided that members shall be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, in all cases except 'treason, *felony, and breach of the peace.' [445] This, it will be recollected, is the form in which the privilege is stated by Sir Edward Coke, and in which it is usually expressed by the English writers on parliamentary law; and it was undoubtedly adopted in the constitutions as correctly expressing the parliamentary rule on the subject. The inaccuracy of the language has already been pointed out, and it has been shown that, in England, the exception embraces all criminal matters whatsoever, and, of course, includes many cases which do not fall within the denomination either of treason, felony, or breach of the peace. The question therefore arises whether the exception of treason, felony, or breach of the peace, being stated in express terms in these constitutions, is to be understood strictly, and confined to cases coming within the technical definitions of those offenses, or whether it is used as a compendious expression to denote all criminal cases of every description. In favor of the latter opinion, it may be said, first, there can be no doubt that the framers of these constitutions intended to secure the privilege in question upon as reasonable and intelligible a foundation as it existed by the parliamentary and common law of England; in short, that, as in a multitude of other cases, they intended to adopt, with the words, the full meaning which had been given to them by usage and authoritative construction; and, second, that the word 'felony,' which alone gives rise to any doubt, 'has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast number of different senses, that it is now impossible to know precisely in what sense we are to understand it;' and, consequently, that unless it is allowed to have such a signification as, with the other words of the exception, will cover the whole extent of criminal matters, it must be rejected altogether for uncertainty, or, at least, restricted to a very few cases. These reasons, alone, though others might be added, are sufficient to establish the point that the terms 'treason, felony, and breach of the peace,' as used in our constitutions, embrace [446] *all criminal cases and proceedings whatsoever. In the Federal government, therefore, and in the states above referred to, the privilege of exemption from legal process may be considered the same as it is in England."

Since from the foregoing it follows that the term "treason, felony, and breach of the peace," as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit, and we are thus brought to consider the other assignments of error relied upon. They are, all but one, based on exceptions challenging the sufficiency of the indictment, and alleging the commission of material error in admitting and rejecting evidence, in refusing requested instructions, and in the instructions given. The only assignment not based upon an exception taken at the trial asserts that it is so clearly shown by the record that there is no proof tending to establish the commission of the offense charged that it should be now so decided, even although no request to instruct the jury on that subject was made at the trial.

1. As to the sufficiency of the indictment. With great elaboration it is insisted in argument that the indictment charges no crime, since there can be no such thing as a conspiracy to commit the offense of subornation of perjury. While the statutes of the United States cause every person who procures another to commit perjury to be guilty of subornation of perjury, it is said there is no punishment by statute, as at common law, for a mere attempt by an individual to induce the commission of perjury. This being so, the argument is that a charge of conspiracy to suborn, etc., perjury, is in the nature of things but a charge of an attempt to suborn perjury, which amounts only to the charge of a conspiracy to do an act which is not a criminal offense. But the proposition wholly fails to give effect to the provisions of the conspiracy statute (U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676), which clearly renders it criminal for two or more persons to conspire to commit [447] any offense against the United *States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy. In other words, although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. The conspiracy is the offense which the statute defines, without reference to whether the crime which the conspirators have conspired to commit is consummated. And this result of the conspiracy statute also disposes of an elaborate argument concerning the alleged impossibility of framing an indictment charging a conspiracy to suborn perjury, since it rests upon the assumption that as the conspirators could not, in advance, know when they entered into the conspiracy that the persons would wilfully swear falsely to what they and the conspirators knew to be false, there could be no conspiracy to suborn.

But, even on the supposition that a valid indictment may be framed charging a conspiracy to commit subornation of perjury, the indictment in question, it is urged, is fatally defective by reason of an omission to directly particularize various elements claimed to be essential to constitute the offense of perjury, and other elements necessary to be averred in respect of the alleged suborners.

This is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury, which, it is alleged, is not done in the indictment under consideration. But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Looking at the indictment, *it in terms charges an unlawful conspiracy [448] and combination to have been entered into on a date and at a place named within the district where the indictment was found, and the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States commissioner of the district of Oregon, and, in proceedings for the entry and purchase of land in such district under the timber and stone acts, make oath before the official that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should enure in whole or in part to the benefit of any person except themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would enure to the benefit of the said John Newton Williamson and Van Gesner, as copartners in the firm of Williamson & Gesner, then and before then engaged in the business of sheep raising in said county; the matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States commissioner as aforesaid, when administering such oaths to those persons, being an officer [449]and person authorized by law *of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered."

These allegations plainly import, and they are susceptible of no other construction, than that the unlawful agreement contemplated a future solicitation of individuals to enter lands, who in so doing would necessarily knowingly state and subscribe under oath material false statements as to their purpose in respect to entering the land, etc., and known to be such by the conspirators. There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may therefore be assumed that the persons who were to be suborned, and the time and place of such subornation, had not been determined at the time of the conspiracy, except as might be inferred from a purpose to procure the persons to be suborned to come before the United States commissioner for the district of Oregon named in the indictment. It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon; and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are therefore without merit.

2. Numerous exceptions were taken (a) to the admission of evidence as to the understanding of the applicants concerning their arrangement with Gesner, one of the accused, and the purpose of the applicants in applying for the land; (b) to the admission of the final proofs, which embraced a sworn statement, made pursuant to the requirements of a regulation adopted by the Commissioner of the General Land Office, declaring the bona fides of the applicant and that at that period he had made no contract or agreement to dispose of the land; *and (c) [450] to evidence respecting the character of the land and concerning an attempt to acquire and the acquisition by like wrongful methods of state school lands located near the government timber lands in question.

As we shall hereafter have occasion to consider the instructions of the court concerning the scope of the indictment as to the final proofs and the law applicable to that subject, we put out of view for the moment the objections just mentioned, under subdivision b, relating to the final proofs and the intention of the applicants in respect to the land at the time such final proof was made, and therefore presently consider the objections in so far only as they concern the other subjects.

The issue being the existence of a conspiracy to suborn various persons to commit perjury in relation to declarations to be made, under the timber and stone act, as to the purpose for which they desired to acquire land, etc., and as it is conceded that no formal contracts were executed between the alleged conspirators and the proposed entrymen, and the alleged understandings were of an ambiguous nature, and proof of the conspiracy depended upon a variety of circumstances going to show motive or intent, we think it was proper to permit the interrogation of the entrymen concerning their understanding of the arrangement with Gesner and their intention at the time when they made their preliminary declarations, as the testimony was relevant to the question of the nature and character of the dealings of the entrymen with the alleged conspirators, and bore on the question of the purpose or motive which influenced the making of the sworn statement required by law as a condition precedent to the purchase of the land. As it was insisted that the motive which impelled the formation of the conspiracy was the desire to acquire a large tract of land for sheep-grazing purposes, which acquisition had become necessary by reason of the fact that a rival had obtained a leasehold interest in a considerable portion of the land which Gesner and Williamson had theretofore used in their [451] sheep-raising *business, we think the testimony as to the character of the timber lands in respect to suitability for grazing purposes, etc. [was competent], and an attempt to acquire and the acquisition of state school lands was, we think, also competent as tending to establish on the part of the conspirators guilty intent, purpose, design, or knowledge.

The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof.

The conclusion above expressed as to the admissibility of the evidence objected to is elucidated by Holmes v. Goldsmith, 147 U. S. 164, 37 L. ed. 123, 13 Sup. Ct. Rep. 292, where it was said:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.' . . .

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

3. The remaining assignments relate to [452] the refusal to give *requested instructions, and to portions of the charge of the court. Many of the requested instructions, however, are so clearly without merit, because in effect covered by the charge as given, that we do not deem it necessary to particularly notice them. The only subjects which we think are sufficiently important to require express notice are—

(a) That, even although no request was made to instruct the jury on the whole evidence to render a verdict of not guilty, nevertheless it should now be held that the record establishes such an entire absence of proof tending to show guilt that it should be so declared.

(b) That prejudicial error was committed by the trial court in refusing requested instructions to the effect that the jury should acquit if they found that the defendants acted in good faith, under the advice of counsel and in the belief of the lawfulness of their conduct.

(c) Exceptions in respect to the instruction given by the court that the indictment covered perjury in the matter of the final proofs, and in instructing the jury that they might convict if satisfied by the evidence, beyond a reasonable doubt, that the defendants intended that the persons who might be procured or induced to make entries of lands should wilfully and deliberately commit perjury in particulars stated at the time of making their depositions or sworn statements when they made their final proofs before the United States commissioner, and in effect charging that a sworn statement made at the time of final proof concerning the purpose for which the land was sought to be purchased, etc., would constitute perjury if the oath so taken, although not expressly embraced in the statute, was required by a regulation of the Commissioner of the General Land Office, because such regulation had the force and effect of law. We shall consider the propositions *seriatim.*

(a) Whilst it has been settled that in a criminal case where it plainly appeared that there was no evidence whatever justifying conviction, this court would so hold, despite the *failure to request an instruction of acquittal [453] (Wiborg v. United States, 163 U. S. 638, 41 L. ed. 291, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429), this case affords no occasion for applying the rule, because it is not certified that the bill of exceptions contains the entire evidence, and we are not otherwise satisfied that it does, and, further, because it is recited in the bill of exceptions that "the plaintiff offered evidence during said trial sufficient to go to the jury, tending to prove each and every material allegation of the indictment."

(b) Without attempting to review in detail the requested charges concerning motive and intent and the effect of advice of counsel, we think the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right, and therefore there is no ground for complaint as to the failure to give the requested charges. The court, after having fully and carefully instructed the jury as to the operative effect of good faith in relieving the defendants from the charge made against them, in express terms noticed the question of the advice of counsel, and said:

"Having now placed before you the timber and stone law, and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel."

(c) As the contentions under this head concern the instructions of the court in relation to the final proof and the effect of the regulations of the Commissioner of the General Land *Office relative to the subject, the [454] exceptions taken to the charge in relation to the matter are in the margin.†

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†The defendants, each of them, also excepted to the giving of said instruction hereinbefore set forth, reading as follows: "Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days, and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the government may enure, in whole or in part, to the benefit of any person except himself, and that he makes his entry in good faith, for the appropriation of the land exclusively for his own use, and not for the use and benefit of any other person,"—as not the law and misleading, and directing the attention of the jury to a matter not charged in the indictment.

Defendants, each of them, also then and there expected to the giving of said instruction as hereinbefore set forth, reading as follows: "But, as heretofore said, if he is not in good faith, and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall enure, in whole or in part, to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and wilfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury,"—and especially to the words in said paragraph, "and in making a deposition that he has not done those things,"—upon the ground that the same is not the law, and misleading, and directs the attention of the jury to a matter not charged in the indictment.

Defendants also except to the giving of the instruction hereinbefore set forth, which reads as follows: "The essential questions, then, for your determination, are, Does the evidence show, beyond a reasonable doubt, that Williamson, Gesner, and Biggs, or two of them, knowingly and intentionally entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment, as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson and Gesner, or either of them? and, next, Does the evidence satisfy you beyond a reasonable doubt that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries, should wilfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement, or at the time of making their depositions or sworn statements when they made their final proofs before the United States commissioner applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith, to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly. made any agreement or contract in any way or manner by which the title to be acquired from the United States should enure, in whole or in part, to the benefit of any persons other than himself or herself?"—and especially to the words therein, "or some of the persons," and also to the words, "or at the time of

Further, as in order to dispose of these
[455] objections it becomes *necessary to consider
not only the scope of the indictment, but,
moreover, to construe the timber and stone
act, and, it may be, to determine the validity
of the regulation of the General Land
Office heretofore referred to, the material
portions of the act are in the margin,† as
well as the regulation in question.

[456] *Contenting ourselves with referring to the
quotation already made from the indictment,
we are of opinion that the particular
false swearing to which the indictment re-
[457] lated was alone the *verified written statement
provided for in § 2 of the act, to be
made on applying to purchase the land, and
therefore the indictment did not embrace a
[458] charge concerning a statement *or deposition
under oath required to be made by any regulation
of the Commissioner of the General
Land Office, after the publication of the notice, and when the period had arrived for final action by the land office on the application to purchase. It seems to us clear that the indictment was thus restricted, since all the language in it speaks as of the time of the first statement, no reference is made to any regulation of the Commissioner supplementing the statute in any particular, and each of the nineteen overt acts charged to have been committed exclusively relates to the statement required by § 2, and to none other. We are of opinion that the elaborate argument made by the government concerning the use in the indictment of the words "declarations and depositions" can serve only to suggest ambiguity in the indictment, and possible doubt as to the meaning of the pleader. But, as of course, in a criminal case, doubt must be resolved in favor of the accused, we hold that the indictment does not charge a conspiracy to

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making their depositions or sworn statements when they made their final proofs before the United States commissioner," as misleading, and not the law, and applying to a matter not charged in the indictment, and variant from said indictment.

†Timber and Stone Act.

(Approved June 3, 1878, 20 Stat. at L. 89, U. S. Comp. Stat. 1901, p. 1545.)

Chap. 151.—An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the states of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: Provided, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes: And provided further, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes" [14 Stat. at L. 251, chap. 262], shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the suborn perjury in respect of the making of the final proofs, and therefore that there was prejudicial error committed in the instructions to the jury on that subject which were excepted to.

As, however, the question which we have hitherto passed over, concerning the admissibility of the final proof to show motive in making the original application, may arise at a future trial, even although it be that the indictment charges only a conspiracy to suborn perjury as to the original application, we proceed to consider that subject. To do so it becomes necessary to determine whether the statute requires an applicant, after he has made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts after notice of his application has been published and the time has arrived for final action on the application. And this, of course, involves deciding whether the regulation of the Commissioner exacting such additional statement at the time of final hearing is valid. The inquiry concerns only the *2d [459] and 3d sections of the act. Turning to the 2d section, it will be seen that it requires the applicant to make a sworn statement, giving many particulars concerning the land,—its unfitness for cultivation; its being uninhabited; the absence of mineral, etc., etc.,—followed by the requirement that the applicant shall declare that he makes the application, not for the purpose of speculation, but in good faith, and that he intends to appropriate the land to his own exclusive use and benefit, and that no agreement has been made, directly or indirectly, with any person or persons whatsoever by which the title to be acquired from the gov-

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pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied, and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two [17 Stat. at L. 95, chap. 152], the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

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Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands under the Homestead, Desert Land, and Other Laws, Issued July 11, 1899, p. 46:

11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before the register and receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the register and receiver upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of affiant's information and the bona fides of the entry must be tested by close and sufficient oral examination. The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith, for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall enure, in whole or in part, to the benefit of any person or persons except himself. They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith.

ernment shall enure, in whole or in part, to any person except the applicant. And the section concludes by causing any false statement made in the sworn application to constitute the crime of perjury. Examining the 3d section, it will be seen that it provides that upon the filing of said statement, as provided in the 2d section, it shall be the duty of the local land officer to post a notice of the application in his office for sixty days, to furnish the applicant with a copy of such notice for publication, at the expense of the applicant, in the nearest newspaper for sixty days, and when such period has expired, on proof of the publication and of certain facts which the statute expressly enumerates, the applicant shall, upon payment of the requisite charge, in the absence of a contest, be entitled to a patent for the land. Examining the items which the statute requires the applicant to make proof of after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof, are reiterated, all requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his bona fides, and his intention to acquire for himself alone. When the context of the statute is thus brought into view, we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in
[460]acquiring *title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifest was intended to be excluded therefrom. We say this, because, as the 3d section re-exacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application, and omits the requirement as to the bona fides, etc., of the applicant, it follows, under the elementary rule that the inclusion of one is the exclusion of the other, that the re-exacting of a portion only of the requirements was equivalent to an express declaration by Congress that the remaining requirements should not be exacted at the final proof. And this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind,—a propinquity which excludes the conception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding,—especially when in the last section some of the requirements of the prior section are re-expressed and made applicable to the final statement. Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the 2d section of the act, and, pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512, construing the timber culture act. Under that law an applicant for entry was obliged, among other things, in making his application, to swear to his good faith and to the absence of speculative purpose, in the exact words of the statute now under consideration. But in the timber culture act, as in the timber and stone act, the requirement was not reimposed in respect to the final proof. In the cited case the entryman, who had complied with the statute in making his application, had, between the date of the application and the making of final proof, disposed of his right, and the question was whether by so doing he had forfeited *his claim. In deciding ad-[461] versely to the contention that he had, the court said (p. 516):

"But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract as was found to exist by the supreme court of Oregon would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law. Myers v. Croft, 13 Wall. 291, 20 L. ed. 562."

It is elaborately insisted on behalf of the government that there is a difference between the timber culture act and the timber and stone act, resulting from the fact that in the one case in the interim between the entry and the final proof a long time must elapse and much is required to be done by the applicant, while in the other a short time intervenes and substantially nothing is required to be done. But this reasoning, in effect, assails the wisdom of Congress in omitting the requirement in the act under consideration, and affords no ground for inserting in the act requirements which Congress has, by express intendment, excluded therefrom. Besides, the weakness of the argument becomes apparent when it is borne in mind that the timber and stone act and the timber culture act were enacted by the same Congress and with only a few days' interval between the two.

It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would 62]be compelled *to do that at the final hearing which the act of Congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in Adams v. Church (p. 517): "To sustain the contentions . . . would be to incorporate . . . a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject." True it is that in the concluding portion of § 3 of the timber and stone act it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." But this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred. As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands.

Reversed and remanded.

Mr. Justice **Harlan** is of opinion that no substantial error was committed, and the judgment should be affirmed.

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*†DAMSELLE HOWARD, Administratrix of [463]
Will Howard, Deceased, Plff. in Err.,
v.
ILLINOIS CENTRAL RAILROAD COMPANY and Yazoo & Mississippi Valley Railroad Company. (No. 216.)

N. C. BROOKS, Administratrix of Morris S. Brooks, Deceased, Plff. in Err.,
v.
SOUTHERN PACIFIC COMPANY. (No. 222.)

(See S. C. Reporter's ed. 463–541.)

Commerce — power of Congress — abolition of fellow-servant doctrine.

1. Congress may prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, that the carrier shall be liable for the death or injury of any such employee while so engaged which may result from the negligence of a fellow servant.

Commerce — power of Congress — regulation of intrastate commerce — validity of employers' liability act.

2. A regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of Congress to enact, is made by the provision of the employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees."

Statutes — invalid in part — validity of Federal employers' liability act.

3. The invalidity, as applied to intrastate commerce, of the provision of the employers' liability act of June 11, 1906, that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of

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†These cases are reported by the official Reporter under the title of "The Employers' Liability Cases."

NOTE.—As to validity of statute abrogating fellow-servant rule—see note to Bradford Constr. Co. v. Heflin, 12 L.R.A.(N.S.) 1040.

"any of its employees" which may result from the negligence of "any of its officers, agents, or employees," invalidates such provision as applied to interstate commerce.

Commerce — Federal control of interstate carrier.

4. A carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of Congress.

[Nos. 216, 222.]

Argued April 10, 11, 1907. Decided January 6, 1908.

TWO WRITS of error directed respectively to the Circuit Court of the United States for the Western District of Tennessee and to the Circuit Court of the United States for the Western District of Kentucky to review judgments dismissing, on demurrer, the declarations in actions to recover damages from an interstate carrier for the death of an employee occasioned by the negligence of a fellow servant. Affirmed.

See same case below, No. 216, 148 Fed. 997; No. 222, 148 Fed. 986.

The facts are stated in the opinion.

Mr. **William R. Harr** argued the cause for plaintiff in error in No. 216.

Mr. **Jesse E. Torrance** argued the cause, and, with Messrs. S. C. Bloss, George M. Durelle, and W. M. Smith, filed a brief for plaintiff in error in No. 222:

The Constitution is one of enumeration, and not of definition; the power of Congress over interstate commerce is as extensive as that of the legislative body of any sovereign state or nation over its commerce.

Gibbons v. Ogden, 9 Wheat. 187, 6 L. ed. 68.

The power to regulate commerce extends to all the means, appliances, facilities, and instrumentalities of commerce.

Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349; Northern Securities Co. v. United States, 193 U. S. 197, 344, 48 L. ed. 679, 703, 24 Sup. Ct. Rep. 436; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 16.

And the power of Congress to regulate commerce extends to persons as well as property.

Lin Sing v. Washburn, 20 Cal. 543; Head-Money Cases, 18 Fed. 135; Memphis & L. R. R. Co. v. Nolan, 14 Fed. 532.

Under its power to regulate commerce Congress has regulated the method of recording bills of sale and mortgages, and the rights and duties of seamen, and the limitation of the responsibility of shipowners for the negligence and mismanagement of their crews.

A statute limiting a vessel owner's liability is valid.

The Lottawanna (Rodd v. Heartt) 21 Wall. 577, 22 L. ed. 662; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 589, 27 L. ed. 1042, 3 Sup. Ct. Rep. 379, 617.

The whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states.

Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 700.

State acts of this character have been held constitutional, as within the police powers of the state.

Missouri P. R. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 55 L.R.A. 610, 82 N. W. 26.

But the state may enact certain legislation for a purpose that is lawful, as police or quarantine legislation, while Congress may enact the same measures for the purpose of regulating commerce, or as war regulation.

Gibbons v. Ogden, supra.

The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, and although they control, in some degree, the conduct and liability of those engaged in such commerce, so long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

Chicago, M. & St. P. R. Co. v. Solan. 169 U. S. 133, 137, 42 L. ed. 688, 691, 18 Sup. Ct. Rep. 289. See also Freund, Pol. Power (1904) p. 66; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Cooley, Const. Lim. 7th ed. p. 856; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

And, for the purpose of regulating commerce, Congress can exercise the power of eminent domain.

Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808, 14 Sup. Ct. Rep. 891.

By the liability acts which apply only to railroads, and which are justified by the hazardous character of that kind of work (Missouri P. R. Co. v. Mackey, supra), the state does not seek to impose a burden on interstate commerce, but Congress, by the act of June 11, 1906, places an additional burden on interstate common carriers and thus on interstate commerce. The view that the new liability of the common carrier is a burden on interstate commerce brings the act clearly within the commerce clause of the Constitution.

Hall v. DeCuir, 95 U. S. 485, 488, 24 L. ed. 547, 548.

The Federal employers' liability act is a regulation of interstate commerce:

1. It places the cost of certain classes of injuries to employees uniformly upon the interstate common carrier. If each state is allowed to say for itself whether or not the cost is to be borne by the interstate common carrier or by the family of the servant, it is apparent that common carriers passing through certain states with no liability acts will have an unnatural advantage over those not so situated.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

2. The Federal liability act will secure better and safer service. The fellow-servant doctrine was based in part on a view that the best service was obtained by placing the cost of certain negligence on the servant.

Priestly v. Fowler, 3 Mees. & W. 1; Murray v. South Carolina R. Co. 1 McMull. L. 385, 36 Am. Dec. 286; Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339; Sullivan v. Mississippi & M. R. Co. 11 Iowa, 421; Union P. R. Co. v. Erickson, 41 Neb. 1, 29 L.R.A. 137, 59 N. W. 347.

The Federal liability act is similar in its scope to the safety appliance act.

This act is constitutional.

Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457.

It has been construed in—

Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 526, 116 Fed. 867.

The form of the rule or statute regulating interstate commerce is within the discretion of Congress. To effect this end of uniformity Congress may use such means as it may deem appropriate; and to undertake to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

M'Culloch v. Maryland, 4 Wheat. 316, 421, 423, 4 L. ed. 579, 605.

The court will not broaden the statute by construction to include an employee of an interstate common carrier, who is concerned wholly in that part of the carrier's business which is intrastate, for the purpose of then holding the entire act unconstitutional. It will rather hold, in a proper case, that such an employee is not within the view of the act.

State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

State statutes relating to commerce which are in terms so general that interstate as well as intrastate commerce may be included are construed to include only what the legislature might lawfully include in them.

17 Am. & Eng. Enc. Law, 2d ed. p. 76; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

An act will be so construed, if possible, as to avoid conflict with the Constitution, although such a construction may not be the most obvious or natural one. The courts may resort to an implication to sustain a statute, but not to destroy it.

Atlantic City Waterworks Co. v. Consumers Water Co. 44 N. J. Eq. 427, 15 Atl. 581; 1 Sutherland, Stat. Constr. 2d ed. § 298, p. 584; Opinion of Justices, 41 N. H. 555; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Johnson v. Southern P. Co. supra.

Attorney General **Bonaparte** argued the cause, and, with Mr. **William R. Harr**, filed a brief as *amicus curiæ:*

State legislation modifying or abolishing the common-law doctrine of common employment and assumption of risk has been uniformly sustained by the state and Federal courts, as a proper exercise of the police power.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 906; Hancock v. Norfolk & W. R. Co. 124 N. C. 222, 32 S. E. 679; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L. R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Georgia R. & Bkg. Co. v. Miller, 90 Ga. 574, 16 S. E. 939; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 7 Sup. Ct. Rep. 243; Holden v. Hardy, 169 U. S. 366, 391, 392, 42 L. ed. 780, 790, 791, 18 Sup. Ct. Rep. 383; St.

Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 409, 410, 43 L. ed. 746, 748, 749, 19 Sup. Ct. Rep. 419.

From the foundation of the government the power of Congress to regulate interstate and foreign commerce has been construed to extend to the regulation of the instrumentalities by which such commerce is conducted, and the regulation of such instrumentalities to include control over the persons operating the same.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Sherlock v. Alling, 93 U. S. 99, 103, 104, 23 L. ed. 819, 820, 821; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 204, 29 L. ed. 158, 161, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 9, 24 L. ed. 708, 710; Brown v. Houston, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 482, 31 L. ed. 700, 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Crutcher v. Kentucky, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 587, 39 L. ed. 538, 543, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9; California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Wilson v. Shaw, 204 U. S. 24, 51 L. ed. 351, 27 Sup. Ct. Rep. 233; Re Debs, 158 U. S. 564, 578, 39 L. ed. 1092, 1100, 15 Sup. Ct. Rep. 900; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; United States v. Joint Traffic Asso. 171 U. S. 505, 569, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25.

The books are full of cases in which state legislation affecting common carriers engaged in interstate commerce has been assailed as invasions of the power of Congress to regulate such commerce. Such legislation has usually been sustained, however, as a valid exercise of the police power of the states; but, in so doing, the court has always been careful to indicate that it must yield to similar legislation by Congress in respect to such commerce whenever it chooses to exercise its power.

Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Cooley v. Port Wardens, 12 How. 299, 320, 13 L. ed. 996, 1005; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 463, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Western U. Teleg. Co. v. James, 162 U. S. 650, 662, 40 L. ed. 1105, 1109, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 317, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Rasmussen v. Idaho, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

The power of Congress to regulate the liability of common carriers and others engaged in interstate commerce for injuries to persons or property has been distinctly recognized in several cases.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100; Missouri P. R. Co. v. Mackey, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; Patterson v. The Eudora, supra.

The power of Congress to limit the liability of common carriers by water for losses occasioned to shippers by the negligence of their servants, as provided in the limited liability act of 1851 and the Harter act, is also beyond question.

Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224; The Katie, 7 L.R.A. 55, 40 Fed. 480; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 576, 577, 22 L. ed. 654, 662, 663; Calderon v. Atlas S. S. Co. 170 U. S. 272, 42 L. ed. 1033, 18 Sup. Ct. Rep. 588; The Carib Prince (Wuppermann v. The Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; The Silvia, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; International Nav. Co. v. Farr & B. Mfg. Co. 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591.

It is for Congress to determine what public policy requires with respect to common carriers engaged in interstate commerce by land or water.

United States v. Joint Traffic Asso. 171 U. S. 569, 571, 573, 43 L. ed. 287, 288, 289, 19 Sup. Ct. Rep. 25; Missouri P. R. Co. v. Mackey, supra; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Lottery Case (Champion v. Ames) 188 U. S. 363, 47 L. ed. 504, 23 Sup. Ct. Rep. 321; McCray v. United States, 195 U. S. 27, 55, 49 L. ed. 78, 95, 24 Sup. Ct. Rep. 769.

The power of Congress to regulate instrumentalities of interstate commerce is not dependent upon mode of creation.

Hale v. Henkel, 201 U. S. 43, 75, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370; Northern Securities Co. v. United States, 193 U. S. 197, 345, 346, 48 L. ed. 679, 703, 704, 24 Sup. Ct. Rep. 436; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 524, 50 L. ed. 845, 852, 26 Sup. Ct. Rep. 518; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The act establishes a rule of conduct.

Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 698; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 138, 42 L. ed. 692, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 491, 48 L. ed. 273, 24 Sup. Ct. Rep. 132.

There is an essential difference between the power of Congress over an article or commodity which ceases to be a subject of interstate commerce the moment its interstate transportation ceases, and the instrumentality by which such commodity may be transported.

Johnson v. Southern P. Co. 196 U. S. 22, 49 L. ed. 371, 25 Sup. Ct. Rep. 158; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; United States v. Great Northern R. Co. 145 Fed. 438; United States v. Baltimore & O. S. R. Co. (D. C. S. D. Ill. Jan. Term, 1905).

It has never been held that Congress was devested of control over the instrumentalities of interstate commerce simply because local commerce might incidentally be affected by its regulations.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 41, 48 L. ed. 860, 867, 24 Sup. Ct. Rep. 563; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, supra.

To say that a statute should not be construed so as to render it unconstitutional when a constitutional construction is open to the court hardly needs to be argued.

McCullough v. Virginia, 172 U. S. 102, 112, 43 L. ed. 382, 385, 19 Sup. Ct. Rep. 134; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 563, 35 L. ed. 572, 577, 11 Sup. Ct. Rep. 865.

The business of common carriers forms a proper basis of classification and special legislation.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 352, 353, 44 L. ed. 194, 195, 20 Sup. Ct. Rep. 136; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

If necessary, under the doctrine of the Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, the general language of the statute might be restricted to those employees of common carriers engaged in interstate commerce whose business is of a hazardous nature, as it was the dangers of transportation which were intended to be remedied.

The act in question has recently been held to be constitutional by several Federal courts.

Plummer v. Northern P. R. Co. 152 Fed. 206; Spain v. St. Louis & S. F. R. Co. 151 Fed. 522; Kelley v. Great Northern R. Co. 152 Fed. 211; Snead v. Central R. Co. 151 Fed. 608.

Mr. **J. M. Dickinson** argued the cause, and, with Messrs. Charles N. Burch and Blewett Lee, filed a brief for defendants in error in No. 216:

The act is not a regulation of commerce, and is therefore unconstitutional and void.

Gibbons v. Ogden, 9 Wheat. 195, 6 L. ed. 69; Veazie v. Moor, 14 How. 568, 574, 14 L. ed. 545, 547; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 589, 22 L. ed. 173, 176; Tucker, Const. § 250; Cooley, Const. Lim. 7th ed. p. 11; Welton v. Missouri, 91 U. S. 275, 279, 23 L. ed. 347, 349; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; Williams v. Fears, 179 U. S. 270, 278, 45 L. ed. 186, 190, 21 Sup. Ct. Rep. 128; Monongahela Nav. Co. v. United States, 148 U. S. 312, 345, 37 L. ed. 463, 474, 13 Sup. Ct. Rep. 622; Hepburn v. Griswold, 8 Wall. 603, 615, 19 L. ed. 513, 523; Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102; M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605; Wayman v. Southard, 10 Wheat. 50, 6 L. ed. 264.

The court will determine for itself whether or not merely giving a right of action against common carriers of interstate commerce to their employees is of itself a regulation of commerce.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 319, 320, 34 L. ed. 455, 457, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Hennington v. Georgia, 163 U. S. 299, 303, 304, 41 L. ed. 166, 168, 169, 16 Sup. Ct. Rep. 1086.

State statutes giving rights of action for torts against interstate carriers are not regulations of interstate commerce.

Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820.

The Constitution intended to authorize Congress to regulate interstate and foreign commerce, and not those engaged in such commerce, so as to control them in affairs not directly involved in interstate and foreign commerce.

Gibbons v. Ogden, 9 Wheat. 1, 194, 195, 6 L. ed. 23, 69, 70; License Cases, 5 How. 504, 574, 620, 625, 12 L. ed. 256, 287. 308, 311; Passenger Cases, 7 How. 283, 400, 12 L. ed. 702, 751; License Tax Cases, 5 Wall. 462, 470, 471, 18 L. ed. 497, 500, 501; The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 564, 565, 19 L. ed. 999, 1001, 1002; State Freight Tax Case, 15 Wall. 232, 277, 21 L. ed. 146, 162; Hall v. DeCuir, 95 U. S. 485, 487, 24 L. ed. 547, 548; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 544, 545, 26 L. ed. 224, 226; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 570, 30 L. ed. 244, 248, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 210, 38 L. ed. 962, 965, 966, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Geer v. Connecticut, 161 U. S. 519, 530, 532, 40 L. ed. 793, 797, 798, 16 Sup. Ct. Rep. 600; Kidd v. Pearson, 128 U. S. 1, 20–22, 32 L. ed. 346, 350, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; United States v. E. C. Knight Co. 156 U. S. 1, 11, 12, 39 L. ed. 325, 328, 329, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 593, 595, 43 L. ed. 290, 296, 297, 19 Sup. Ct. Rep. 40; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 246, 248, 44 L. ed. 136, 149, 150, 20 Sup. Ct. Rep. 96; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; Northern Securities Co. v. United States, 193 U. S. 197, 349, 350, 48 L. ed. 679, 705, 706, 24 Sup. Ct. Rep. 436.

The act interferes with the police power of the states.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 591, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 547, 41 L. ed. 256, 259, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 393, 395, 45 L. ed. 244, 247, 248, 21 Sup. Ct. Rep. 101; Leisy v. Hardin, 135 U. S. 100, 122, 123, 34 L. ed. 128, 137, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Eilenbecker v. District Court, 134 U. S. 31, 40 L. ed. 801, 10 Sup. Ct. Rep. 424; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 137, 138, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Western U. Teleg. Co. v. James, 162 U. S. 650, 658, 40 L. ed. 1105, 1107, 16 Sup. Ct. Rep. 934; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 100, 101, 2 Inters. Com. Rep. 238, 32 L. ed. 352, 354, 9 Sup. Ct. Rep. 28; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 489, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132; Covington & C. Bridge Co. v. Kentucky, supra; United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Gladson v. Minnesota, 166 U. S. 427, 430, 41 L. ed. 1064, 1065, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 391, 303, 43 L. ed. 702, 708, 709, 19 Sup. Ct. Rep. 465; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 689, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565.

The law of Tennessee in respect to distribution of money, which can have no possible bearing upon interstate commerce, is to be entirely supplanted by a congressional provision under the pretext of regulating commerce between the states.

Freeman v. Illinois C. R. Co. 107 Tenn. 344, 64 S. W. 1; Greenlee v. East Tennessee, V. & G. R. Co. 5 Lea, 418; Stephens v. Nashville, C. & St. L. R. Co. 10 Lea, 451; Holder v. Nashville, C. & St. L. R. Co. 8 Pick. 141, 36 Am. St. Rep. 77, 20 S. W. 537.

Because powers, rights, and liabilities may be defined and enforced under the maritime and admiralty jurisdiction of the United States, it does not follow that similar powers, rights, and liabilities can be defined or enforced as to interstate carriers by land. The character of commerce by water and that by land is essentially different.

The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 565, 19 L. ed. 999, 1002; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 470, 22 L. ed. 678, 683; Re Garnett, 141 U. S. 1, 12, 35 L. ed. 631, 633, 11 Sup. Ct. Rep. 840; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Patterson v. The Eudora, 190 U. S. 169, 175, 176, 47 L. ed. 1002, 1006, 1007, 23 Sup. Ct. Rep. 821; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 577, 22 L. ed. 654, 662.

When a provision of an act of Congress, in assuming to regulate commerce, covers intrastate as well as interstate commerce, the action of Congress on the two classes of commerce, being inseparable, must fail *in toto*.

United States v. Reese, 92 U. S. 214, 220, 221, 23 L. ed. 563, 565, 566; United States v. Steffens, 100 U. S. 82, 96–99, 25 L. ed. 550, 552, 554; United States v. Ju Toy, 198 U. S. 253, 262, 263, 49 L. ed. 1040, 1043, 1044, 25 Sup. Ct. Rep. 644; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Trade-Mark Cases, 100 U. S. 82, 89, 25 L. ed. 550; Baldwin v. Franks, 120 U. S. 678, 686, 30 L. ed. 766, 768, 7 Sup. Ct. Rep. 656, 763; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533.

The principle is not different whether the case be civil or criminal.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431; Northern Securities Co. v. United States, 193 U. S. 197, 358, 48 L. ed. 679, 709, 24 Sup. Ct. Rep. 436; Allen v. Louisiana, 103 U. S. 80, 83, 84, 26 L. ed. 318, 319; Spraigue v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 635, 637, 39 L. ed. 1108, 1125, 1126, 15 Sup. Ct. Rep. 912.

The act is unconstitutional in that it violates the 5th Amendment to the Constitution of the United States.

San Mateo County v. Southern P. R. Co. 7 Sawy. 517, 13 Fed. 150; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 61, 49 L. ed. 937, 943, 25 Sup. Ct. Rep. 539; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 540, 58 L. R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073; Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; State v. Bateman, 7 Ohio N. P. 487; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 589, 590, 22 L. ed. 173, 176, 177; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 534, 12 L.R.A. 70, 15 S. W. 87; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 156, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; Ballard v. Mississippi Cotton Oil Co. supra; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 98, 43 L. ed. 909, 910, 19 Sup. Ct. Rep. 609.

Mr. **Alexander Pope Humphrey** argued the cause, and, with Messrs. R. S. Lovett and Maxwell Evarts, filed a brief for defendant in error in No. 222:

There is a commerce wholly within the state which is not subject to Federal regulation.

Gibbons v. Ogden, 9 Wheat. 1, 194, 6 L. ed. 23, 69; Trade-Mark Cases, 100 U. S. 96, 25 L. ed. 552; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 565, 30 L. ed. 244, 247, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

A carrier engaged generally in interstate commerce is subject to state control as to its intrastate commerce.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

Another line of cases which is illustrative of this doctrine concerns the right of the states to pass separate coach laws.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

There is another series of cases in regard to state laws requiring railroad trains to stop at certain stations.

Gladson v. Minnesota, 166 U. S. 427, 430, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

In these cases some state laws were held valid and others invalid, depending upon whether their effect was to regulate strictly intrastate commerce or positively, immediately, and directly to affect interstate commerce.

So, also as to power over rates, the two cases of Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95, and Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277 may be contrasted.

Exactly the same result has followed from an examination by this court of the Sherman anti-trust law.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 212, 44 L. ed. 136, 137, 20 Sup. Ct. Rep. 96.

Various cases have come to this court involving the fellow-servant laws of the states.

Missouri P. R. Co. v. Mackey, 127 U. S. 206, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 210, 39 L. ed. 676, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

These fellow-servant laws were not made by the states to apply simply to corporations created by the particular state enacting the law, nor as applicable alone to the citizens of such state, but were general in their application, applying to all persons, individuals, or corporations carrying on business within the state, and without regard to the character of that business. They were vigorously assailed in this court, and yet there was not a suggestion, by court or counsel, that they were in any way inimical to the commerce clause of the Constitution.

Again, there is a series of cases (Missouri P. R. Co. v. Humes, 115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870) where state legislation required railroads to fence their tracks, and imposed upon them single or double liability for damages growing out of their failure so to do. There is no doubt that these were interstate roads, and yet, although the constitutionality of these acts was attacked in this court, no one suggested that they were regulations of interstate commerce.

The same is true of the case of St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243 where this court had under consideration an act of the state of Missouri, making a railroad liable for accidental fires. Here no suggestion was made that this was a regulation of commerce, but the 14th Amendment was invoked, although without success.

We think it most significant that when state legislation has been attacked in this court as violative of the Constitution of the United States (a) because it required an express company to be licensed by the state in order that it might carry on an intrastate business (Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214), or (b) because it taxed the Pullman Company for carrying on on intrastate business (Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494), or (c) because it taxed a railroad company on its cab service (New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202), or (d) because it required separate coaches for the races (Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547), or (e) because it required trains to stop at certain stations (Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627), or (f) because it required engineers to be licensed (Smith v. Alabama, 124 U. S. 465, 1 Inters. Com. Rep. 804, 31 L. ed. 508, 8 Sup. Ct. Rep. 564), or (g) because it required engineers to be examined for color blindness (Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28),—the argument of counsel and opinions of court have been at once directed to the consideration of the commerce clause of the Constitution.

On the other hand, when state legislation has been attacked in this court as invalid (a) because it altered the rule of fellow servant (Missouri R. Co. v. Mackey, supra), or (b) because it rendered a railroad company liable for stock killed on account of failure to fence (Missouri P. R. Co. v. Humes, supra), or (c) because it rendered a railroad company liable for fire set without negligence (St. Louis & S. F. R. Co. v. Mathews, supra),—in no one of the cases, although all these laws were general in their nature, and applicable to intrastate as well as interstate commerce, has the argument of counsel or opinion of the court so much as hinted that these matters have any sort of relation to the commerce clause.

When cases have come to this court involving the question whether a particular state law is a regulation of interstate commerce, the question has been, Does the state law put a burden on interstate traffic?

Brown v. Maryland, 12 Wheat. 420, 6 L. ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup.

Ct. Rep. 681; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Or the question has been, Does the state law place a burden on interstate transportation?

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

Federal legislation on the subject of transportation of persons and property by water is not and cannot be rested on the commerce clause.

Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 203, 36 L. ed. 675, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; The Roanoke, 189 U. S. 185, 47 L. ed. 770, 23 Sup. Ct. Rep. 491; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; The Belfast (The Belfast v. Boon) 7 Wall. 624, 640, 19 L. ed. 266, 270; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 364, 98 Am. St. Rep. 610, 64 N. E. 152.

Even if the control of ships and shipping was given to Congress under the commerce clause of the Constitution, yet the wide extent of the exercise of that power with reference to matters pertaining to navigation is no precedent for the exercise of such power by Congress with reference to commerce on land between the states.

The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 23, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Sherlock v. Alling, 93 U. S. 100, 23 L. ed. 819; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 544, 26 L. ed. 224, 226.

As the act embraces employees of all kinds, it is void, not being separable.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Poindexter v. Greenhow, 114 U. S. 269, 304, 305, 29 L. ed. 185, 197, 198, 5 Sup. Ct. Rep. 903, 962; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153.

Mr. Justice **White** delivered the opinion of the court:

To dispose of these cases it is necessary to decide a fundamental question which is equally decisive as to both. They were argued at the bar together, and because of their unity have been considered at the same time.

As stated in the declarations as finally amended, recovery was sought in each case of damages occasioned by the death of the respective intestates while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train. In each of the cases it was alleged that the intestate met his death through no fault of his, but solely through the fault of employees of the company, who were his fellow servants. In both the right of action was expressly based upon the act of Congress of June 11, 1906, entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to Their Employees." [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891.] By demurrer in each of the cases the act relied upon was assailed as being repugnant to the Constitution of *the United States. In both cases the **[490]** Department of Justice, on behalf of the United States, asked to be allowed to intervene for the purpose of supporting the constitutionality of the act. In the first (the Howard) case this request was granted. In the second (the Brooks) case the court, while denying the request upon the ground that it knew of no law authorizing such an intervention simply because the validity of an act of Congress was drawn in question, intervention simply because the validity of be heard as a friend of the court. In both cases the act was held to be unconstitutional, the demurrer was sustained, and the declarations dismissed. These direct writs of error were then prosecuted, and at bar the cases have been argued, by printed brief and orally, not only by the parties in interest, but on behalf of the United States through the Attorney General as a friend of the court.

As the issue to be decided is whether the courts below were right in holding that the act of Congress, which was the basis of the respective causes of action, was repugnant to the Constitution of the United States, we reproduce the text of that act in the margin.†

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†Chapter 3073. An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to Their Employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any

[491] *Before coming to consider the contentions concerning the constitutionality of the act, we notice certain suggestions which proceed upon the assumption that they may concern the issue for decision. It is said that the statute inordinately extends the power of Congress and unduly diminishes the legislative authority of the states, since it seeks to exert the power of Congress as to the relation of master and servant,—a subject hitherto treated as being exclusively within the control of the states; and that in practice its execution will cripple the state and enlarge the Federal judicial power, since its effect will be to cause every action concerning an injury to a servant employed by a common carrier who may engage in interstate commerce to cease to be a matter of state jurisdiction, and to be cognizable in the Federal courts. Moreover, it is said, the statute will create confusion and uncertainty as to the rights of those dwelling within the states, that it will operate injuriously upon all who choose to engage in [492] interstate commerce *as a common carrier, since those who so do will become subject to the liability which the statute creates, to be tested by the rules of negligence which the statute embodies, although such rules be unknown to the laws of the several states. Besides, the statute, it is urged, discriminates against all who engage as common carriers in interstate commerce, since it makes them responsible without limit as to the amount to one servant for an injury suffered by the acts of a coservant, even in a case where the negligence of the injured servant has contributed to the result, hence placing all employers who are common carriers in a disfavored, and all their employees in a favored, class. Indeed, it is insisted the statute proceeds upon contradictory principles, since it imposes the increased responsibility just stated upon the master, presumably in order to make him more careful in the selection of his servants, and yet minimizes the necessity for care on the part of the servant by allowing recovery, although he may have been negligent.

But without, even for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power of Congress to enact it. We say this since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it, and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary.

All the questions which arise concern the nature and extent of the power of Congress to regulate commerce. That subject has been so often here considered and has been so fully elaborated in recent decisions, two

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territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him,—for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Sec. 3. That no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That, upon the trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Sec. 4. That no action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

Sec. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety appliance act of March second, eighteen hundred and ninety-three [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174], as amended April first, eighteen hundred and ninety-six [29 Stat. at L. 85, chap. 87], and March second, nineteen hundred and three [32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1907, p. 885].

Approved June 11, 1906.

of which are noted in the margin,† that we content ourselves, for the purposes of this case, with repeating the broad definition of the commerce power as expounded by Mr. Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70, where he said:

"We are now arrived at the inquiry, What [493] is this power? *It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Accepting, as we now do and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce:

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

We think the orderly discussion of the question may best be met by disposing of the affirmative propositions relied on to establish that the statute conflicts with the Constitution.

*In the first place, it is asserted that there [494] is a total want of power in Congress in any conceivable aspect to regulate the subject with which the act deals. In the second place, it is insisted the act is void, even although it be conceded, for the sake of argument, that some phases of the subject with which it is concerned may be within the power of Congress, because the act is confined not to such phases, but asserts control over many things not in any event within the power to regulate commerce.

While it may be, if we indulged, for the sake of argument, in the hypothesis of limited power upon which the second proposition rests, it would result that a consideration of the first proposition would be unnecessary because the act would be found to be repugnant to the Constitution, because embracing provisions beyond such assumed and restricted authority, we do not think we are at liberty to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress. We say this, for if it be that, from the nature of the subject, no power whatever over the same can, under any conceivable circumstances, be possessed by Congress, we ought to so declare, and not, by an attempt to conceive the inconceivable, assume the existence of some authority, thus, it may be, misleading Congress and giving rise to future contention.

1. The proposition that there is an absolute want of power in Congress to enact the statute is based on the assumption that, as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs, and the relation of those employed by him among themselves, it deals with subjects which cannot, under any circumstances, come within the power conferred upon Congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow that the act is beyond the authority of Congress if the proposition just stated be well founded. But we may not *test the power [495] of Congress to regulate commerce, solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce.

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†Lottery Case (Champion v. Ames) 188 U. S. 321, 345 et seq., 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321; Northern Securities Co. v. United States, 193 U. S. 197, 335, 48 L. ed. 679, 699, 24 Sup. Ct. Rep. 436, and cases cited.

We think the unsoundness of the contention that, because the act regulates the relation of master and servant, it is unconstitutional, because, under no circumstances, and to no extent, can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train; that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede the power and then to deny it; or, at all events, to recognize the power and yet to render it incomplete.

Because of the reasons just stated we might well pass from the consideration of [496] the subject. We add, however, that we *think the error of the proposition is shown by previous decisions of this court. Thus, the want of power in a state to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 343, 51 L. ed. 209, 214, 27 Sup. Ct. Rep. 90, and cases cited; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, ante, 121, 28 Sup. Ct. Rep. 121. And decisions cited in the margin,† holding that state statutes which regulated the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until Congress acted, by necessary implication refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by Congress, would be necessarily void because the regulation of the relation of master and servant was, however intimately connected with interstate commerce, beyond the power of Congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of Congress known as the safety appliance act. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

2. But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but embraces *those relations as to matters and [497] things domestic in their character, and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act.

From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a "common carrier, engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce.

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†Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates.

[498] *Thus, the liability of a common carrier is declared to be in favor of "any of its employees." As the word "any" is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from "the negligence of any of its officers, agents, or employees."

The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line *moving wholly within [499] a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employees of railroads engaged in interstate commerce to which it is said the act in its original form alone related, it is yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business, and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the government:

"It is the *carrier*, and not its employees, that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce.

. . . . . .

"By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.

" . . . It is submitted that Congress can make a common carrier engaged in interstate commerce liable to *anyone* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employees."

On the other hand, the same brief insists that these propositions are irrelevant, because the statute may be interpreted so as to confine its operation wholly to interstate commerce, or to means appropriate to the regulation of that subject, and hence relieves from the necessity of deciding whether, if the statute could not be so construed, it would be constitutional. *In the oral dis- [500]

cussion at bar this latter view was earnestly insisted upon by the Attorney General. Assuming, as we do, that the propositions are intended to be alternative, we disregard the order in which they are pressed in argument, and therefore pass for a moment the consideration of the proposition that the statute is constitutional though it includes all the subjects which we have found it to embrace, in order to weigh the contention that it is susceptible on its face of a different meaning from that which we have given it, or that such result can be accomplished by the application of the rules of interpretation which are relied upon.

So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words "any employee," as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But, if we could bring ourselves to modify the statute by writing in the words suggested, the result would be to restrict the operation of the act as to the District of Columbia and the territories. We say this because, immediately preceding the provision of the act concerning carriers engaged in commerce between the states and territories, is a clause making it applicable to "every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States." It follows, therefore, that common carriers in such territories, even although not engaged in interstate commerce, are, by the act, made liable to "any" of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the territories being plenary, and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories, if standing alone, could not be questioned. [501]*Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read, "any employee when engaged in interstate commerce," we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy.

The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153, and authorities there cited.

As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions *been restricted to [502] the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, where an act of Congress concerning trademarks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said (p. 99):

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trademark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. Cooley, Const. Lim. 178, 179; Com. v. Hitchings, 5 Gray, 482."

3. It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of

Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, [503] *have been, and must continue to be, under their control so long as the Constitution endures.

4. Reference was made to the report of a committee submitted to the House of Representatives on the coming in of the bill which finally became the act in question. We content ourselves on this subject with saying that that report, we think, instead of adding force to the argument that the plain terms of the act should be disregarded, tends to the contrary. And the same observation is appropriate to the reference made to the text of the safety appliance act of March 2, 1893 [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174], which, it is insisted, furnishes a guide which, if followed, would enable us to disregard the text of the act. We say this because the face of that act clearly refutes the argument based upon it. It is true that the act, like the one we are considering, is addressed to every common carrier engaged in interstate commerce, but this direction is followed by provisions expressly limiting the scope and effect of the act to interstate commerce, which are wholly superfluous if the argument here made concerning the statute before us be sound.

We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the due process clause of the 5th Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin,† wherein state statutes were held not to be repugnant to the 14th Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant. We further deem it unnecessary to express an opinion concerning the alleged repugnancy of the statute to the 7th Amendment, because of the provision of the act as to the power of the jury. In saying this, however, we must not be considered as intimating that we think *the provision [504] in question is susceptible of the construction placed on it in argument, or that, if it could be so construed, it would be constitutional.

Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are, therefore, affirmed.

Mr. Justice **Day** concurs in this opinion.

Mr. Justice **Peckham**, concurring:

I concur in the result of the foregoing opinion, but I am not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant.

I concur in the proposition that, as to traffic or other matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all that it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it.

I am authorized to state that the Chief Justice and Mr. Justice **Brewer** agree in this view.

Mr. Justice **Moody**, dissenting:

I am unable to agree in the judgment of the court. Under ordinary circumstances, where the judgment rests exclusively, as it does here, upon a mere interpretation of the words of a law, which may be readily changed by the lawmaking branches of the government, if they be so minded, a difference of opinion* may well be left without [505] expression. But where the judgment is a judicial condemnation of an act of a coordinate branch of our government, it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates. Moved by this consideration, and solicitous to maintain what seems to me the lawful powers of the nation, I have no doubt of my duty to disclose fully the opinions which, to my regret, differ in some respects from those of some of my brethren.

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†Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

The only question which these cases present is the constitutionality of the employers' liability act, which, briefly stated, provides a remedy for the injury or death of the employees of territorial, interstate, and foreign common carriers, caused by the negligence of the carrier. The defendants were both interstate carriers, and these actions were brought to recover for the deaths of their employees who, at the time, were engaged in interstate transportation. The judgment of the court does not deny that it is within the power of the Congress to provide a remedy for the injury or death of employees engaged in the conduct of territorial, interstate, and foreign commerce. It rests upon the ground that this statute is unconstitutional because it seeks to do more than that, and regulates the liability of employers while engaged in intrastate commerce or in manufacture. At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the states, and that I understand that to be the opinion of every member of the court.

The constitutionality of the act was attacked in the arguments before us upon three grounds: First, because it seeks to control by provisions so inseparable that they are incapable of resolution into their several parts, not only the territorial, foreign, and interstate business of carriers, but also their intrastate business, which, by the Constitution, is reserved for the government of the states. Second, because, if the act [506] should *be interpreted as not intruding upon the domain of the states by directly regulating commerce exclusively within the states, yet, that legislation fixing the obligation of employers engaged in interstate and foreign commerce to their employees in such commerce, for injuries suffered by the latter in the course of the employment, is not the regulation of commerce, and, therefore, is not within any power conferred by the Constitution upon Congress. Third, because, even if the act is concerned with a subject which is within the power of Congress, yet the specific changes made by it in the common-law rules governing the relations of employer and employee exceed the legislative power or violate the constitutional prohibitions which restrict that power.

I am of opinion that the act is not open to any of the constitutional objections urged against it, and shall consider all of the objections in the order in which I have stated them.

In the consideration of the scope of the statute for the purpose of determining whether it seeks to control that part of commerce which is beyond the power of Congress and subject only to the government of the states, it is to be observed that the opening words of Congress are in recognition of the limitation of its authority and of the constitutional distinction between commerce among the states and with foreign nations on the one hand and commerce within the states on the other hand. The commands of the law are addressed only to "common carriers engaged in trade and commerce" in the territories, with foreign nations, and among the states, and with respect to carriers engaged in commerce within the states the laws is impressively silent. The expression and enumeration of the parts of commerce which are clearly within the control of Congress is equivalent to an exclusion of the part which is not within its control. In the careful selection of the language of this law the legislators may well have in mind the words of Chief Justice Marshall which have received the constant approval ot this court. He said (in Gibbons v. Ogden, 9 Wheat. 194, 195, 6 L. ed. 69, 70):

*"The subject to which the power is next [507] applied is to commerce 'among the several states.' . . . Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved to the state itself."

These words of the Chief Justice have been regarded as delimiting accurately the constitutional boundaries of the respective powers over commerce of the nation and the states. They have been frequently repeated, and, though differences have arisen in their application to the complicated affairs of mankind, never doubted, and universally ap-[508]proved. It is not *easy to believe that Congress intended to dispute their authority. The reasoning which was thought worthy for the interpretation of the Constitution will not be misapplied if it be employed in the interpretation of a law passed in pursuance of the powers conferred by the Constitution. Why should it not be said of the law as it was said of the Constitution, that "the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, . . . must be the exclusively internal commerce of the state." From the enumeration of territorial, interstate, and foreign commerce, and the omission of the internal commerce of the state, is it not clear that the commerce which is exclusively internal to the state, and does not affect any other character of commerce, was intended to be outside the purview of the law? Does not a proper respect for the acts of Congress and the strong presumption that it will not exceed its powers, so frequently declared by this court, require us to believe that, when the kinds of commerce within its undoubted control are carefully enumerated, all the words of the law, however general, are to be referred solely to that commerce and no other?

If carriers were separated by a clear line of division, so that one class were engaged exclusively in interstate and foreign commerce, and the other class were engaged exclusively in commerce within the states, it would not, of course, occur to any mind that this act had any reference whatever to the state carriers. But there is no such hard and fast line of division. Carriers often, and, where they are railroads, usually are, as a matter of fact, engaged both in interstate and foreign commerce, over which Congress has the control, and intrastate commerce, over which the states have the control. Applying the law under consideration to the conditions as they actually exist, it is said that its words are so general and sweeping as *to comprehend within its [509] benefits not only the employees of the interstate carrier, engaged in the business of interstate carriage, but also the employees of the same carrier engaged in the business of intrastate carriage which it may and usually does conduct. Counsel illustrated their argument by suggesting that if a carrier doing an interstate business on the Pacific slope also conducted a local trolley line wholly along the Atlantic seaboard within a single state, an employee on the local trolley line would, by the terms of this act, be entitled to its benefits. If such be the necessary interpretation of the statute, plainly it exceeds the power of Congress, for Congress certainly has no right to regulate the purely internal commerce of a state. Nor can the statute be saved by rejecting that part of it which is unconstitutional, because its provisions are single and incapable of separation. The vicious part, if such exist, is so intermingled with that which is good that it cannot be eliminated without destroying the whole structure.

Which interpretation, then, should be adopted? That which regards the law as prescribing the liability of the carrier only to those employees who are engaged in the work of interstate and foreign commerce, or that which extends the benefits of the law also to those employees engaged in work which has no relation whatever to such commerce? In answering this question it must not be forgotten that, if the latter interpretation be adopted, in the opinion of the whole court the act is beyond the constitutional power of Congress. That is a consideration of vast importance, because the court has never exercised the mighty power of declaring the acts of a co-ordinate branch of the government void except where there is no possible and sensible construction of the act which is consistent with the fundamental organic law. The presumption that other branches of the government will restrain themselves within the scope of their authority, and the respect which is due to them and their acts, admits of no other attitude from this court. This is more than a canon of interpretation, it is a rule of

conduct resting upon considerations of pub-
[510]lic *policy, and, in the exercise of the delicate function of condemning the acts of co-ordinate and equal branches of the government, under the same obligation to respect the Constitution as ourselves, has been observed from the beginning. I regard the rule as so vital and fundamental in this and all other parts of the case that I select almost at random some expressions of it by different justices of this court. When the power to declare an act of Congress void was still undecided, Mr. Justice Chase said in Hylton v. United States, 3 Dall. 171, 1 L. ed. 556, p. 175: "If the court have such power, I am free to declare that I will never exercise it, but in a very clear case." Mr. Justice Strong said in Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, p. 531: "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress, to show clearly that it is in violation of the provision of the Constitution. It is not sufficient for them that they succeed in raising a doubt." In Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, Mr. Justice Miller said, p. 96: "When this court is called on, in the course of the administration of the law, to consider whether an act of Congress, or any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty." In Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, Mr. Justice Peckham said, p. 514: "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest." Mr. Justice White in Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, said, p. 492: "In examining the statute in order to determine its constitutionality, we must be guided by the well-settled rule that every intendment is in
[511]favor of its validity. *It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears." Mr. Chief Justice Waite in Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, said, p. 718: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Justice Story, in United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004, said, page 76: "If the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

Citations of this character might be multiplied, but to no good purpose. There is no doubt that the rule exists, there is no doubt that it is wise, and promotes the mutual respect between the different branches of the government which is so essential to the welfare of all, and that it requires us, if it is within our power, to give to the words of the statute before us a meaning which will confine its provisions to subjects within the control of Congress. If two interpretations are possible our plain duty is to adopt that which sustains the statute as a lawful exercise of authority, and not that which condemns it as a usurpation.

The argument which supports a construction of the statute which would include within its provisions intrastate commerce is readily stated. It is said that "every common carrier" engaged in territorial, foreign, or interstate trade, is made "liable *to[512] any of its employees . . . for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect" in its instrumentalities, and that, as there is no qualification of or exception to the generality of the language descriptive of the employees or instrumentalities, it must be deemed to include those engaged and used solely in intrastate commerce, and even in manufacture, as well as those engaged and used in other commerce. But I venture to think that this argument rests upon too narrow ground. It contemplates merely the words of the statute; it shuts out the light which the Constitution sheds upon them; it overlooks the significance of the enumeration of the kinds of commerce clearly within the national control and the omission of the commerce beyond that control,—an enumeration and omission which characterizes colors, and restrains every word of the statute,—and it neglects the presumptions in favor of the validity of the law and of the obedience of Congress to the commands of the Constitution, which cannot with propriety be disregarded by this court. Taking into account these missing aids to construction, it becomes quite easy, quite reasonable, and, in my opinion, quite necessary, to construe the act as conferring its benefits only upon employees engaged in some fashion in the commerce which is enumerated in it and is undoubtedly under the control of Congress. Even without these guides for discovering the intent of Congress, which the uniform practice of the court compels us to use, it is natural to suppose that, when territorial, interstate, and foreign carriers only are mentioned and every such carrier is declared to be liable "to any of its employees," only its employees in such commerce are intended. With those guides the conclusion appears to me irresistible, for they show that if the words, "any of its employees," in the context where they are used, are capable of meaning all of the employees upon any kind of work, yet their generality should be restrained so as to include only those who are subject to the power of the lawmaking body. The case of McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134, [513] *is precisely in point here. An act of the general assembly of the state of Virginia provided for refunding the state debt by the issue of coupon bonds for two thirds of the total amount of that debt. It was enacted that the coupons should "be receivable at and after maturity for all taxes, debts, dues, and demands due the state." There was at the time of the passage of the refunding act a provision of the Constitution of Virginia requiring all school taxes to be paid in cash, and it had been held by this court that the constitutional provision disabled the Virginia legislature from providing that the coupons should be receivable for such taxes. McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972. The argument was then made that as the statute providing for the receivability of the coupons for "all taxes, debts, dues, and demands on the state" was in part beyond the constitutional power of the legislature, the contract evidenced by that statute was entirely void. The court, speaking by Mr. Justice Brewer, answered this argument by saying, p. 112: "It ignores the difference between the statute and the contract, and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues *which, under the existing provisions of the [514] state Constitution, could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation." The language quoted was not *obiter*. The case turned upon the construction of the statute and reversed the construction by the highest court of the state of its own statute, as well as its judgment that the statute thus construed was inconsistent with the state Constitution, because "all taxes" included taxes beyond the power of the legislature. I am unable to reconcile the judgment in that case with the conclusion which is reached by the court in this. The reasoning which, in that case, led the court to construe a statute providing that the coupons should be receivable for "all taxes" to mean only for such taxes as the legislature had the constitutional power to declare payable in such a manner, is equally potent to lead the court, in the case at bar, to construe a statute providing for the liability of the interstate and foreign carrier to "any of its employees" to mean only to any of its employees for whom Congress has the constitutional power to make such a provision. In that case there were taxes within the legislative control, and taxes without the legislative control of the Virginia assembly; in this case there are employees within the legislative control and employees without the legislative control of Congress; in that case the statute provided for "all taxes;" in this case the statute provides for "any employees;" in that case, examining the statute "in the light of the Constitution," this court declared that "however broad and general its language, it cannot be interpreted as extending beyond those matters which it is within the constitutional power of the legislature to reach," and if it appears that there were taxes beyond the control of the legislature, that the statute should be read "as though it in terms excluded them from its operation;" I am unable to imagine any reason why, examining the statute in this case with the aid of the same light, the court should not make the same declaration of its meaning. Moreover, it should be remembered that a cir-[515]cumstance leading *in the same direction is present in the case at bar which was absent in that case, for, to repeat what has already been said, here the general words are used in a context which suggests, if it does not require, the less extended meaning.

It should be observed that the McCullough Case was simply a case of construction. The court made no judicial amendment of the statute or exception from its provisions of any subject which came within them according to their proper meaning, ascertained with the aid of the light of the constitutional limits of the legislative power. Mr. Justice Brewer pointed out the distinction between the construction of the statute and its validity, saying: "The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes." Thus the case is distinguished from some others, much relied upon in the argument, which establish the proposition that a single statutory provision is void if it is expressed in general words so used as to manifest clearly the intention to include within those words subjects beyond the constitutional power of the lawmaking body. The courts have no power to read into such a provision an exception for the purpose of saving that which is left from condemnation. A law which cannot endure the test of the Constitution without judicial amendment must perish. United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644. See Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153. But the rule derived from these cases is by no means decisive of the inquiry whether this statute must be construed as seeking to accomplish objects beyond the power of Congress. It can be made decisive only by begging the very question to be determined, and, in the words of Mr. Justice Brewer, confusing "the two entirely distinct matters of construction and validity." It merely expresses the judicial duty which arises after the question of construction is determined. A critical exam-[516]ination of the *cases shows that in each of them, in the opinion of the court, the language of the statute admitted of no possible interpretation, except that Congress intended to deal, by a single and inseparable provision, with subjects without as well as subjects within its control. As was said in one of them (United States v. Reese, 92 U. S. 220, 23 L. ed. 565), there was "no room for construction unless it be as to the effect of the Constitution." It would be unprofitable to dwell upon all these decisions, and I content myself with the analysis of one, and that the one deemed by counsel who rely upon it as the most important and conclusive. In "The Trade-Mark Cases" it appeared that, in an act entitled, "An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights" [16 Stat. at L. 198, chap. 230], provision was made for the registration of trademarks in the Patent Office. Some years later an act was passed providing for the punishment by fine and imprisonment of any person making fraudulent use of or counterfeiting trademarks thus registered. The cases were indictments under this later act, and the question for decision was its constitutionality. The act was supported first upon the ground that it was authorized by that part of the Constitution which confers upon Congress the authority "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The court, after saying "that it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution," and that "it was mainly, if not wholly, to this clause that the advocates of the law looked for its support," held that this clause was not a sufficient source of authority for the act. The act was supported, second, upon the ground that the commerce clause of the Constitution supplied the requisite authority to Congress. But there was not a word in the act from which it could be inferred that Congress intended to exercise the power conferred by the commerce clause. The court, by Mr. Justice Miller, after pointing out that *com-[517] merce within a state was beyond the control of Congress, said: "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes." Words could not be more happily chosen than these, to describe what the statute in the case at bar is on its face and from its essential nature. The Justice then proceeds to say:

"If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress." No words could be more happily chosen than these, to describe exactly what the statute in the case at bar is not. The court, then, taking the view, upon which there cannot be two opinions, that the act intended to establish a universal system of trademark legislation applicable to all commerce, held the statute void, saying: "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." The reasoning relied upon in this case to overthrow the statute, if applied to the statute before us, tends to support it.

I do not wish to be understood as saying that the group of cases I am now discussing does not furnish instances where the court has declined to limit the meaning of words in order to save the act. I only say that, in these cases, it could not be done without violating the obvious intent of Congress, as ascertained by the necessary meaning of the language it employed; in other words, that in these cases only one interpretation was possible, and there was "no room for construction." They cannot be understood as [518]deciding that general *words may not, in view of the context where they are found, and, with the aid of the light of the Constitution, be restrained in their meaning, with the purpose and effect of giving them such a construction that the act may be sustained as a legitimate exercise of the legislative power. If they should be so understood they would be in flat conflict with the McCullough Case, and with the spirit of the interpretation that prevailed in United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471, and Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511. In the former case it was held that an act which punished certain offenses committed by "any person or persons" upon the high seas should not be construed as including persons who might commit such offenses on board a vessel belonging to the subjects of a foreign state; Marshall, Ch. J., saying: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." In the latter case it was held that an act that forbade all persons from assisting the migration into the United States of "any alien or aliens, any foreigner or foreigners," under contract "to perform labor or services of any kind," did not include a minister of religion, though such a person was within the letter of the statute. These cases show that we may with propriety give to the words "any of its employees" the narrower meaning, and, because such meaning saves the act from condemnation, it is, I believe, our imperative duty to adopt it. No words need to be read into the act. It is required only that the words already there shall be applied to that commerce which Congress referred to; namely, territorial, foreign, and interstate. Thus read, the whole statute is saved and no part of it is destroyed.

The natural meaning of the words of the statute considered together, each word receiving significance from those with which it is allied, the respect which is due to Congress, the *belief which I hold that it would[519] not intentionally overstep the clearly defined limits of its authority, and the principles of construction heretofore acted upon by this court, lead my mind to the settled conviction that the statute can be interpreted, and ought to be interpreted, as affording the remedy therein prescribed only to the employees of foreign, interstate, and territorial carriers, who are themselves engaged in some capacity in such commerce in some of its manifold aspects. If this meaning be attributed to the words of the law, it is apparent that, in the opinion of a majority of the court, the law, in its main features at least, would be constitutional.

Entertaining these views of the meaning of the statute, I am compelled to go further and consider the other objections to it. I agree entirely with all that was said in the opinion of Mr. Justice White in support of the power of the Congress to enact a law of this general character, but, as I think that the judgments in these cases ought to be reversed, I cannot escape dealing with specific objections to the statute which he has not deemed it necessary to discuss. I think it better, therefore, to deal with all the questions that are necessarily raised in these cases.

I come now to the question whether the statute, thus construed, is in the execution of any power conferred by the Constitution upon the Congress. It is apparent that there is no such power unless it be found in that clause of the Constitution which authorizes Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes." It hardly needs to be said that the inability of the national government created by the Articles of Confederation to deal effectively with commerce was one of the efficient causes of the call for the constitutional convention. No doubt the most urgent need of that time was a central government with powers adequate to control foreign commerce, but interstate commerce was not overlooked, though its principal importance then consisted in its relation to foreign commerce. Federalist, No. 42, by Mr. Madison. [520]*No one could then have foreseen the extent of the interstate commerce of our times, for no one could foretell the employment of the forces of steam and electricity which have so wonderfully aided its development. But the statesmen of that time, confident of the future, and hopeful that they might devise a government which would endure, must have understood that the commerce which concerned more than one state, from its essential nature, was in part outside the territorial jurisdiction of any state, could not be governed efficiently by a single state, and, if left outside of the national control, would be subject to woeful embarrassment by the conflicting regulations of the several states into which it entered. It appears in the reports of the debates that these dangers were appreciated by the members of the convention, so far as they threatened that part of the commerce among the states which was conducted by water transportation, then the only part of such commerce of sufficient importance to attract public attention. But fortunately the spirit of the nation builder, and not of the codemaker, inspired and dominated the convention. Its members were not content to frame a system of laws sufficient for the present moment; which might, in a few years, become unsuited to, or inadequate for, the needs of the people. They undertook, rather, the task of devising a scheme of government, and of allotting the powers usually exercised by governments between the existing states and the prospective nation. Whenever such a power came under consideration its nature was examined, and it was then placed in the hands of that governmental agency which it was supposed could exercise it most advantageously. This very power furnishes a signal illustration of the method pursued. The convention did not determine how interstate commerce should be regulated, but rather who should regulate it, and left, with certain limitations, the necessity, extent, and nature of the regulation to the contemporaneous knowledge, wisdom, and discretion of the body in whom the power was vested. We may well believe that, contemplating the subject with the enlarged vision of *those [521] who are building for a future unknown or dimly discerned, and seeing clearly that interstate, like foreign, commerce, was, in the words of the resolutions with which Randolph opened the deliberations of the convention, a matter "to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," the convention was constrained to associate the two together in every draft of the Constitution proposed, and place them with the Indian trade, under the control of the national legislature. Madison's Journal, Scott's ed. pp. 67, 161, 164, 185, 362, 453, 654, 656, 704, 753.

The different kinds of commerce described have the common qualities that they are more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws, and thereby are all alike distinguished from the purely internal commerce of the states. There is nothing in the words of the grant that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either, though it may well be that the restrictive parts of the Constitution, its prohibitions and reservations, may operate differently on different kinds of commerce, or even on different aspects of the same kind of commerce.

It is said that Congress has never before enacted legislation of this nature for the government of interstate commerce on land, though it has for the government of such commerce upon the water and for the government of foreign commerce; that, on the contrary, the relations affected have been controlled by the undoubted power of the states to govern men and things within their respective dominions; and that this omission of Congress is of controlling significance. The fundamental fallacy of this argument is that it misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the *infinite variety [522] of the changing conditions of our national life. Surely, there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority, save that of the people whom it represents, which may, with propriety, challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong. It cannot be doubted that the exercise of a power for the first time may be called upon to justify itself. The fact that it is for the first time is a circumstance to be considered. But in this case it is a circumstance whose significance disappears in the light of history. Henry Adams, a writer of high authority, in the first chapter of his History of the United States, has drawn a vivid picture of the conditions of our national life at the beginning of the nineteenth century. The center of population was near Baltimore. The interior was almost impenetrable except by the water ways and two wagon roads from Philadelphia to Pittsburg and from the Potomac to the Monongahela. The scattered settlements of what was then the Western country were severed from the seaboard settlements by mountain ranges, and there was little connection between the two almost independent peoples. There was scarcely a possibility of trade between the states except along the seacoast and over the dangerous and uncertain rivers. "The experience of mankind," says the author, p. 7, "proved trade to be dependent on water communications, and as yet Americans did not dream that the experience of mankind was useless to them." We need not look beyond these conditions for an explanation why Congress, though it early and vigorously exercised its power of legislation over foreign commerce and interstate commerce by water, left it unused in respect to interstate commerce on the land. As population multiplied, bringing the isolated settlements nearer to each other, wealth increased, creating a wider demand for commodities, and roads and bridges came to be better and more numerous, doubtless overland commerce was somewhat stimulated. But the iron restrictions which nature had placed up- [523]on land transportation *remained constant until they were unloosed by the operation of the steam railroad. The system of steam transportation began modestly by the construction of short lines, often wholly within a single state. These lines were lengthened by extensions and consolidations, until at the present time the states of the Union are all bound together by a network of interstate railroads. Their operation, aided by the quick and cheap transmission of the mails, and the communication of intelligence by electricity, has transformed the commerce of the country. Interstate commerce by land, once so slight as to be unworthy of the attention of the national legislature, has come to be the most important part of all trade, and it is not too much to say that the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other states.

It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the states, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the Constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to it to require action. A description of its action in this respect was given in Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, where it was said, p. 579: "Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by, for the present, all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation (for this is the specific matter involved in this case), these acts *may be noticed: First. That of June 15th, [524] 1866, chap. 124, 14 Stat. at L. 66, carried into the Revised Statutes as § 5258 (U. S. Comp. Stat. 1901, p. 3564), which provides: 'Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several states, to establish post roads, and to raise and support armies: Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its roads, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination.' Second. That of March 3d, 1873, chap. 252, 17 Stat. at L. 584. (Rev. Stat. §§ 4386 to 4389, U. S. Comp. Stat. 1901, pp. 2995, 2997), which regulates the transportation of live stock over interstate railroads. Third. That of May 29th, 1884, chap. 60, § 6, 23 Stat. at L. 31, 32, U. S. Comp. Stat. 1901, pp. 299, 3184, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4th, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, with its amendments of March 2d, 1889, chap. 382, 25 Stat. at L. 855, U. S. Comp. Stat. 1901, p. 3158, and February 10th, 1891, chap.

128, 26 Stat. at L. 743, U. S. Comp. Stat. 1901, p. 3163, known as the 'interstate commerce act,' by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the 16th section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1st, 1888, chap. 1063, 25 Stat. at L. 501, providing for arbitration between railroad interstate companies and their employees. And, sixth, the act of March 2d, 1893, chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions."

Since this decision other laws more fully regulating interstate commerce on land have [525] been enacted, which need not *here be stated. They show a constantly increasing tendency to exercise more fully and vigorously the power conferred by the commerce clause. It is well to notice, however, that Congress has assumed the duty of promoting the safety of public travel by enacting the safety appliance law; an act to require reports of casualties to employees or passengers (31 Stat. at L. 1446, chap. 866, U. S. Comp. Stat. 1901, p. 3176); a resolution directing the Interstate Commerce Commission to investigate and report on the necessity for block signals (34 Stat. at L. 838, U. S. Comp. Stat. Supp. 1907, p. 912); an act limiting the hours of service of employees; and the act under consideration. These acts, all relating to interstate transportation, demonstrate the belief of Congress that the safety of interstate travel is a matter of national concern, and its deliberate purpose to increase that safety by laws which it deems conducive to that end. I think, therefore, that we may consider whether this act finds authority in the commerce clause of the Constitution without embarrassment from any inferences which may be drawn from the inaction of Congress.

It is settled beyond the necessity of citing cases that the transportation of persons and property is commerce; in other words, that the business of carriers is commerce. Where, therefore, the business is foreign or interstate, Congress, it has frequently been decided, has the paramount, if not the sole, power to legislate for its direct control. An obstruction of such commerce by unlawful violence may be made punishable under the laws of the United States, suppressed by the armies of the United States, or, at the instance of the United States, enjoined in its courts. Re Debs, ubi supra. It is difficult to conceive how legislation may effectively control the business if it cannot regulate the conduct of those engaged in the business, while engaged in the business, in every act which is performed in the conduct of the business. The business of transportation is not an abstraction. It is the labor of men, employed, with the aid of instrumentalities, animal and mechanical, in carrying men and things from place to place. In every form of transportation, from the simplest to the most *complex, [526] whether the man carries the burden on his back, or drives an animal which carries it, or a locomotive which draws a car which carries it, the one and only constant factor is the labor of mankind. I am quite unable to understand the contention made at the bar that the power of Congress is to regulate commerce among the states, and not to regulate persons engaged in commerce among the states, for, in the case of transportation, at least, the labor of those engaged in it is commerce itself. How poor and meager the power would be if, whenever it was exercised, the legislator must pause to consider whether the action proposed regulated commerce or merely regulated the conduct of persons engaged in commerce. The contention derives some plausibility from its vagueness. Of course, the power to regulate commerce does not authorize Congress to control the general conduct of persons engaged therein, but, unless it is an idle and useless power, it authorizes Congress to control the conduct of persons engaged in commerce in respect to everything which directly concerns commerce, for that is commerce itself. It would seem, therefore, that when persons are employed in interstate or foreign commerce, as the employment is an essential part of that commerce, its terms and conditions, and the rights and duties which grow out of it, are under the control of Congress, subject only to the limits on the exercise of that control prescribed in the Constitution. This has been the view always expressed or implied by this court. In his concurring opinion in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, Mr. Justice Johnson said, p. 229: "Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulations." In Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, the court, in holding *inter alia* that a regulation of pilots is a regulation of commerce within the meaning of the commerce clause, *said [527] (p. 316 by Justice Curtis) of the power: "It extends to the persons who conduct it as well as to the instruments used." In the opinion of the court, delivered by Mr. Justice Field, in Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, it was said: "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on." In delivering the opinion of the court in Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, where a state statute requiring interstate locomotive engineers to obtain a license after a qualifying examination, and imposing a penalty for operating without such license, was sustained, Mr. Justice Matthews said: "It would, indeed, be competent for Congress to legislate upon its subject-matter and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce." In sustaining a similar state statute, directed against color blindness, Mr. Justice Field said, in Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any state action on the subject. But, until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains." In Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, a state statute forbidding a contract limiting liability for injury was sustained, the court, by Mr. Justice Gray, saying: "The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those [528] engaged in such commerce. *So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." This statement was assumed to be true in Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, and Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100. The case of Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, was decided by the court of appeals of the sixth circuit by Mr. Justice Harlan and Judges Taft and Lurton. The opinion was delivered by Mr. Justice Harlan. After sustaining a state statute which modified the common-law rules with respect to the liability for injuries of a carrier to its employees, he said of it: "The Ohio statute is not applicable alone to railroad corporations of Ohio, engaged in the domestic commerce of this state. It is equally applicable to railroad corporations doing business in Ohio, and engaged in commerce among the states, although the statute, in its operation, may affect in some degree a subject over which Congress can exert full power. The states may do many things affecting commerce with foreign nations and among the several states until Congress covers the subject by national legislation. . . . Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states."

We may not trust implicitly to the accuracy of statements gathered from opinions where the precise question was not for decision. But where, as in these quotations, the statements were an essential part of the course of reasoning deemed appropriate for the disposition of the cases, where the same thought, clothed in different words, has been expressed at intervals from early times to the present day, and where no decision or judicial utterance has been found in opposition to them, they are entitled to profound respect, and furnish cogent evidence of what the law has always been supposed to *be by the members of this court. [529] They cannot be regarded lightly, and if we follow them they lead us to the conclusion that the national power to regulate commerce is broad enough to regulate the employment, duties, obligations, liabilities, and conduct of all persons engaged in commerce with respect to all which is comprehended in that commerce. Upon what principle except this could this court have twice enforced the safety appliance act, undisturbed by a doubt of its constitutionality? Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407. That act (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174) compelled interstate railroads to equip all their trains with power brakes operated from the engine, and all their cars with automatic couplers, grab irons, and hand holds, by enacting that the use of engines and cars not thus equipped should be unlawful. There was no express provision that an employee injured by the failure of a railroad to comply with the law should been entitled to damages, but without doubt the liability of the railroad is implied. The common-law rule governing the liability was materially changed by § 8, which abolished in part the doctrine of the assumption of risk, by providing that the employee should "not be deemed to have assumed the risk" of the unlawful conditions, though he knew of them and continued in his employment. This section was enforced in most emphatic manner in the Schlemmer Case, where Mr. Justice Holmes said: "An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man." If the statute now before us is beyond the constitutional power of Congress, surely the safety appliance act is also void, for there can be no distinction in principle between them. If Congress can create a liability to an injured employee for the existence of conditions in certain mechanisms which he uses, by declaring those conditions unlawful, it may create the same liability for negligence of the agents and imperfections in the instruments used in the [530] carrier's *work; if it may change the common-law rule of the assumption of the risk of imperfect appliances, it may change the rule of the assumption of the risk of a careless fellow servant. I can conceive of no principle of constitutional law which enables us to say that the commerce clause authorizes Congress to fix upon the carrier a liability for an insufficient brake but not for a defective rail, for the absence of automatic couplers, but not for the negligent order which brings trains into collision, for an insecure grab iron, but not for a heedless switchman. If Congress has the right to control the liability in any way it may control it in every way, subject, as all powers are subject, to the express prohibitions of the Constitution. Unless the cases on the safety appliance acts are deemed to have been inadvertently decided, they seem to be conclusive of this branch of the case. This seems to have been feared by counsel for one of the defendants, who, in his brief, said "that the giving of a right of recovery to an injured employee is a proper and necessary method for making effective the safety appliance act . . . we do not admit."

But, if we put aside the authority of precedents, and examine the nature and extent of the grant to Congress of power over commerce in the light of the settled principles of interpretation fit to be applied to the exposition of a constitution, we shall arrive at the same result. One main purpose and effect of the Constitution was to devise a scheme of efficient government. In order to accomplish this all the powers usually exercised by governments were distributed between the states and the nation, except those deemed unfit or unsafe to be intrusted to either and withheld from both. In the allotment of powers to the nation they were enumerated rather than defined. In the enumeration, words of the largest import were employed, comprehending within their meaning grand divisions of the powers of government. The nature of the Constitution, said Chief Justice Marshall (M'Culloch v. Maryland, 4 Wheat. p. 407, 4 L. ed. 601), "requires that only its great outlines should be marked, its important objects designated, and *the minor ingredients which [531] compose those objects be deduced from the nature of the objects themselves." The wide extent of the powers granted to Congress is expressed in a few simply-worded provisions, all of which might be printed on a single page of its book of annual laws. Counsel have argued that the power to regulate commerce does not include the power to regulate the conduct of persons engaged in that commerce in respect of that commerce. This is what Mr. Justice Miller (Ex parte Yarbrough, 110 U. S. 658, 28 L. ed. 276, 4 Sup. Ct. Rep. 155) described as "the old argument, often heard, often repeated, and in this court never assented to, that, when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it." Suppose that method of reasoning had been applied to the power "to establish postoffices and post roads," under which Congress governs the postal system of the country as fully and freely in every detail as it is governed by any other nation. It could be said to Congress, "You cannot carry the mail, you cannot issue money orders, you cannot determine what shall be excluded from the mail, you cannot regulate the conduct of those who are employed in the mail service, you cannot exempt them from militia duty, you cannot punish their theft or embezzlement, you cannot punish him who breaks and enters the postoffice or mail car,—all these powers are reserved to the states. You can only establish postoffices and post roads, and when that is done your power is exhausted." Yet Congress has done all these things, and no one now doubts its power to do them, because the grant of power is of the whole governmental power over the subject. So, too, the power to regulate interstate and foreign commerce is the whole power which any government can exercise over that subject; it "is vested in

Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Marshall, Ch. J., in Gibbons v. Ogden, 9 Wheat. 197, 6 L. ed. 70; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321. We are brought, then, directly to the [532]*inquiry whether a power so extensive is a sufficient warrant for the enactment of the statute before us.

By what has been called the auxiliary power, Congress may "make all laws which shall be necessary and proper for carrying into execution" its granted powers. It is settled that this provision authorizes the enactment of laws which, in the exercise of a wide discretion, Congress deems adapted to secure a legitimate end and calculated to effect any of the objects intrusted to it, and the exercise of that discretion, unless it violates some prohibition of the Constitution or is used as a pretext to accomplish some object not intrusted to the national government, cannot be reviewed by the judicial branch of the government without trespassing upon a domain which is peculiarly and exclusively the province of the legislative branch. If the statute under consideration be brought to the test of these principles, there can be no doubt of its validity.

It cannot be denied that in that part of commerce which consists in transportation, the safety of those who are concerned in it as passengers or employees is of the first importance. As was said by Mr. Justice Gray, in Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 135, 42 L. ed. 690, 18 Sup. Ct. Rep. 290: "The fundamental principle on which the law of common carriers was established [was] the securing of the utmost care and diligence in the performance of their important duties to the public." The government having the relations which the national government has to interstate commerce, pronounced by the court in the Debs Case to be "those of direct supervision, control, and management," which neglects to do what it is fitting for a government to do to insure the safety of public travel, fails in the performance of its highest duty. The lengthening list of casualties to employees and passengers on our railroads has arrested the public attention and created public alarm. Ought Congress alone to be indifferent? Or have we so weak a system of government that the only part of it which is clothed with direct authority over the commerce in which the casualties happen is powerless? What does the "direct supervision, control, [533]and management" amount to if *it does not include the power to pass any laws really calculated to lessen the great dangers of public travel? Congress, recognizing its responsibility, and believing in its power, has enacted the group of laws to which reference has been made. Of one (the safety appliance act) the Chief Justice said, in the Johnson Case, what is true of all: "The primary object of the act was to promote the public welfare by securing the safety of employees and travelers." That act, like this, in terms simply safeguarded the employee, but his safety cannot be separated from the safety of the traveler; both may be affected by the same act of negligence and the same defect in appliances, and suffer injury in the same disaster. Any law which promotes the safety of either promotes the safety of both. Much of the law of common carriers, whether created by decisions of the courts or by acts of legislatures, has been based upon or influenced by the theory that the nature of the liabilities imposed upon the carriers directly affects the care, diligence, and safety with which they conduct their business. For instance, one consideration which has influenced the courts in the judicial development of the fellow-servant doctrine is that, by imposing upon the employee the risk of the carelessness of the men with whom he works, a greater degree of care and therefore of safety would result. The truth of this theory has been often disputed (see Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184), and it is almost universally disregarded in modern legislation. It is of no importance here whether it is right or wrong. The only significance is that the greater or less liability in damages is generally regarded as having some relation to the safety of operation. It follows that if Congress, in the exercise of its plenary power over interstate and foreign transportation, deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the states, this court cannot, without overstepping the boundary which separates the judicial from the legislative field, declare the enactment void.

*The power of Congress to enact the law[534] under consideration, which seems so clearly to result from a just interpretation of the commerce clause, might not have been disputed but for the fact that up to this time the subject has been left to be dealt with by the states. If a doubt ever existed that the states could lawfully deal with the subject under the general legislative authority to govern their territory, which was undisturbed by the Constitution, that doubt was dispelled by the decision in Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, and it is now agreed that the state may, in the absence of action by Congress, fix and determine the liability of all carriers while operating within the state, to those whom they employ for the injuries which are suffered in the course of the employment. But such authority in the state is not inconsistent with a like authority in the nation. Where, as in the case of our dual government, the same territories and the same individuals are subject to two governments, each supreme within its sphere, both governments, by virtue of distinct powers, may legislate for the same ends. The exercise of the rightful authority of the nation and the state, though it proceeds from different governmental powers, may reach and control the same subject. This result arises from the different relations to the community the subject may sustain; a drove of cattle may be at once interstate freight and the vehicle by which infectious disease may be brought within the borders of a state; a bridge may, at the same time, interrupt the navigation of the river, and serve as a continuation of the highways of the state; a man, while the agent through which the transaction of interstate commerce is conducted, is, at the same time, one of the population, permanent or transient, of a state, and subject to its general laws. There is no conflict in powers, though there may be conflict in legislation, referable to different powers. In such a case, under our system, the law of the state, enacted by virtue of its undoubted powers, must yield to the national law, enacted in pursuance of the powers conferred by the Constitution. There is no necessity in this case to disturb the troublesome question [535] *when, if ever, even where Congress is silent, the states may exercise any direct power over interstate and foreign commerce. For the power hitherto exercised by the states over this particular subject has never been deemed to be a regulation of commerce, but rather an exercise of their authority to regulate generally the relations of men to each other, which may indirectly affect such commerce. "If a state," said Chief Justice Marshall (in Gibbons v. Ogden, 9 Wheat. 204, 6 L. ed. 72), "in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state and may be executed by the same means. All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical." That the states may by their laws fix the relative rights, duties, obligations, and liabilities of all persons or corporations within their territorial jurisdictions, and thus control in that respect those who are engaged in interstate and foreign commerce; that such laws do not proceed from any power to regulate such commerce, though incidentally and indirectly they do regulate it, but are to be referred to their general power over persons and things within their territories; and that all such laws, so far as they affect such commerce, must yield to the superior authority of the laws of Congress, is, I think, conclusively shown by the following cases: Sherlock v. Alling, supra; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693. Upon principle and authority it, in my opinion, is clear that Congress had constitutional power over the subject with which it dealt in the statute before us.

*There remains to be considered the objection that the specific provisions of the act exceed the legislative power over the subject. [536] The powers of Congress are not only confined to those which may be inferred from the Constitution, but are also restrained by the express limits upon their exercise which are contained in that instrument. They are delegated and enumerated and then limited. Even when Congress enters upon a field in which it rightfully exercises the supreme governmental power, it is not supreme in the fullest sense. It does not enjoy complete sovereignty like that, for instance, of the British Parliament. All its legislation must obey the express commands of those parts of the Constitution which mark a limit beyond which legislation cannot go. The only limit upon the authority of Congress relevant to the discussion of this branch of the case is that which forbids Congress from depriving any person of his life, liberty, or property without due process of law. Amendment 6. It is contended that, although the law deals with a subject under the control of Congress, it deals with it in such a manner as to violate that prohibition, and is therefore void. Before considering the contention it is desirable to state clearly the substantial provisions of the act. The remedy afforded by it is more generous to the employee than that given by the common law in several respects. The common law recognized no recovery of damages for death resulting from negligence; by the statute damages are recoverable for death as well as for injury. The common law allowed no recovery against the employer for the neglect of a fellow servant engaged in a common employment; by the statute the employer is held responsible for the negligence of any of its officers, agents, or employees, even though the guilty person is a fellow servant of him who is injured or killed. The common law denied to one who, by his negligence, had contributed to his own injury, the right to a remedy for the neglect of another which had been a concurring cause; by the statute the negligent sufferer may recover if his negligence be slight, and that of the employer gross in compar- [537]ison, though the contributing *negligence must be taken into account in reduction of the damages. The common law, as adjudged by this court, permitted the employee to enter into a contract renouncing his right to damages in case he incurred injuries in the course of his employment; the statute forbids such a contract. Thus, four doctrines of the common law restrictive of the employee's rights are supplanted by others more favorable to him.

There can be no doubt of the right of a legislative body, having jurisdiction over the subject, to modify the first three of these rules of the common law in the manner in which this act of Congress does it. They are simply rules of law, unprotected by the Constitution from change, and, like all other such rules, must yield to the superior authority of a statute. They have so generally been modified by statute that it may well be doubted if they exist in their integrity in any jurisdiction. The common-law rules have taken form through the decisions of courts, whose judges, in announcing them, were controlled by their views of what justice and sound public policy demanded. This is nowhere more clearly stated than by Chief Justice Shaw in Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, the leading American case establishing the doctrine that one cannot recover against the master for the negligence of a fellow servant, where he said: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned." But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges, but, while they may influence, they cannot control, legislators. Legislators have their own economic theories, their own views of justice and public policy; and their views, when embodied in a written law, must prevail. Whenever the legislative power to change any of these rules of the *common law has been drawn in question [538] in this court it has been sustained. Various state statutes allowing a remedy against a railroad employer for the negligence of a fellow servant have been held to be within the legislative power. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136. State statutes allowing a recovery for death were sustained in American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369, and Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, though the statute was attacked in the first case only on the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the states and doubtless in the territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the Constitution removes them from the legislative power. The same observation may be made, though not so emphatically, of statutes modifying the common-law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, established a rule in principle the same, to govern the recovery in admiralty of damages by a person injured on a ship (The Max Morris [The Max Morris v. Curry] 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29), holding that it promoted "the more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good." It is enough to say here that the decisions of the court in the safety appliance cases, supporting a statute changing the analogous common-law doctrine of assumption of risk, are in principle conclusive that the whole subject of contributory negligence is under the control of the legislative power, in this respect unrestrained by any constitutional provision. [539]But it is earnestly urged upon us *that the statute under consideration, applying to all interstate common carriers and all their employees in that business, without distinguishing between that part of the business and employment which is dangerous and hazardous and that part which is not, and confined solely to the business of common carriage and its employers, is a deprivation of the employer's property without due process of law, in violation of the 5th Amendment of the Constitution. The manner in which due process of law is said to be denied is by the denial of the equal protection of the laws by imposing unusual burdens upon a class of persons arbitrarily and capriciously selected. In support of this position cases from state courts, interpreting state constitutions, and cases from this court, interpreting the restriction upon state action imposed by the 14th Amendment, are indiscriminately cited. They furnish little aid.

It is not necessary in this case to determine how far, if at all, the requirement from the states of the equal protection of the laws, made by the 14th Amendment, is included in the requirement from the nation of due process of law, made by the 5th Amendment to the Constitution. It is enough to say that this statute complies with both. It is rather startling to hear that, in enacting laws applicable to common carriers alone, Congress has made a capricious and arbitrary classification. From time immemorial the common law has set apart those engaged in that business as a peculiar class, to be governed in many respects by laws peculiar to themselves. In separating carriers from those engaged in other interstate and foreign commerce, Congress has but followed the ancient classification of the common law, based upon reasons so obvious that they need no statement. Whether the law should be made to apply to all carriers or to carriers by railroad alone, or whether the employees should be classified according to the degree of danger which surrounds their employment, is a matter of legislative discretion with which we have no right to meddle. See Missouri P. R. Co. v. Mackey, ubi supra.

I have confined my observations up to this [540]point to the first *three changes in the common law made by the statute. The fourth change, that forbidding the employee to make a contract releasing his employer from the consequences of his negligence, is open to a possible objection not common to the others. It is asserted that this part of the act violates the right of free contract which in same cases this court has protected against the exercise of the legislative power. Without intimating any opinion on that subject, it is enough to say that that part of the statute is separable from and independent of the remainder, and may stand or fall by itself, and that no question concerning it is raised in these cases. I see nothing in the provision that "all questions of negligence or contributory negligence shall be for the jury" which affects the right of jury trial guaranteed by the 7th Amendment. Such questions always have been for the jury, and I cannot see that this enactment makes any change whatever.

I am of opinion, therefore, that the act should be sustained as a legitimate exercise of the authority of Congress, and that orders in these cases should be made accordingly.

Mr. Justice **Harlan** (with whom concurred Mr. Justice **McKenna**), dissenting:

Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe, as between an interstate commerce carrier and its employees, the rule of liability established by the act of June 11th, 1906. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Sup. 1907, p. 891.] But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply only to cases of interstate commerce and to employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred. We concur in the views expressed by Mr. Justice Moody as to the *scope and[541] interpretation of the act. We think the act is constitutional, and, therefore, that the judgment should be reversed.

Mr. Justice **Holmes**, dissenting:

I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase "every common carrier engaged in trade or commerce" may be construed to mean "while engaged in trade or commerce" without violence to the habits of English speech, and to govern all that follows. The statute then will regulate all common carriers while so engaged in the District of Columbia or in any territory, thus covering the whole ground as to them; and it will regulate carriers elsewhere while engaged in commerce between the states, etc., thus limiting its scope where it is necessary to limit it. So construed, I think the act valid in its main features under the Constitution of the United States. In view of the circumstances I do not discuss details.

CONSOLIDATED RENDERING COMPANY, Plff. in Err.,
v.
STATE OF VERMONT, by Clarke C. Fitts, Attorney General.

(See S. C. Reporter's ed. 541-556.)

Error to state court — questions reviewable — local law.

1. Whether the notice to a corporation to produce books and papers before a grand jury is broader than that provided for by Vermont act of October 9, 1906, is a question of the construction of the statute and of the notice, on which the decision of the state court is final, and not reviewable by the Federal Supreme Court on writ of error.

Constitutional law — due process of law — hearing.

2. An opportunity for hearing, sufficient to satisfy any requirement of U. S. Const., 14th Amend., respecting due process of law, is afforded by the provisions of Vermont act of October 9, 1906, for the compulsory production of the books and papers of a corporation before a court or grand jury, where the corporation has full opportunity to show cause before the court why it does not produce such books and papers, and, by objection to the production before the grand jury, can raise the question before that body, and is entitled to be heard upon that question before the court to which it is the grand jury's duty to report the question for its action.

Constitutional law — due process of law.

3. Due process of law is not denied a foreign corporation doing business in the state

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NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

For persons against whom production and inspection of books or writings may be obtained—see note to Cassett v. Mitchell Coal & Coke Co. 81 C. C. A. 96.

Compulsory production of books and papers as unreasonable search and seizure.

In the leading case of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, it is held that it does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the 4th Amendment, but that a compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.

The question remains, when such compulsory production may be regarded as unreasonable. It is remarked in the foregoing case that there is an intimate relation between the provision of the 4th Amendment that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," and the provision of the 5th Amendment that no person "shall be compelled, in any criminal case, to be a witness against himself;" the court saying: "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the 5th Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."

A like idea has been expressed by other courts, and the general principle may be accordingly deduced that a compulsory production of private books and papers is unreasonable where it substantially compels the owner to furnish evidence which may be used against himself in proceedings of a criminal or quasi-criminal character.

And it may be further stated, as a general rule, that no compulsory production can be characterized as unreasonable which has, as its object, books and papers of a public character. See United States v. 3 Tons of Coal; United States v. Distillery No. 28,—infra; People v. Coombs, 158 N. Y. 532, 53 N. E. 527.

The provision has been held to apply to criminal actions and proceedings for penalties and forfeitures only, and to have no application to civil proceedings. Re Meador, by Vermont act of October 9, 1906, under which it may be compelled, under penalty of fine in case of refusal, to produce before a court or grand jury material evidence in the shape of books or papers kept by it in the state, and which are in its custody and control, although at the time outside the borders of the state.

Constitutional law — delegation of power.

4. There is nothing in the Federal Constitution which directly or impliedly forbids a state to confer judicial functions upon nonjudicial bodies.

Witnesses — privilege.

5. The objection that incriminating books and papers were required to be produced before a grand jury under Vermont act of October 9, 1906, without extending immunity from criminal prosecution, is not available to a corporation which has been fined for contempt in failing and absolutely refusing to produce any of the books and papers called for, with some unimportant exceptions, and has thus prevented the court from inquiring into the validity of the objection.

Searches and seizures — compulsory production of books and papers.

6. An unreasonable search and seizure of the private books and documents of a corporation doing business in the state is not made by the proceedings under Vermont act of October 9, 1906, to compel the production before a grand jury of material books and papers called for by a notice limited to such books or papers as relate to or concern any dealings or business between January 1, 1904, and the date of the

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1 Abb. (U. S.) 317, Fed. Cas. No. 9,375; Re Strouse, 1 Sawy. 605, Fed. Cas. No. 13,548.

Section 49 of the act of Congress of July 20, 1868 (15 Stat. at L. 144, chap. 186), providing that supervisors of internal revenue shall have power, for the purpose of seeing that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, to examine all persons, books, accounts, and premises, and to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons by applying for an attachment as for contempt, is not in conflict with the 4th Amendment, the proceeding being of a civil character. Re Meador, supra.

The compulsory production before a supervisor of internal revenue, acting under the foregoing statutory provision, of the books and papers of a private bank, subject to internal revenue taxes upon its business, is not an unreasonable search and seizure within the constitutional provision. Stanwood v. Green, 2 Abb. (U. S.) 184, Fed. Cas. No. 13,301.

Proceedings under § 14 of the internal revenue act of June 30, 1864, as amended by § 9 of the act of July 13, 1866 (14 Stat. at L. 101, chap. 184), to compel the production of books before an assessor of internal revenue, do not constitute an unreasonable search within the meaning of the 4th Amendment, the proceedings not being of a criminal character. Re Strouse, supra.

In United States v. 3 Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515, it was held that the 4th Amendment of the Federal Constitution is intended for the protection of purely private rights, and does not apply to the compulsory production, in a proceeding against a distillery for forfeiture under the revenue laws, of books and papers under § 5 of the act of June 22, 1874 (18 Stat. at L. 186, chap. 391, U. S. Comp. Stat. 1901, p. 2018), relating to internal revenue, which provides that, in any proceeding other than criminal, arising under any of the revenue laws of the United States, the court in which such proceeding is pending may, at its discretion, on motion of the government attorney, require the claimant or defendant to produce for examination any business book, invoice, or paper belonging to or under the control of such claimant or defendant, and which, in the belief of the attorney, will tend to prove any allegation made by the United States, and, on failure to produce the books and papers required, the allegations of the government may be taken as confessed. This decision is based on two grounds: First, that a proceeding for forfeiture under the revenue laws is not a criminal proceeding within the meaning of the Constitution,—as to which it is overruled by Boyd v. United States, supra; and second, that the books and papers called for pertained to a business in which the government, as a supervising power under the internal revenue laws, had an interest, the business being regulated by law, so that there was no unreasonable search into the private affairs of a citizen.

A like decision was made in United States v. Distillery No. 28, 6 Biss. 483, Fed. Cas. No. 14,966, in which it was said that since no one can engage in the manufacture and sale of spirits without the consent of the government, which consent is obtained on certain terms and conditions, no one can be allowed to say that, as a distiller, rectifier, or wholesale liquor dealer, he has kept a private record of his transactions, but his books and entries are quasi-public books and entries.

In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, the 5th section of the act of June 22, 1874, above set forth, was held unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods, the making the nonproduction of books and papers and invoices a confession of the allegations which it is claimed they will prove if produced being held equivalent to their compulsory production, and therefore within the spirit and meaning of the constitutional prohibition against unreasonable searches and seizures.

The compulsory production of documentary evidence in a proceeding before the notice, October 10, 1906, with the parties named therein, who were cattle commissioners of the state, to be used relative to the matter of a complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington, Vermont, the notice also giving in detail the dates and amounts of checks and vouchers which the company was required to produce.

Contempt — disobeying order to produce books and papers — effect on right to object to notice.

7. A corporation which, with unimportant exceptions, refuses to produce certain books and papers before a grand jury, in compliance with Vermont act of October 9, 1906, cannot urge the sweeping character of the notice to produce to invalidate the order adjudging the corporation guilty of a contempt.

Constitutional law — due process of law — taking private property without compensation.

8. Want of due process of law cannot be urged against proceedings taken pursuant to Vermont act of October 9, 1906, to compel a foreign corporation doing business in the state to produce books and papers before the grand jury, on the theory that no compensation is provided for the time, trouble, and expense incurred in collecting documents outside the state and sending them into the state, and that private property is thus taken for public use without compensation, where the highest state court has held that

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Interstate Commerce Commission on a complaint alleging violations by railroad companies of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), to regulate commerce, does not infringe the immunity from unreasonable searches and seizures guaranteed by the 5th Amendment to the Federal Constitution, since that act, as amended by the act of February 11, 1893 (27 Stat. at L. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173), expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

As is said in Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, while a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, a *subpœna duces tecum*, where too sweeping in its terms to be regarded as reasonable, may constitute an unreasonable search and seizure; and it was accordingly held that the compulsory production before a grand jury under a *subpœna duces tecum* of all understandings, contracts, or correspondence between a corporation supposed to have violated the anti-trust act of July 2, 1890, and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization from more than one dozen different companies situated in seven different states, amounted to an unreasonable search and seizure, where the necessity of the production of such a mass of papers was not shown.

But in Santa Fe P. R. Co. v. Davidson, 149 Fed. 603, a *subpœna duces tecum* directed to an officer of a railroad corporation, requiring him to appear before a United States grand jury and bring with him certain claims made upon and against the company on account of freight paid to it, together with all letters, papers, memoranda, and documents relating thereto, and showing the final disposition of such claims and the method by which the same were paid or disposed of, and particularly certain tissue impression copy books containing copies of vouchers made during a certain period in payment of each, every, and all of the claims made upon and against such railway company for refund of any freight paid, was held so sufficiently restricted as not to amount to an unreasonable search and seizure.

While the provisions of the 4th Amendment operate upon the national government alone, and do not limit the powers of the state governments, the question under discussion has nevertheless arisen in state courts under similar provisions in state constitutions.

Thus, in Coöperative Bldg. & L. Asso. v. State, 156 Ind. 463, 60 N. E. 146, it was held that a statutory provision giving taxing officers the right to examine books and papers of taxpayers for the purpose of properly listing and assessing property for taxation does not violate the constitutional prohibition of unreasonable searches and seizures, the court saying: "The prohibition is of *unreasonable* searches and seizures. In the provisions made by the legislature for searching for property omitted from taxation there is nothing unreasonable. If the omission was accidental the owner ought not to complain; and, if intentional, he ought not to be heard except as to the truth of the supposed discoveries."

And in Washington Nat. Bank v. Daily, 166 Ind. 631, 77 N. E. 53, a statute providing that if, in listing and assessing property for taxation, any township or county assessor may have good reason to believe that any person, firm, or corporation within his jurisdiction has improperly omitted to return property for taxation, he may, upon filing in the circuit court of the county an affidavit setting forth his belief that certain designated property has been unlawfully omitted from such tax return, and that some other person, firm, or corporation named has in his or its possession certain specified books or papers containing evidence tending to show such unlawful omisthe general law of the state in reference to the compensation of witnesses applies.

Constitutional law — equal protection of the laws.

9. Corporations are not denied the equal protection of the laws secured by U. S. Const., 14th Amend., by the provisions of Vermont act of October 9, 1906, under which corporations alone may be compelled to produce before a court or grand jury material books and papers in their custody or control.

[No. 364.]

Argued December 3, 4, 1907. Decided January 6, 1908.

IN ERROR to the Supreme Court of the State of Vermont to review a judgment which affirmed a judgment of the County Court of the County of Chittenden, in that state, adjudging a corporation to be in contempt and fining it for its refusal to produce certain books and papers called for before a grand jury. Affirmed.

See same case below, 80 Vt. 55, 66 Atl. 790.

Statement by Mr. Justice **Peckham**:

This writ of error brings up for review a [543]judgment of the *supreme court of the state of Vermont, affirming a judgment of the county court of the county of Chittenden, adjudging the plaintiff in error, a corporation, hereinafter called "the company," in contempt, and fining it $3,000, for the collection of which it was ordered that execution should issue.

The company in due form was served in Vermont with a notice to produce certain described books and papers before the grand jury sitting at Burlington, in that state. The notice was given pursuant to the provisions of a statute passed by the general assembly of the state, October 9, 1906. That statute provided for the service upon a corporation doing business in the state, whether organized under its laws or those of another state or country, of a notice to produce books and documents before any court, grand jury, etc., which contained any account or information concerning the subject of inquiry before the tribunal, acting under the authority of the state, and which books, etc., have at any time been made or kept within the state of Vermont, and were within the custody or control of the corporation in that state or elsewhere at the time of the service of the notice upon it. Such corporation, when notice to the above effect is served upon it, is, by the statute, directed to produce the books and papers as required. The notice is to be issued from the court or tribunal before whom the papers are required to be produced, and a general description of what is required is to be given in the notice. If the corporation, without reasonable cause, neglects or refuses to comply, "it may be punished as for contempt by the court having jurisdiction in the premises to punish for the contempt. Execution may issue for the collection of such fine as may be imposed for such contempt."

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sion, obtain a writ requiring the person, firm, or corporation having possession of such books or papers to permit their inspection, was held valid, the search provided for therein not being unreasonable within the meaning of the constitutional guaranty.

In Anti-Kalsomine Co. v. Kent Circuit Judge, 120 Mich. 250, 79 N. E. 186, it was held that an order requiring a party to an action to produce for inspection of its adversary its books and correspondence for a certain period, "which may contain evidence relating to the matters at issue," does not authorize an unreasonable search within the meaning of the Constitution.

In State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. District Court, 27 Mont. 441, 94 Am. St. Rep. 831, 71 Pac. 602, it is held that a statute providing that any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action or the defense therein, gives to the constitutional guaranty against unreasonable searches and seizures a legislative construction defining the circumstances under which the inspection of the private papers and documents of one party by another will not be deemed an unreasonable search.

The question has also been raised in the state courts with reference to *subpœna duces tecum.*

In Re Moser, 138 Mich. 302, 101 N. W. 588, it was held that the production before the grand jury, under a *subpœna duces tecum*, of books of a corporation by an officer thereof, for the purpose of investigating charges of corruption against municipal officers in connection with a contract between the city and the corporation, did not amount to an unjustifiable search and seizure prohibited by the Constitution.

In Re Dunn, 9 Mo. App. 255, it was held that the constitutional guaranty against unreasonable searches and seizures would not protect a person in refusing to obey a *subpœna duces tecum* commanding him to appear before a committee of the House of Delegates of the municipal assembly and bring with him a certain book kept by him while in the employ of the receiver of a certain corporation, the court saying: "It has long been understood that the constitutional guaranties against unreasonable searches

This company was doing business at Burlington, Vermont, under a certificate from the secretary of state, certifying that it had complied with all the requirements of the law authorizing it to do business in the state. On the 17th of October, 1906, the grand jury was in session at Burlington, [544]*and had been investigating a complaint which had been made against certain individuals who were members of the Vermont cattle commission, the complaint being that such persons, or one of them, had unlawfully sold diseased meat for food purposes at Burlington. In order to continue the investigation the grand jury had caused a notice, under the above statute, to be served upon the company, directing it to produce certain books and papers described in such notice before the grand jury on the 17th of October, 1906. On the day named, a person representing the company appeared before the grand jury and produced some books of account and other *data,* but failed to produce others which were described in the notice, and which it was therein directed to produce. The grand jury reported the facts to the county court, stating in the report that the company had kept books which would have shown material facts for the purpose of the investigation, but had not produced them, as required in and by the notice, and that they were necessary for the further pursuit of the inquiry. The attorney general at the same time filed a petition to the court, containing, in substance, the same facts, and asked that the company should be proceeded against for contempt. The county court thereupon, on the 19th of October, 1906, made an order to show cause why the company should not be punished as for a contempt in failing to produce such books and papers. Upon the return of the order the company appeared by counsel and made a motion to dismiss the proceeding on the ground that the memoranda and papers called for in the notice were not legal and material evidence before the grand jury, and also because it was sought by the notice to produce, and by the other proceedings to compel the company to bring into the state of Vermont, before the grand jury, papers which might tend to criminate the company and render it liable to criminal prosecution, contrary to the provisions of the 4th, 5th, and 14th Amendments to the Constitution of the United States. Accompanying this motion to dismiss was the affidavit of counsel, in which he stated that *the papers and [545] memoranda which the company had failed to produce before the grand jury would, if produced in evidence before the jury, tend to criminate the company and render it liable to criminal prosecution. The company also answered and admitted that it had kept at Burlington, in Vermont, such papers as were described in the notice to produce, but that, on August 20, 1906, all such books and papers were sent to the main office of the company at Boston, Massachusetts, for the purpose of examination and verification, and that, after it was made, and long before the service of the notice,

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and seizures, against depriving any person of life, liberty, or property without due process of law, and in favor of the trial by jury, have no application to the compulsory production of muniments of testimony under proper authority, or to commitments for contempt by any tribunal lawfully acting in a quasi-judicial capacity. This is familiar law, and needs no elucidation."

Likewise in Re Conrades, 112 Mo. App. 21, 85 S. W. 150, it was held that an order of the municipal assembly requiring the production before it of books of a corporation in aid of investigations as to evasions of license taxes by corporations did not violate the constitutional guaranty against searches and seizures, the court saying: "Compelling the production of books and papers for purposes of evidence is no unreasonable search or seizure, provided the subpœna for their production be precise and definite as to the documents necessary as evidence."

In People v. Coombs, 158 N. Y. 532, 53 N. E. 527, it was held that the constitutional right of a coroner on trial for presenting for audit a false bill for inquests was not violated by a *subpœna duces tecum,* requiring the clerk in charge of the coroner's office to produce the inquests held during the period covered by the indictment, in compliance with which a number of false and fictitious vouchers which had been prepared, but not yet filed, were produced. The contention was made that these were defendant's private papers, and that their production at the trial by the people, under the circumstances stated, was, in substance, a violation of the defendant's constitutional rights. The court said: "We think there was no search, no seizure, or a violation of any right secured to the defendant by the Constitution or by law. The papers were in a public office, in the custody of a clerk who was paid by the city. On their face they were public records and intended to be used as such. The district attorney could not know, when he required their production under the subpœna, that they were false or fictitious, and, even if he did, it cannot be said that a public officer is privileged to retain in a public office a fraudulent record, made for the purpose of concealing a fraudulent claim for fees. The subpœna did not call for any private papers; only for public documents. The papers in question were produced in that character, and, had they been genuine, would have constituted evidence in favor of the defendant."

such papers or memoranda as were not produced before the grand jury had been destroyed at Boston. The state took issue upon the averments of the answer.

Upon the hearing before the court one of the company's agents testified that the papers had been destroyed in Boston because they were of no consequence, and there was nothing in them to incriminate anybody.

The court, for reasons which it stated, found that the papers wanted were material to the inquiry which the grand jury was making, and that without their presence it was impossible to proceed to any effect with the investigation. It further found, upon all the evidence before it, that the books and papers had been in possession of the company at the time they were taken away from the state, and the court said that it failed to find that the papers were destroyed, and that it also failed to find that they were not then in the custody and control of the company so that it could produce them, and that, "thus failing to find, we find them guilty of contempt." This judgment was affirmed by the supreme court of Vermont. 66 Atl. 790.

Messrs. **Albert S. Hutchinson** and **Freedom Hutchinson** argued the cause and filed a brief for plaintiff in error:

The due process of law required by the 14th Amendment demanded that this important question, affecting the control of the property of the plaintiff in error in another state, should not thus be determined *ex parte* without notice to it, or an opportunity for hearing.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Holden v. Hardy, 169 U. S. 366, 389, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

The method of proceeding in this case was novel and totally at variance with the accepted practice sanctioned by long usage in England and in this country relative to the production of documents.

Hale v. Henkel, 201 U. S. 43, 80, 50 L. ed. 652, 667, 26 Sup. Ct. Rep. 370; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Ballmann v. Fagin, 200 U. S. 186, 50 L. ed. 433, 26 Sup. Ct. Rep. 212; Nelson v. United States, 201 U. S. 92, 116, 50 L. ed. 673, 686, 26 Sup. Ct. Rep. 358; Story, Eq. Pl. 10th ed. §§ 575, 824; United States v. Saline Bank, 1 Pet. 100, 7 L. ed. 69; 3 Wigmore, Ev. pp. 2443, 3014, note 6; Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 716.

This statute is an attempt by the state of Vermont to limit a corporation in the complete dominion and control of its property situated in another state, although the corporation is not organized under her laws and is not personally within her jurisdiction.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712; Allgeyer v. Louisiana, 165 U. S. 578, 592, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 645, 646, 38 L. ed. 846, 852, 853, 14 Sup. Ct. Rep. 952; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

The statute attempts to confer judicial functions upon nonjudicial bodies, in violation of the 14th Amendment of the United States Constitution.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Re Pacific R. Commission, 32 Fed. 253; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 38 L. ed. 1047, 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The statute, since it contains no immunity clause, is in plain contravention of the 10th article of the Vermont Constitution, which is substantially the same as the 5th Amendment of the United States Constitution.

Counselman v. Hitchcock, supra; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; State ex rel. Atty. Gen. v. Simmons Hardware Co. 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125; Re Cullinan, 82 App. Div. 445, 81 N. Y. Supp. 567; Ex parte Clarke, 103 Cal. 352, 37 Pac. 230; Ex parte Cohen, 104 Cal. 524, 26 L.R.A. 423, 43 Am. St. Rep. 127, 38 Pac. 364; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; Ex parte Carter, 166 Mo. 604, 57 L.R.A. 654, 66 S. W. 540; Smith v. Smith, 116 N. C. 386, 21 S. E. 196; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303; People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353; Logan v. Pennsylvania R. Co. 132 Pa. 408, 19 Atl. 137; United States v. National Lead Co. 75 Fed. 94.

For the same reason the statute is in conflict with the 14th Amendment of the United States Constitution.

That amendment prohibits the infringement of fundamental rights by state action, whether legislative, executive, or judicial.

Boyd v. United States, 116 U. S. 616, 631. 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524; West v. Louisiana, 194 U. S. 258, 262, 263, 48 L. ed. 965, 969, 970, 24 Sup. Ct. Rep. 650; Jack v. Kansas, 199 U. S. 372, 380, 50 L. ed. 234, 236, 26 Sup. Ct. Rep. 73; State v. Height, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935.

Such a requisition is clearly an unreasonable search and seizure within the meaning of the 4th Amendment of the United States Constitution.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Hale v. Henkel, supra; Re Pacific R. Commission, 32 Fed. 241; Ex parte Clarke, supra; Lester v. People, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426; State v. Davis, 117 Mo. 614, 23 S. W. 759; Carson v. Hawley, 82 Minn. 214, 84 N. W. 746; Newberry v. Carpenter, 107 Mich. 567, 31 L.R.A. 163, 61 Am. St. Rep. 346, 65 N. W. 530; People ex rel. Lewisohn v. O'Brien, 176 N. Y. 267, 68 N. E. 353.

This requisition was also in conflict with the 14th Amendment.

Boyd v. United States, supra; West v. Louisiana, 194 U. S. 258, 262, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; Jack v. Kansas; Re Pacific R. Commission; and State v. Height,—supra.

This right is secured to a corporation as well as to a natural person.

Hale v. Henkel, 201 U. S. 43, 75, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370.

The statute provides no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country, of collecting and sending the documents demanded to the state of Vermont.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 595, 599, 50 L. ed. 596, 610, 612, 26 Sup. Ct. Rep. 341; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The statute is confined in its operation to corporations. An arbitrary classification is thus established, and the plaintiff in error is deprived of the equal protection of the law, secured by the 14th Amendment.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 569, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. **Clarke C. Fitts** argued the cause and filed a brief for defendant in error:

This court has not yet said that the due process of law clause of the 14th Amendment means any more than in the 5th Amendment, except that it reaches to the authority of the states.

Adams v. New York, 192 U. S. 594, 48 L. ed. 579, 24 Sup. Ct. Rep. 372.

The question of incrimination is for the court.

Rapalje, Contempts, § 63; Wigmore, Ev. 2200, 2210; United States v. Hunter, 15 Fed. 715.

It is doubtful whether a corporation can claim the privilege.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

The requirement of the production of books and papers did not compel the company to incriminate itself.

Adams v. New York, 192 U. S. 597, 48 L. ed. 580, 24 Sup. Ct. Rep. 372.

The law does not take private property for public use without compensation.

22 Enc. Pl. & Pr. p. 1340; West v. State, 1 Wis. 209; Israel v. State, 8 Ind. 467; Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75.

The full measure of due process of law is given to the plaintiff in error by this statute and by these proceedings.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; 2 Kent, Com. 13; Marchant v. Pennsylvania R. Co. 153 U. S. 390, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Brown v. New Jersey, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Turpin v. Lemon, 187 U. S. 51, 58, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; State v. Cadigan, 73 Vt. 252, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 191, 51 L. ed. 147, 27 Sup. Ct. Rep. 132; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Black. Const. Law, 490, 492; State v. Matthews, 37 N. H. 450; State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671.

A corporation may be punished for contempt as well as an individual person.

People v. Albany & V. R. Co. 20 How. Pr. 358.

Where a foreign corporation is doing business in another state, it is proper to punish a contempt by a fine, as well against the corporation itself as the subordinate agents found within its jurisdiction.

United States ex rel. Southern Exp. Co. v. Memphis & L. R. R. Co. 6 Fed. 237.

Although a corporation cannot be hung, there is no reason why it might not be fined for the same act which would subject an individual to the gallows.

1 Bishop, Crim. Law, 6th ed. § 423.

It is proper to provide by statute the manner of punishment for contempt.

2 Bishop, Crim. Law, § 267; Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205.

And the statute may provide for execution to issue.

People v. Boyle, 64 Cal. 153, 28 Pac. 232.

It is not required that the statute provide for a tender in advance of indemnity for expenses.

Wigmore, Ev. 2201.

The operation of the law here in question is not an unjust and arbitrary classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

We take the findings of fact by the state court as conclusive upon us. It therein appears that the company was duly served with a notice (which was in substance a substitute for a *subpœna duces tecum*) to produce books and papers required, and that they had not been destroyed, but were then under its control and custody; that the papers were material evidence upon the subject of inquiry before the grand jury, and that the company had (with some minor exceptions) omitted and refused to produce them before that body. The company had a hearing before the court, and an opportunity was given it, under the statute, to set up any reasonable cause for its failure to comply with the requirements of the notice. The court, after this hearing, found the company guilty of the contempt charged and fined it accordingly.

The company insists that the proceedings were in violation of the Constitution of the United States. The objections made before us were: (1) That the notice to produce was in excess of the authority granted by the statute, and was therefore invalid; (2) that neither the statute nor the notice afforded the company an opportunity to present in court reasons why the writings demanded should not be produced; (3) that the effect of the statute is to limit a corporation in the complete dominion and control of its property situated in another state, although the corporation is not organized under the laws of the state of Vermont, and is not personally within her jurisdiction; (4) that the statute attempts to confer judicial functions upon nonjudicial bodies, in violation of the 14th Amendment to the Constitution of the United States; (5) that the statute and notice required the company to produce writings which tend to incriminate it, without extending immunity *against [551] criminal prosecution; (6) that the statute and notice authorized an unreasonable search and seizure of the private books and documents of the company; (7) that the statute provided no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country of collecting and sending the documents demanded to the state of Vermont; and lastly (8) that the statute is confined in its operation to corporations, thus making an arbitrary classification, by which the company is deprived of the equal protection of the law secured by the 14th Amendment.

The first objection made by counsel for the company is not of a Federal nature. Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the state court is final on that question.

Counsel insisted before us in discussing the second objection, that the failure to give an opportunity to be heard why the books should not be produced deprived it of due process of law guaranteed under the 14th Amendment. Without discussing the question whether this matter comes within the meaning of due process of law, we may say that the objection to the statute is not borne out by its text. The company had, under its provisions, and by the 4th section, full opportunity to show cause before the court why it did not produce the papers, and the supreme court of Vermont has held in this case that any objection to the production of the papers, made before the grand jury, would have raised the question before that body, which it would have been its duty to report to the court for its action. Upon such question the company would have been entitled to be heard, and it was in fact heard before the court previous to any decision by the court regarding the right of the company to withhold the papers. So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded. Simon v. Craft, 182 U. S. 427, 45 [552]L. ed. 1165, 21 Sup. Ct. Rep. 836; *Wilson v. Standefer, 184 U. S. 399-415, 46 L. ed. 612-619, 22 Sup. Ct. Rep. 384; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336-349, 46 L. ed. 936-943, 22 Sup. Ct. Rep. 691.

The third objection is without force. It is argued that the statute in this particular denies due process of law to the company, because it authorized the infliction of a fine by the court for failure to perform an act outside the state, ordered by a nonjudicial body, and without notice and opportunity for hearing. The last reason has already been answered by showing that a hearing is provided for before any punishment of the company for disobedience to the requirements of the notice to produce can be enforced. There can surely be no illegality in providing that a corporation doing business in the state, and protected by its power, may be compelled to produce, before a tribunal of the state, material evidence in the shape of books or papers kept by it in the state, and which are in its custody and control, although, for the moment, outside the borders of the state. The statute is in no sense a provision as to how the company shall perform its duties and obligations in other states. It directs the company doing business in the state and present therein, by its officers or some of them, to do something which it is entirely competent to do, the purpose of which is to enable the tribunal making the investigation under a state statute to perform its duty.

Fourth. There is no provision in the Federal Constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon nonjudicial bodies certain functions that may be called judicial. It is said that the statute, in providing for the production of books and papers, includes not only the court and grand jury, but any tribunal or commission authorized by the state. There is nothing, as we have said, in the Federal Constitution which prevents it.

The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for [553]inspection *by the court, though before they were to be used in evidence. If, after that inspection, any portion were found of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce any of the books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice, and it was fined for the contempt. Obviously the company could not, by its refusal to produce the books, thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such nonproduction. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses. The statute might as well not exist if this were to be permitted.

Sixth. The objection that the notice authorized by the statute amounted to an unreasonable search and seizure of the private books and documents of the company is also not well founded. In Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, where the question was raised, the court refused to discuss the contention that the 14th Amendment made the provisions of the 4th and 5th Amendments to the Constitution of the United States, so far as they related to the right of the people to be secure against unreasonable searches and seizures, and to be protected against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they could not be deprived by the action of the state, because, on an examination of the record, the court concluded that there had been no violation of this restriction, either in the unreasonable search and seizure, or in compelling plaintiff in error to testify against himself. We are of opinion that there was no violation of such rights in the case before us, and we think it equally unnecessary to decide the question which was left undecided in the Adams Case.

The objection is also made that the documents were not *described with the particu-[554] larity required in the description of documents necessary to a search warrant or subpœna, and that it was not a valid paper, and created no obligation to obey the notice, which could form no justification for any proceeding for contempt, and was not due process of law. An examination of the notice to produce shows that the requirements of the notice, while quite broad, yet were limited to such books or papers as related to, or concerned, any dealings or business between January 1, 1904, and the date of the notice, October, 1906, with the parties named therein, who were cattle commissioners of the state of Vermont, and which papers were to be used relative to the matter of complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington. The notice also gave in detail the dates and amounts of checks and vouchers which the company was required to produce. The company refused to produce the books (with the exceptions stated), and, even if the notice had been too broad, the objection cannot be urged as to the validity of the order adjudging the company guilty of contempt. Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. But unless it can be said that the court or grand jury never has any right to call for all the books and papers, or correspondence, between certain dates and certain persons named, in regard to a complaint which is pending before such court or grand jury, we think the objection here made is not well founded. We see no reason why all such books, papers, and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise the state would be compelled to designate each particular paper which is desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have. The notice is not nearly so sweeping in its reach as in the case of Hale v. Henkel, supra.

Seventh. The next objection relates to the [555] claim that the *statute provides no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country in collecting and sending the documents demanded to the state of Vermont, and that it thereby takes, if enforced, private property for public use without compensation. The prohibition to that effect is found in the 5th Amendment to the Federal Constitution. Here again we meet the question whether that Amendment, because of the subsequent adoption of the 14th Amendment, applies to a state proceeding; but, for the reasons already stated, we do not find it expedient to discuss it here. We do not say that in any event a witness is entitled to compensation in order to avoid the above constitutional provision, but the supreme court in this case has held that the general law of the state in reference to the compensation of witnesses applied to this statute. The answer which the counsel for the company makes is that neither the statute nor the notice required the attendance of anyone as a witness, but was merely an order for production for which no compensation was provided, either by the statute or under the general law. But the papers cannot walk into court of themselves, and when they are brought there by virtue of the notice to produce served on the company, and they are given to some person by the company for the purpose of such production, he has a right to be sworn as to the papers which he produces, for the purpose of identification, if nothing else, and the state court has held that he is entitled as a witness to compensation.

Lastly, the objection is urged that there is an arbitrary classification in the statute, which is confined to corporations alone, and the company is thereby deprived of the equal protection of the laws secured by the 14th Amendment. There is no improper classification in this regard. It is stated by the state court that prior to the passage of this act there was no adequate provision for compelling the production of books and papers by a corporation, and it was held that the statute was designed for requiring the corporation itself, as *the responsible [556] owner and custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers, or other servants who may, or may not, in fact, have custody or control thereof at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. There is ample justification for the classification made by the statute.

The judgment of the Supreme Court of the state of Vermont is affirmed.

ANHEUSER-BUSCH BREWING ASSOCIATION, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 556-564.)

Duties — drawback — imported corks used in exporting bottled beer.

Imported corks used in bottling beer for export are not articles manufactured from imported materials within the meaning of the act of October 1, 1890 (26 Stat. at L. 617, chap. 1244), § 25, allowing a drawback of duties on such articles when exported, although such corks were subjected to a special treatment after importation to make them fit for the purpose intended.

[No. 60.]

Argued December 9, 1907. Decided January 6, 1908.

APPEAL from the Court of Claims to review a judgment refusing to allow a drawback on imported corks used in bottling beer for export which were subjected to a special treatment after their importation to make them fit for the purpose intended. Affirmed.

See same case below, 41 Ct. Cl. 389.

The facts are stated in the opinion.

Mr. **L. T. Michener** argued the cause, and, with Mr. W. W. Dudley, filed a brief for appellant:

This court has sanctioned the use of dictionary definitions in determining the meaning of words in tariff laws.

Marvel v. Merritt, 116 U. S. 11, 12, 29 L. ed. 550, 6 Sup. Ct. Rep. 207; Nix v. Hedden, 149 U. S. 304, 37 L. ed. 745, 13 Sup. Ct. Rep. 881.

The things done to, by, and with the corks were a manufacture of corks.

Brande's Enc. title, "Manufacture;" State, Evening Journal Asso. Prosecutor, v. State Assessors, 47 N. J. L. 38, 52 Am. Rep. 107, note; Atty. Gen. ex rel. Miner v. Lorman, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311; Louisville & N. R. Co. v. Fulghan, 91 Ala. 555, 8 So. 803; Beggs v. Edison Electric Illuminating Co. 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381; Lamborn v. Bell, 18 Colo. 346, 20 L.R.A. 241, 32 Pac. 989; Murphy v. Arnson, 96 U. S. 131, 134, 24 L. ed. 773, 775; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; Carlin v. Western Assur. Co. 57 Md. 526, 40 Am. Rep. 440; Norris Bros. v. Com. 27 Pa. 496; Landgraf v. Kuh, 188 Ill. 484, 59 N. E. 501; State v. Dupre, 42 La. Ann. 561, 7 So. 727; New Orleans v. La Blanc, 34 La. Ann. 597; New Orleans v. Ernst, 35 La. Ann. 747; State v. American Sugar Ref. Co. 108 La. 603, 32 So. 965; People ex rel. L. E. Waterman Co. v. Morgan, 48 App. Div. 395, 63 N. Y. Supp. 79; Schriefer v. Wood, 5 Blatchf. 215, Fed. Cas. No. 12,481; Com. v. Juniata Coke Co. 157 Pa. 507, 22 L.R.A. 232, 27 Atl. 373; Burke v. Mead, 159 Ind. 252, 64 N. E. 883; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808; Nassau Gaslight Co. v. Brooklyn, 89 N. Y. 409; Southern Chemical & F. Co. v. Board of Assessors, 48 La. Ann. 1475, 21 So. 31; Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759.

Assistant Attorney General **Van Orsdel** argued the cause and filed a brief for appellee:

The corks in question were not a part or ingredient of the beer exported, and were not, therefore, in contemplation of law, exported at all.

Joseph Schlitz Brewing Co. v. United States, 181 U. S. 584, 45 L. ed. 1013, 21 Sup. Ct. Rep. 740; Wheeler v. United States, 75 Fed. 654; United States v. Allen, 163 U. S. 499, 41 L. ed. 242, 16 Sup. Ct. Rep. 1071.

The process of cleansing and preparation adopted and applied by the appellant to the corks in question did not constitute a manufacture of corks, within the purview of the statute providing for a rebate or drawback on exported manufactured articles.

Swan & F. Co. v. United States, 190 U. S. 143, 47 L. ed. 984, 23 Sup. Ct. Rep. 702; Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; Frazee v. Moffitt, 20 Blatchf. 267, 18 Fed. 584; United States v. Potts, 5 Cranch, 284, 3 L. ed. 102; 23 Ops. Atty. Gen. 625; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an action for $27,000 for drawbacks on corks imported from Spain and used by claimant in bottling its beer, and entered for the benefit of drawback upon exportation under § 25 of the act of Congress entitled "An Act to Reduce the Revenue and Equalize Duties on Imports and for Other Purposes," *approved October 1, [559] 1890. The section reads as follows:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: Provided, that when the articles exported are made in part from domestic materials, the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained. And provided further, that the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of custom duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either, or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe." [26 Stat. at L. 617, chap. 1244.]

The corks in question were, after their importation, subject to a special treatment, which, it is contended, caused them to be articles manufactured in the United States of "imported materials" within the meaning of § 25. The court of claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.

The treatment to which the corks were subjected is detailed in finding 3, inserted in the margin.†

[560]*In opposition to the judgment of the court of claims counsel have submitted many defi-
[561]nitions of "manufacture," both *as a noun and a verb, which, however applicable to the cases in which they were used, would be,
[562]we think, extended too far *if made to cover the treatment detailed in finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and of meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation we are involved in refinements and in impracticable niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240. There must be transformation; a new and different article must emerge, "having a distinctive name, character, or use." This cannot be said of the corks in question. A cork put through the claimant's process is still a cork. The process is the preparation of the encasement of the beer, and assimilates this case to Joseph Schlitz Brewing Co.

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†3. That while said acts of October 1, 1890 [26 Stat. at L. 567, chap. 1244], and August 27, 1894 [28 Stat. at L. 509, chap. 349], and July 24, 1897 [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626], were in force and operation, the claimant herein, being engaged in the regular, ordinary, and usual course of its business aforesaid, exported from the United States a large quantity of beer brewed and manufactured by it, which exportation thereof was in bottles duly corked by it with corks so as to preserve the beer; that such corks so used by it in the bottles in which such beer was exported were imported from Spain, a foreign country (and on which corks duty had been paid to the United States, according to law, at the rate of 15 cents per pound, under the provisions of paragraph 416 of the act of Congress approved July 24, 1897), they being corks over three fourths of an inch in diameter, measured at the larger end. The corks so imported from Spain were subjected to treatment by claimant.

The corks so used by the claimant in the making and shipment of its export beer were corks imported into this country from Spain, where they were cut by hand, without steaming. After these corks were received by claimant in its brewery in St. Louis, and while in the same state in which they were imported from Spain, they were carefully examined and all that were not fit for use in the export trade were rejected. The good ones were then selected and assorted according to sizes, and were branded with the date, the name of the brewer, the name of the beer, and a special private mark to show what firm the cork came from. All this was done by unskilled labor.

The selected corks were put into a machine, or air fan, the unpatented invention of a man in the employ of the claimant, and all dust, meal, bugs, and worms were removed therefrom. They were then thoroughly cleansed by washing and steaming, removing the tannin and germs and making the cork soft and elastic, and they were next exposed to blasts of air in a machine, the unpatented invention of the same employee, until they were absolutely dry.

Following this, they were put for a few seconds into a bath of glycerin and alcohol, the proportions of which are a trade secret which the claimant has the right to use, and then they were dried by a special system. This bath closed up all the seams, holes, and crevices, and gave the corks a coating which prevented the beer from acquiring a cork taste. The corks were then dried by absorption of the chemicals that had covered them. If the corks had been used without the application of this chemical bath, the beer would have acquired a taste of cork which would have injured the market for it.

The whole process took from one day to three days, the longest part of it being the drying after the chemical bath.

The bath made it easier to put the cork into the bottle and take it out. The pores and apertures of the cork were thoroughly closed by the bath, and thus the escape of the gases contained in the beer was prevented.

The steaming of the corks, or pasteurizing them, destroyed all the germs in them that would damage or spoil the beer, if they were not pasteurized. This pasteurizing also destroyed the yeast that might have been in the beer.

If the corks had but little or no elasticity, and did not fit the bottles perfectly, the gas would escape while the beer was yet in the brewery, or in transportation, or in the place of market, and the beer would be flat, stale, worthless, and unmarketable.

When the corks had been dried, they were soft, elastic, and pliable, free from all foreign substances and germs, perfectly airtight, and fitted for use in bottling beer for

v. United States, 181 U. S. 584, 45 L. ed. 1013, 21 Sup. Ct. Rep. 740. There it was contended that bottles and corks in which beer is bottled and exported were "imported
[563] materials used in the manufacture" *of such beer, within the meaning of § 25. And it was pointed out—found by the court of claims—that the process of manufacturing beer for exportation was different from the process of manufacturing beer for domestic use, and the materials selected with greater care, in order that the bottled product might preserve purity under the conditions of transportation and change of climate. The process was detailed at length. It was decided, however, that such special process and treatment did not make the bottles and corks component parts of the beer when exported, as it was insisted they were. It is true that it was not contended in that case, as it is in this, that the corks or the bottles were articles manufactured in the United States of imported materials by reason of the special treatment to which they had been subjected, making them better or necessary for their purpose. That such a contention was possible under the statute did not occur to the brewing company. It does not appear in the statement of the case that the corks were subjected to any treatment, and appellant denies the application of the case by saying that "the corks were not put through any process of manufacture whatever." And yet it must have been necessary then, as the court of claims has found it to be, that "without the careful selection and thorough treatment of corks, beer cannot with safety be exported from the United States to foreign countries." Of course the views of a litigant of his rights under a statute are not an absolute test of the views of a litigant in another case, but the Schlitz Brewing Case was one which may be supposed to have brought to consideration

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export. They were next taken to the building in claimant's brewery which was used for bottling purposes, where they were again soaked or wetted by steaming them for a short time. so they would fit snugly and easily in the bottles.

The bathing, or treatment by the bath, and the washing and steaming of the corks, were all done by skilled labor.

After the beer had been put in the bottles and they had been corked, the filled bottles were put in a large vat, where they were pasteurized by heating to the right temperature for a sufficient length of time and cooled again. If the corks had not been treated as above described, the carbonic-acid gas would have escaped in the heating or pasteurizing process, because there was a powerful gas pressure toward the cork during all that process. If that gas had escaped, the beer would have become flat.

The corks, so treated by this process and put in the bottles of beer, could only be removed therefrom by means of a corkscrew or other instrument of force, which removal would damage or destroy the cork so it could not be used afterwards for the same purpose.

The hand-cut corks which come from Spain have all been cut out of the wood without steaming it beforehand. The corks that are cut in the United States are cut from the wood that has been steamed first, thus depriving them of much of their elasticity. Because the Spanish hand-cut corks are cut without having been steamed in the first instance, they are far safer and better corks to be made for and used in bottling export beer than corks cut in the United States after being steamed.

Without the careful selection and thorough treatment of corks, beer cannot with safety be exported from the United States to foreign countries.

When the corkwood reaches the United States it is steamed in order to get an increase volume out of it. The steaming of the corkwood makes it open something like a sponge. The steaming swells the cork, and those who do the steaming get more corks out of it, but how much more does not appear. But the steaming takes away its elasticity, and the cork cut after steaming is not so good or so perfect as one cut from the dry wood in the first place.

Corks cut after steaming will shrink, and that fact makes them inferior corks. Cork dealers in the United States also put it through various treatments, such as polishing it and using chemicals to make it look bright and have a good color. They do not attempt to close up the pores in the cork, nor run it through machinery to shake or wash the dust or impurities out of it. They put the cork on the market as the machine cuts it after it has been steamed. Corks so cut and treated in the United States would not be fit for use in the exportation of beer, for they would damage the beer through contact, and much stale beer would result from the escape of the carbonic-acid gas by reason of the imperfect corking, and the beer would not be marketable.

In the manufacture of beer for export to other countries it was necessary to destroy the yeast in the beer to prevent second fermentation and the consequent ruin of the beer. In order to destroy the germs of yeast the finished beer was steamed to the degree necessary to destroy the germs, and for that purpose the beer was inclosed securely in a vessel to prevent the escape of the carbonic-acid gas, and of all such vessels a bottle made of glass was and is the one best adapted to the purpose aforesaid. And such steaming was also necessary to the perfect manufacture of beer for bottling, and to the perfect corking thereof it was essential and necessary that the cork as treated should be used as herein described.

every practicable and legal problem under the statute, and if a cork by special treatment ceases to be a cork and becomes an article manufactured of cork, the change and the legal effect of it would have thrust themselves upon the notice of somebody. But passing this, there is force in the contention of the United States that the exportations were not of corks or bottles, but of beer, and therefore not articles exported within the meaning of § 25, entitled to a drawback. This phase of the case—indeed [564]all *phases of it—is ably dealt with in the opinion of the court of claims, and it would be unnecessary repetition to go over the argument or to review the cases.

Judgment affirmed.

HENRY WINTERS, John W. Acker, Chris Cruse, Agnes Downs, et al., Appts., v. UNITED STATES.

(See S. C. Reporter's ed. 564–578.)

Appeal — necessary parties.

1. All the defendants named in a bill to enjoin the diversion of water need not join in an appeal from a decree granting a permanent injunction, where the bill does not necessarily imply concert of action or union of interest, and the answer is joint and several, and in effect avers separate rights, interests, and action on the part of the defendants.

Appeal — necessary parties — defaulting defendants.

2. Those defendants in a suit to enjoin the diversion of water who have defaulted, and against whom a decree *pro confesso* has been entered, are not necessary parties to an appeal from a decree granting a permanent injunction, taken by the answering defendants, who justified by counter rights and submitted those rights for judgment.

Indians — cession of lands to the United States — reservation of irrigation rights.

3. A reservation of the waters of Milk river for irrigation purposes in favor of the Indians on the Fort Belknap Reservation will be implied from the agreement of May 1, 1888 (25 Stat. at L. 113, chap. 213), by which the Indians, having the right to occupy and use a large tract of arid lands, ceded to the United States all those lands except a small tract set apart as such reservation.

Indians — reservation of irrigation rights in cession to United States — admission of state as repeal.

4. The reservation of the waters of Milk river for irrigation purposes, implied in favor of the Indians on the Fort Belknap Reservation from the agreement of May 1, 1888, in which the Indians ceded to the United States all their lands except a small tract set apart as such reservation, was not repealed by the admission of Montana into the Union by the act of February 22, 1889, 25 Stat. at L. 676, chap. 180, on an equal footing with the original states.

[No. 158.]

Argued October 24, 1907. Decided January 6, 1908.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Montana, enjoining a diversion of the waters of Milk river. Affirmed.

See same case below, 78 C. C. A. 546, 148 Fed. 684.

Statement by Mr. Justice **McKenna**:

*This suit was brought by the United[565] States to restrain appellants and others from constructing or maintaining dams or reservoirs on the Milk river in the state of Montana, or in any manner preventing the water of the river or its tributaries from flowing to the Fort Belknap Indian Reservation.

An interlocutory order was granted, enjoining the defendants in the suit from interfering in any manner with the use by the reservation of 5,000 inches of the water of the river. The order was affirmed by the circuit court of appeals. 74 C. C. A. 666, 143 Fed. 740. Upon the return of the case to the circuit court, an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer, upon which and the bill a decree was entered making the preliminary injunction permanent. The decree was affirmed by the circuit court of appeals. 78 C. C. A. 546, 148 Fed. 684.

The allegations of the bill, so far as necessary to state them, are as follows: On the 1st day of May, 1888, a tract of land, the property of the United States, was reserved and set apart "as an Indian reservation as and for a permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the state (then territory) of Montana, designated and known as the Fort Belknap Indian Reservation." The tract has ever since been used as an Indian reservation and as the home and abiding place of the Indians.

NOTE.—As to parties to appellate proceedings in Federal Supreme Court—see notes to Amadeo v. Northern Assur. Co. 50 L. ed. U. S. 722, and Wedding v. Meyler, 66 L.R.A. 854.

Its boundaries were fixed and defined as follows:

"Beginning at a point in the middle of the main channel of Milk river, opposite the mouth of Snake creek; thence due south to a point due west of the western extremity of the Little Rocky mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk river opposite the mouth of People's creek; thence up Milk river, in the middle of the main channel thereof, to the place of beginning."

Milk river, designated as the northern [566] boundary of the *reservation, is a non-navigable stream. Large portions of the lands embraced within the reservation are well fitted and adapted for pasturage and the feeding and grazing of stock, and since the establishment of the reservation the United States and the Indians have had and have large herds of cattle and large numbers of horses grazing upon the land within the reservation, "being and situate along and bordering upon said Milk river." Other portions of the reservation are "adapted for and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of grass, grain, and vegetables," but such portions are of dry and arid character, and, in order to make them productive, require large quantities of water for the purpose of irrigating them. In 1889 the United States constructed houses and buildings upon the reservation for the occupancy and residence of the officers in charge of it, and such officers depend entirely for their domestic, culinary, and irrigation purposes upon the water of the river. In the year 1889, and long prior to the acts of the defendants complained of, the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miners' inches, and conducted it to the buildings and premises, used the same for domestic purposes and also for the irrigation of land adjacent to the buildings and premises, and by the use thereof raised crops of grain, grass, and vegetables. Afterwards, but long prior to the acts of the defendants complained of, to wit, on the 5th of July, 1898, the Indians residing on the reservation diverted from the river for the purpose of irrigation a flow of 10,000 miners' inches of water to and upon divers and extensive tracts of land, aggregating in amount about 30,000 acres, and raised upon said lands crops of grain, grass, and vegetables. And ever since 1889 and July, 1898, the United States and the Indians have diverted and used the waters of the river in the manner and for the purposes mentioned, and the United States "has been enabled by means thereof to train, encourage, and accustom large numbers of Indians residing upon the said reservation *to habits of industry [567] and to promote their civilization and improvement." It is alleged with detail that all of the waters of the river are necessary for all those purposes and the purposes for which the reservation was created, and that in furthering and advancing the civilization and improvement of the Indians, and to encourage habits of industry and thrift among them, it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

It is alleged that, "notwithstanding the riparian and other rights" of the United States and the Indians to the uninterrupted flow of the waters of the river, the defendants, in the year 1900, wrongfully entered upon the river and its tributaries above the points of the diversion of the waters of the river by the United States and the Indians, built large and substantial dams and reservoirs, and, by means of canals and ditches and water ways, have diverted the waters of the river from its channel, and have deprived the United States and the Indians of the use thereof And this diversion of the water, it is alleged, has continued until the present time, to the irreparable injury of the United States, for which there is no adequate remedy at law.

The allegations of the answer, so far as material to the present controversy, are as follows: That the lands of the Fort Belknap Reservation were a part of a much larger area in the state of Montana, which, by an act of Congress, approved April 15, 1874 [18 Stat. at L. 28, chap. 96], was set apart and reserved for the occupation of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians, but that the right of the Indians therein "was the bare right of the use and occupation thereof at the will and sufferance of the government of the United States." That the United States, for the purpose of opening for settlement a large portion of such area, entered into an agreement with the Indians composing said tribes, by which the Indians "ceded, sold, transferred, and conveyed" to the United States all of the lands embraced in said area, except Fort Belknap Indian Reservation, *described in the bill. This agreement [568] was ratified by an act of Congress of May 1, 1888 [25 Stat. at L. 113, chap. 213], and thereby the lands to which the Indians' title was thus extinguished became a part of the public domain of the United States and subject to disposal under the various land laws, "and it was the purpose and intention of the government that the said land should be thus thrown open to settlement, to the end that the same might be settled upon, inhabited, reclaimed, and cultivated, and communities of civilized persons be established thereon."

That the individual defendants and the stockholders of the Matheson Ditch Company and Cook's Irrigation Company were qualified to become settlers upon the public land and to acquire title thereto under the homestead and desert land laws of the United States. And that said corporations were organized and exist under the laws of Montana for the purpose of supplying to their said stockholders the water of Milk river and its tributaries, to be used by them in the irrigation of their lands.

That the defendant the Empire Cattle Company is a corporation under the laws of Montana, was legally entitled to purchase, and did purchase, from those who were qualified to acquire them under the desert and homestead land laws of the United States, lands on the Milk river and its tributaries, and is now the owner and holder thereof.

That the defendants, prior to the 5th day of July, 1898, and before any appropriation, diversion, or use of the waters of the river or its tributaries was made by the United States or the Indians on the Fort Belknap Reservation, except a pumping plant of the capacity of about 250 miners' inches, without having notice of any claim made by the United States or the Indians that there was any reservation made of the waters of the river or its tributaries for use on said reservation, and believing that all the waters on the lands open for settlement as aforesaid were subject to appropriation under the laws of the United States and the [569]laws, decisions, rulings, and customs *of the state of Montana, in like manner as water on other portions of the public domain, entered upon the public lands in the vicinity of the river, made entry thereof at the United States land office, and thereafter settled upon, improved, reclaimed, and cultivated the same and performed all things required to acquire a title under the homestead and desert land laws, made due proof thereof, and received patents conveying to them, respectively, the lands in fee simple.

That all of said lands are situated within the watershed of the river, are riparian upon the river and its tributaries, but are arid and must be irrigated by artificial means to make them inhabitable and capable of growing crops.

That for the purpose of reclaiming the lands, and acting under the laws of the United States and the laws of Montana, the defendants, respectively, posted upon the river and its tributaries, at the points of intended diversion, notices of appropriation, stating the means of diversion and place of use, and thereafter filed in the office of the clerk and recorder of the county wherein the lands were situated a copy of the notices, duly verified, and within forty days thereafter commenced the construction of ditches and other instrumentalities, and completed them with diligence, and diverted, appropriated, and applied to a beneficial use more than 5,000 miners' inches of the waters of the river and its tributaries, or 120 cubic feet per second, irrigating their lands and producing hay, grain, and other crops thereon. The defendants and the stockholders of the defendant corporations have expended many thousands of dollars in constructing dams, ditches, and reservoirs, and in improving said lands, building fences and other structures, establishing schools, and constructing highways and other improvements usually had and enjoyed in a civilized community, and that the only supply of water to irrigate the lands is from Milk river. If defendants are deprived of the waters their lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained thereon.

That there are other lands within the watershed of the *Milk river and its tributaries, and dependent upon its waters for [570] irrigation, upon which large numbers of persons have settled under the land laws of the United States, and are irrigating and cultivating the same by means of said waters, and have assisted the defendants "in establishing a civilized community in said country and in building and maintaining churches, schools, villages, and other elements and accompaniments of civilization; that said communities consist of thousands of people, and, if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up, and the purpose and object of the government in opening said lands for settlement will be wholly defeated."

It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained for stock and irrigation purposes, and particularly these: People creek, flowing about 1,000 inches of water; Big Horn creek, flowing about 1,000 inches; Lodge

Pole creek, flowing about 600 inches of water; Clear creek flowing about 300 inches. That all of the waters of these streams can be made available for use upon the reservation, and that it was not the intention of the government to reserve any of the waters of Milk river or its tributaries. That the respective claims of the defendants to the waters of the river and its tributaries are prior and paramount to the claims of the United States and the Indians, except as to 250 inches used in and around the agency buildings, and at all times there has been sufficient water flowing down the river to more than supply these 250 inches.

And it is again alleged that the waters of the river are indispensable to defendants, are of the value of more than $100,000 to them, and that if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated, but will great-[571]ly exceed $100,000," and that they will *be wholly without remedy if the claim of the United States and the Indians be sustained.

Messrs. **Edward C. Day** and **James A. Walsh** argued the cause and filed a brief for appellants:

There is nothing before the court for construction or interpretation, but the plain, unambiguous language of the agreement, and that is so clear that it does not require any construction or interpretation.

United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; The Amiable Isabella, 6 Wheat. 1, 5 L. ed. 191.

The rule that a grant must be construed in favor of the grantor is subject to exceptions.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773.

Where there is no ambiguity on the face of a grant, there is no rule of law to authorize the court to depart from the grant to obtain evidence to vary, contradict, or limit it.

United States v. Fossat, 20 How. 413, 15 L. ed. 944.

In controversies relating to property rights the government has the same standing before the court, no greater and no less, than a private individual or corporation.

People v. Brandreth, 36 N. Y. 197; United States v. Arredondo, 6 Pet. 711, 8 L. ed. 554; United States v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; State ex rel. Lewis v. Dennis, 39 Kan. 516, 18 Pac. 723; Metzel v. State, 16 Wis. 348; Sholes v. State, 2 Chand. (Wis.) 182; 3 Alexander Hamilton's Works, p. 518; Deming v. United States, 1 Ct. Cl. 190; Carr v. United States, 22 Ct. Cl. 158; Cape Ann Granite Co. v. United States, 20 Ct. Cl. 11; Southern P. R. Co. v. United States, 28 Ct. Cl. 105; Choctaw Nation v. United States, 21 Ct. Cl. 104.

Any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be the subject of appropriation by the citizens and inhabitants of the said state, was repealed by the act of admission.

Ward v. Race Horse, 163 U. S. 504, 515, 41 L. ed. 244, 248, 16 Sup. Ct. Rep. 1076; Thomas v. Gay, 169 U. S. 264, 270, 42 L. ed. 740, 743, 18 Sup. Ct. Rep. 340; United States v. McBratney, 104 U. S. 621, 26 L. ed. 869.

If there were any conflict between the agreement as signed by the Indians and the act of Congress ratifying the treaty, the act of Congress would prevail.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

When the agreement was made with the Indians, and that agreement was ratified by Congress, the lands on the north side of Milk river, which are the lands occupied by appellants, were declared to be a part of the public domain, as were a part of the lands on the south side. The lands described as constituting the Fort Belknap, Fort Peck, and Blackfeet reservations were reserved for the use of the Indians. The government was the owner of all of the lands, those declared to be a part of the public domain, as well as those reserved for the use of the Indians. The government was in the attitude of a private owner of these lands. They were all subject to the laws of the territory of Montana, and after the state of Montana was admitted into the Union upon an equal footing with the rest of the states, they all became subject to the laws of the state of Montana, in so far as those laws were applicable to the conditions there existing.

Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Kean v. Calumet Canal & Improv. Co. supra; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. ed. 220; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Kaukauna Water Power Co. v.

Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Lowndes v. Huntington, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; Farnham, Waters, § 50; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

The judgment below must be construed as a separate and several judgment.

Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Gilfillan v. McKee, 159 U. S. 303, 40 L. ed. 161, 16 Sup. Ct. Rep. 6; City Nat. Bank v. Hunter, 129 U. S. 578, 32 L. ed. 759, 9 Sup. Ct. Rep. 346; Milner v. Meek, 95 U. S. 252, 24 L. ed. 444; Todd v. Daniel, 16 Pet. 521, 10 L. ed. 1054; Norwich & W. R. Co. v. Johnson, 15 Wall. 8, 21 L. ed. 118; Germain v. Mason, 12 Wall. 261, 20 L. ed. 392; Hill v. Chicago & E. R. Co. 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; Louisville, N. A. & C. R. Co. v. Pope, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 5; Farmers' Loan & T. Co. v. McClure, 24 C. C. A. 66, 49 U. S. App. 46, 78 Fed. 211; Mercantile Trust Co. v. Kanawha & O. R. Co. 7 C. C. A. 3, 16 U. S. App. 37, 58 Fed. 6.

Assistant Attorney General **Sanford** and Assistant Attorney General **Van Orsdel** argued the cause and filed a brief for appellee:

All parties against whom a joint judgment or decree is rendered must join in prosecuting a writ of error or appeal; and, if prosecuted by less than the whole number of such parties, without a summons and severance or other equivalent proceeding, the appellate court acquires no jurisdiction of the case, and the writ of error or appeal will be dismissed.

Williams v. Bank of United States, 11 Wheat. 414, 6 L. ed. 508; Owings v. Kincannon, 7 Pet. 399, 8 L. ed. 727; Wilson v. Life & F. Ins. Co. 12 Pet. 140, 9 L. ed. 1032; Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810; Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 19 L. ed. 953; Hampton v. Rouse, 13 Wall. 187, 20 L. ed. 593; Simpson v. Greeley, 20 Wall. 152, 22 L. ed. 338; Feibelman v. Packard, 108 U. S. 14, 27 L. ed. 634, 1 Sup. Ct. Rep. 138; Estis v. Trabue, 128 U. S. 225, 230, 32 L. ed. 437, 438, 9 Sup. Ct. Rep. 58; Mason v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Inglehart v. Stansbury, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; Davis v. Mercantile Trust Co. 152 U. S. 590, 38 L. ed. 563, 14 Sup. Ct. Rep. 693; Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 127, 39 L. ed. 919, 921, 15 Sup. Ct. Rep. 786; Wilson v. Kiesel, 164 U. S. 248, 41 L. ed. 422, 17 Sup. Ct. Rep. 124.

When all the necessary parties are not joined in an appeal or writ of error or proceedings had in the nature of a severance, the case is not legally before the appellate court, and it has no jurisdiction to try it.

Wilson v. Life & F. Ins. Co. and Dolan v. Jennings, supra.

Although the interest of several defendants below might have been severable in the sense that each had a separate claim as to his own interest, yet, where the case was heard below as one case, and a judgment or decree rendered below in complainants' favor against all the defendants, based upon a common ground which affects the separate interest of all the defendants alike, and gives them a common interest in the disposition of the questions involved in the affirmance or reversal of the decree below, a separate writ of error or appeal is not permitted, as the appellate court will not dispose of such questions by instalments, at the instance of a part only of the parties adversely affected by the common decree below.

Simpson v. Greeley, 20 Wall. 152, 158, 22 L. ed. 338, 339; Owings v. Kincannon; Masterson v. Herndon; Hampton v. Rouse; and Wilson v. Life & F. Ins. Co.—supra; American Loan & T. Co. v. Clark, 27 C. C. A. 522, 49 U. S. App. 571, 83 Fed. 230.

Solicitor General Hoyt and Mr. A. C. Campbell also filed a brief for appellee:

The appeal should be dismissed for the reason that, of the nineteen defendants who were served with notice of the suit, and against whom the decree complained of was entered, only fourteen appealed to the circuit court of appeals and from that court here, and there was no summons and severance in either instance.

Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 418, 19 L. ed. 953, 954; American Loan & T. Co. v. Clark, 27 C. C. A. 522, 49 U. S. App. 571, 83 Fed. 230.

By the ratifying act the agreement became, in effect, a law of Congress; hence, it should be interpreted to carry into effect the object and purpose of that body, as expressed in the language used.

White v. United States, 191 U. S. 545, 552, 48 L. ed. 295, 298, 24 Sup. Ct. Rep. 171.

Under the act of April 15, 1874, the Indians had the right to the use of the waters in the said river and its tributaries for any purpose. Their failure to exercise said right for irrigation purposes cannot be held to be an abandonment of such right during the time intervening between April 15, 1874, and the date of the agreement in question, for the reason that, so long as they maintain their tribal relations, they are incapable of being affected with laches (Felix v. Patrick, 145 U. S. 317, 332, 333, 36 L. ed. 719, 726, 727, 12 Sup. Ct. Rep. 862). Nor can it be presumed, in the absence of clear and explicit language to that effect, that the Indians would surrender the greater part of the lands they had occupied from April 15, 1874, to the date of the agreement, and at the same time surrender or agree to abandon the only means they had to raise crops on any of the lands they retained, and thus to defeat their desire and purpose to acquire permanent homes and gain a livelihood by the cultivation of the soil (Hatch v. Dwight, 17 Mass. 297, 9 Am. Dec. 145). So to presume and thus to construe the agreement as not reserving sufficient water to meet the reasonable needs of the Indians for all purposes, including the cultivation of the soil by irrigation, would not only defeat this main object, but would work a wrong and be prejudicial to them.

All agreements are to be construed, if possible, to effect their object and to carry out the intentions of the parties.

Rood v. Johnson, 26 Vt. 64.

An agreement between the government and the Indians, however, is to be construed in favor of the latter, and never to their prejudice.

Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, 508; Choctaw Nation v. United States, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; Minnesota v. Hitchcock, 185 U. S. 373, 396, 46 L. ed. 954, 966, 22 Sup. Ct. Rep. 650; United States v. Rickert, 188 U. S. 432, 443, 47 L. ed. 532, 538, 23 Sup. Ct. Rep. 478; Re Heff, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506; United States v. Winans, 198 U. S. 371, 380, 381, 49 L. ed. 1089, 1092, 1093, 25 Sup. Ct. Rep. 662; Francis v. Francis, 136 Mich. 288, 99 N. W. 14; Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1.

Mr. Justice **McKenna** delivered the opinion of the court:

A question of jurisdiction is presented by the United States. Five of the defendants named in the bill failed to answer and a decree *pro confesso* was taken against them. The other defendants, appellants here, after the affirmance by the circuit court of appeals of the interlocutory injunction, filed a joint and several answer. On this answer and the bill the case was heard and a decree entered against all of the defendants. From that decree the appellants here appealed to the circuit court of appeals without joining therein the other five defendants. The contention is that the circuit court of appeals had no jurisdiction and that this court has none, because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal, or proceedings should have been taken against them in the nature of summons and severance or its equivalent.

The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established.† But the the rule only applies to joint judgments or decrees.‡ In other words, when the interest of a defendant *is separate from that of [575] other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was between them, in the diversion of the waters of Milk river, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests, and action on the part of the defendants. In other words, whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all, they were separate trespassers. Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree *pro confesso* was entered against them and thereafter, according to equity rule 19, the cause was required to proceed *ex parte* and the matter of the bill decreed by the court. Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788. The decree was in due course made absolute, and granting that it might have been appealed from by the defaulting defendants, they would have been, as said in Thomson v. Wooster, absolutely barred and precluded from questioning its correctness, unless, on the face of the bill, it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied and we proceed to the merits.

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†Williams v. Bank of United States, 11 Wheat. 414, 6 L. ed. 508; Owings v. Kincannon, 7 Pet. 399, 8 L. ed. 727; Wilson v. Life & F. Ins. Co. 12 Pet. 140, 9 L. ed. 1032; Mussina v. Cavazos, 6 Wall. 355, 18 L. ed. 810; Masterson v. Herndon (Masterson v. Howard) 10 Wall. 416, 19 L. ed. 953; Hampton v. Rouse, 13 Wall. 187, 20 L. ed. 593; Simpson v. Greeley, 20 Wall. 152, 22 L. ed. 338, Feibelman v. Packard, 108 U. S. 14, 27 L. ed. 634, 1 Sup. Ct. Rep. 138; Estis v. Trabue, 128 U. S. 225, 230, 32 L. ed. 437, 438, 9 Sup. Ct. Rep. 58; Mason v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; Inglehart v. Stansbury, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; Davis v. Mercantile Trust Co. 152 U. S. 590, 38 L. ed. 563, 14 Sup. Ct. Rep. 693; Beardsley v. Arkansas & L. R. Co. 158 U. S. 123, 127, 39 L. ed. 919, 921, 15 Sup. Ct. Rep. 786; Wilson v. Kiesel, 164 U. S. 248, 41 L. ed. 422, 17 Sup. Ct. Rep. 124.

‡Todd v. Daniel, 16 Pet. 521, 523, 10 L. ed. 1054, 1055; Germain v. Mason, 12 Wall. 259, 20 L. ed. 392; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Brewster v. Wakefield, 22 How. 118, 129, 16 L. ed. 301, 304; Milner v. Meek, 95 U. S. 252, 24 L. ed. 444; Basket v. Hassell, 107 U. S. 602, 608, 27 L. ed. 500, 502, 2 Sup. Ct. Rep. 415; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147; City Nat. Bank v. Hunter, 129 U. S. 557, 32 L. ed. 752, 9 Sup. Ct. Rep. 346; Gilfillan v. McKee, 159 U. S. 303, 40 L. ed. 161, 16 Sup. Ct. Rep. 6.

The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there [576]are certain elements to *be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the answer as true, that there are springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible. The government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule *should[577] certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk river by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889 [25 Stat. at L. 676, chap. 180], "upon an equal footing with the original states." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be subject to appropriation by the citizens and inhabitants of said state, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 702, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

Appellants' argument upon the incidental repeal of the agreement by the admission of Montana into the Union, and the power over the waters of Milk river which the state thereby acquired *to dispose of them [578] under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government.

Decree affirmed.

Mr. Justice **Brewer** dissents.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[579]*GALBAN & COMPANY, Appellant, v. UNITED STATES. [No. 14.]

Appeal from the Court of Claims.

See same case below, 40 Ct. Cl. 495.

Messrs. W. W. Dudley, L. T. Michener, and Barry Mohun for appellant.

The Attorney General and Assistant Attorney General Van Orsdel for appellee.

October 21, 1907. *Per Curiam:* Judgment affirmed. Neely v. Henkel, 180 U. S. 109, 45 L. ed. 448, 21 Sup. Ct. Rep. 302; Pearcy v. Stranahan, 205 U. S. 257, 51 L. ed. 793, 27 Sup. Ct. Rep. 545, and cases cited.

EX PARTE: IN THE MATTER OF THOMAS B. CLEMENT, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. George N. Baxter for petitioner.

The Attorney General opposed.

October 21, 1907. Denied.

CLARK WOODARD SPRAGUE, Sole Surviving Executor, etc., Plaintiff in Error, v. JACOB BETZ et ux. [No 260.]

In Error to the Supreme Court of the State of Washington.

See same case below, 44 Wash. 650, 87 Pac. 916.

Mr. Chas. S. Fogg for plaintiff in error.

Mr. John F. Shafroth for defendants in error.

October 28, 1907. *Per Curiam:* Dismissed for want of jurisdiction. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; and see Thomas v. Provident Life & T. Co. 70 C. C. A. 488, 138 Fed. 348, 200 U. S. 618, 50 L. ed. 622, 26 Sup. Ct. Rep. 755.

*W. F. BAIRD, Administrator, etc., Plaintiff [580 in Error, v. J. D. MONROE et al. [No. 306.]

In Error to the Supreme Court of the State of California.

See same case below, 150 Cal. 560, 89 Pac. 352.

Mr. Rufus H. Thayer for plaintiff in error.

Mr. John M. York for defendants in error.

October 28, 1907. *Per Curiam:* Dismissed for want of jurisdiction. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Miller v. Cornwall R. Co. 168 U. S. 134, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

BLYTHE COMPANY, Plaintiff in Error, v. BANKERS' INVESTMENT COMPANY et al. [No. 358.]

In Error to the Supreme Court of the State of California.

See same case below, 147 Cal. 82, 81 Pac. 281.

Mr. George W. Towle for plaintiff in error.

Messrs. E. S. Heller, Frederic D. McKenney, and Thomas I. Bergin for defendants in error.

October 28, 1907. *Per Curiam:* Dismissed for the want of jurisdiction. Blythe v. Hinckley, 84 Fed. 228; Blythe Co. v. Blythe, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873; Blythe Co. v. Hinckley, 49 C. C. A. 647, 111 Fed. 827; Blythe Co. v. Hinckley, 184 U. S. 701, 46 L. ed. 766, 22

Sup. Ct. Rep. 941; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; Blythe Co. v. Bankers' Invest. Co. 147 Cal. 82, 81 Pac. 281; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 558, 582, 40 L. ed. 536, 543, 16 Sup. Ct. Rep. 389; Semple v. Hagar, 4 Wall. 432, 434, 18 L. ed. 402, 403.

MRS. WILLIAM F. HARDIN et al., Plaintiffs in Error, v. COTTONWOOD LUMBER COMPANY. [No. 30.]

In Error to the Supreme Court of the State of Arkansas.

See same case below, 78 Ark. 95, 92 S. W. 1118.

Mr. John W. Blackwood for plaintiffs in error.

Messrs. John B. Jones and Wm. L. Terry for defendant in error.

[581] November 4, 1907. *Per Curiam:* *Judgment affirmed with costs. Soper v. Lawrence Bros. Co. 201 U. S. 359, 50 L. ed. 788, 26 Sup. Ct. Rep. 473; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Towson v. Denson, 74 Ark. 302, 86 S. W. 661.

NATHANIEL C. FOSTER, Plaintiff in Error, v. WILLIAM ROWE, Impleaded, etc. [No. 451.]

In Error to the Supreme Court of the State of Wisconsin.

See same case below, 132 Wis. 268, 111 N. W. 688.

Mr. W. M. Tomkins for plaintiff in error.

Mr. James Wickham for defendant in error.

November 4, 1907. *Per Curiam:* Dismissed for the want of jurisdiction. Foster v. Rowe, 128 Wis. 326, 107 N. W. 635; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 111, 14 Sup. Ct. Rep. 131; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663.

C. B. BOYETT et al., Plaintiffs in Error, v. UNITED STATES. [No. 35.]

In Error to the District Court of the United States for the Eastern District of Arkansas.

Mr. J. W. Blackwood for plaintiffs in error.

The Attorney General for defendant in error.

November 11, 1907. *Per Curiam:* Judgment reversed and cause remanded with a direction to sustain the motion in arrest of judgment, on the authority of Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6.

WILLIAM COUTURE, JR., Plaintiff in Error, v. UNITED STATES. [No. 42.]

In Error to the District Court of the United States for the Western District of Wisconsin.

Mr. W. M. Tomkins for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

*November 11, 1907. *Per Curiam:* Judg-[582] ment affirmed. United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff in Error, v. MARY E. WYNCOOP. [No. 362.]

In Error to the Court of Appeals of the District of Columbia.

See same case below, 29 App. D. C. 594, 11 L.R.A.(N.S.) 542.

Mr. James H. Hayden for plaintiff in error.

Messrs. Chas. A. Douglas and E. B. Sherrill for defendant in error.

November 18, 1907. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. D. C. Code, § 233 [31 Stat. at L. 1227, chap. 854]; Walker v. United States, 4 Wall. 163, 18 L. ed. 319; Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540; District of Columbia v. Gannon, 130 U. S. 229, 32 L. ed. 923, 9 Sup. Ct. Rep. 508; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; United States ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148.

W. J. WARDER et al., Plaintiffs in Error, v. WILLIAM C. COTTON and WALTER B. GRANT, Executors. [No. 47.]

In Error to the Circuit Court of the United States for the Western District of Texas.

Mr. A. Seymour Thurmond for plaintiffs in error.

Mr. Walter B. Grant for defendants in error.

November 18, 1907. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. Warder v. Loomis, 197 U. S. 619, 45 L. ed. 909, 25 Sup. Ct. Rep. 799; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; Budzisz v. Illinois Steel Co. 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503; Jones v. United States, 137 U. S. 212, 34 L. ed. 695, 11 Sup. Ct. Rep. 80.

583]*OREGON SHORT LINE RAILROAD COMPANY, Plaintiff in Error, v. ADDA MCMANUS, etc. [No. 46.]

In Error to the St. Louis Court of Appeals, State of Missouri.

See same case below, 118 Mo. App. 152, 94 S. W. 743.

Messrs. Martin L. Clardy and J. D. Howe for plaintiff in error.

Messrs. W. C. Marshall and Henry W. Bond for defendant in error.

December 2, 1907. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix), 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375.

ALASKA COMMERCIAL COMPANY et al., Plaintiffs in Error, v. GEORGE H. MELSE et al. [No. 55.]

In Error to the Supreme Court of the State of Washington.

See same case below, 42 Wash. 356, 84 Pac. 1127.

Mr. Wm. H. Gorham for plaintiffs in error.

Messrs. Corwin S. Shank and John C. Higgins for defendants in error.

December 2, 1907. *Per Curiam:* Judgment affirmed with costs. Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 134, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63, 47 L. ed. 76, 23 Sup. Ct. Rep. 24; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161; Morris v. Gilmer, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; Offner v. Chicago & E. R. Co. 78 C. C. A. 359, 148 Fed. 201; Knuth v. Butte Electric R. Co. 148 Fed. 73.

EUGENE F. ROBINSON, Appellant, v. ANDREW B. DUVALL, Executor, etc., et al. [No. 72.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 27 App. D. C. 535.

[584] Messrs. Charles H. Merillat and *Mason N. Richardson for appellant.

Messrs Edward H. Thomas and Andrew B. Duvall for appellees.

December 16, 1907. Decree affirmed with costs.

LEWIS STEWART, Plaintiff in Error, v. STATE OF LOUISIANA. [No. 74.]

In Error to the Supreme Court of the State of Louisiana.

See same case below, 117 La. 476, 41 So. 798.

Mr. Murphy J. Foster for plaintiff in error.

Mr. Walter Guion for defendant in error.

December 23, 1907. *Per Curiam:* Writ of Error dismissed for the want of jurisdiction. Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; State v. Deffes, 44 La. Ann. 581, and cases, 10 So. 812; State v. Hennessey, 44 La. Ann. 805, 11 So. 39.

VAL MARCINIAK, Plaintiff in Error, v. STATE OF MINNESOTA. [No. 83.]

In Error to the Supreme Court of the State of Minnesota.

See same case below, 97 Minn. 355, 105 N. W. 965.

Messrs. Anson B. Jackson and Ernest S. Cary for plaintiff in error.

Messrs. Frank Healy and A. C. Finney for defendant in error.

December 23, 1907. *Per Curiam:* Judgment affirmed with costs. Natal v. Louisiana, 139 U. S. 623, 35 L. ed. 289, 11 Sup. Ct. Rep. 636; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

CITY OF OMAHA et al., Appellants, v. OMAHA WATER COMPANY. [No. 88.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1.

Messrs. John L. Webster and Carl C. Wright for appellants.

Messrs. Lucius H. Beers, R. S. Hall, and Howard Mansfield for appellee.

December 23, 1907. *Per Curiam:* Appeal dismissed for want of jurisdiction. Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Wishkah Boom Co. v. United States, 202 U. S. 613, 50 L. [585]ed. 1171, 26 Sup. Ct. Rep. 765; *California Consol. Min. Co. v. Manley, 203 U. S. 579, 51 L. ed. 326, 27 Sup. Ct. Rep. 779. Certiorari denied. Chicago & N. W. R. Co. v. Osborne, 146 U. S. 354, 36 L. ed. 1002, 15 Sup. Ct. Rep. 281; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

PAUL F. VOGEL, Petitioner, v. WILLIAM WORTH BURSON. [No. 310.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 29 App. D. C. 388.

Messrs. E. T. Fenwick and E. M. Kitchin for petitioner.

Mr. Geo. W. Rea for respondent.

October 21, 1907. Denied.

CITY OF DEFIANCE, Petitioner, v. WILLIAM J. MCGONIGALE, Receiver, etc. [No. 316.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 80 C. C. A. 425, 150 Fed. 689.

Messrs. John H. Doyle and Henry B. Harris for petitioner.

Messrs. Henry Newbegin and Robert Newbegin for respondent.

October 21, 1907. Denied.

WILLIAM GORDON CRAWFORD, Petitioner, v. UNITED STATES. [No. 323.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. A. S. Worthington for petitioner.

The Attorney General and the Solicitor General for respondent.

October 21, 1907. Granted.

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[586]*FIDELITY & CASUALTY COMPANY OF NEW YORK, Petitioner, v. BANK OF TIMMONSVILLE. [No. 327.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. J. P. Kennedy Bryan for petitioner.

Messrs. Henry A. M. Smith and P. A. Willcox for respondent.

October 21, 1907. Denied.

EDWARD E. BLODGETT, Petitioner, v. PORTLAND CHEMICAL & PHOSPHATE COMPANY et al. [No. 328.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 82 C. C. A. 77, 152 Fed. 929.

Mr. G. Philip Wardner for petitioner.

Messrs. Horatio Bisbee and Geo. C. Bedell for respondents.

October 21, 1907. Denied.

JEROME P. PORTER et al., Petitioners, v. TONOPAH NORTH STAR TUNNEL & DEVELOPMENT COMPANY. [No. 329.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 76 C. C. A. 657, 146 Fed. 385.

Messrs. John E. Humphries and Frederick DeC. Faust for petitioners.

Messrs. Joseph C. Campbell and Wm. H. Metson for respondent.

October 21, 1907. Denied.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Owner, etc., Petitioner, v. ELIZA E. WREN et al. [No. 330.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 83 C. C. A. 276, 154 Fed. 182.

Messrs E. Grenville Benedict and R. W. DeForest for petitioner.

Messrs. J. Parker Kirlin and Eliot Tuckerman for respondents.

October 21, 1907. Denied.

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*FEDERAL CONTRACTING COMPANY, Petitioner, v. BOWERS HYDRAULIC DREDGING COMPANY. [No. 331.] [587]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 83 C. C. A. 52, 153 Fed. 870.

Messrs. Rowland B. Mahany and Edward W. Norris for petitioner.

Mr. Horace L. Cheyney for respondent.

October 21, 1907. Denied.

R. H. Wright, Petitioner, v. Gorman-Wright Company et al. [No. 333.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 81 C. C. A. 534, 152 Fed. 408.

Messrs. L. L. Lewis and S. S. P. Patteson for petitioner.

Mr. G. A. Hanson for respondents.

October 21, 1907. Denied.

J. I. Case Threshing Machine Co., Petitioner, v. Indiana Manufacturing Co. [No. 335.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 343, 154 Fed. 365.

Messrs. R. S. Taylor, I. K. Boyesen, and Jas. H. Peirce for petitioner.

Messrs. W. H. H. Miller, C. K. Offield, C. C. Linthicum, Chester Bradford, and Harold Taylor for respondent.

October 21, 1907. Granted.

Penrose McClain, United States Collector, etc., Petitioner, v. William Disston et al., Executors, etc. [No. 336.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 77 C. C. A. 340, 147 Fed. 114.

The Attorney General and the Solicitor General for petitioner.

No opposition.

October 21, 1907. Denied.

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[588]*N. A. Munn et al., Petitioners, v. Clinton Reed [No. 340]; N. A. Munn et al., Petitioners, v. Ibex Mining Company [No. 341]; N. A. Munn et al., Petitioners, v. Ibex Mining Company [No. 342]; N. A. Munn et al., Petitioners, v. Ibex Mining Company [No. 343].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 80 C. C. A. 215, 148 Fed. 737.

Messrs. Edwin H. Park and T. J. O'Donnell for petitioners.

Messrs. Charles J. Hughes, Jr., and Charles Cavender for respondents.

October 21, 1907. Denied.

Security Mutual Life Insurance Company, Petitioner, v. Frederick L. Michaelsen. [No. 371.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 83 C. C. A. 334, 154 Fed. 356.

Mr. Fredric W. Jenkins for petitioner.

Mr. Josiah M. Vale for respondent.

October 21, 1907. Denied.

George G. Ware, Petitioner, v. United States. [No. 442.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 12 L.R.A. (N.S.) 1053, 154 Fed. 577.

Mr. T. J. Mahoney for petitioner.

The Attorney General and the Solicitor General for respondent.

October 21, 1907. Denied.

Baltimore & Ohio Railroad Company, Petitioner, v. James B. McCune. [No. 453.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 83 C. C. A. 175, 154 Fed. 63.

Mr. Robert J. Fisher for petitioner.

Mr. James M. Martin for respondent.

October 21, 1907. Denied.

Weems Steamboat Company of Baltimore City, Petitioner, v. People's Steamboat Company et al. [No. 455.]

*Petition for a Writ of Certiorari to the [589] United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Geo. Weems Williams, St. Geo. R. Fitzhugh, and Nicholas P. Bond for petitioner.

Mr. Wm. D. Carter for respondents.

October 21, 1907. Granted.

Milo H. Osborn, Petitioner, v. Atchison, Topeka, & Santa Fé Railway Company. [No. 456.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 78 C. C. A. 378, 148 Fed 606.

Mr. A. A. Hoehling, Jr., for petitioner.

Messrs. Gardiner Lathrop, Robert Dunlap, and A. B. Browne for respondent.

October 21, 1907. Denied.

MILWAUKEE RUBBER WORKS COMPANY, Petitioner, v. RUBBER TIRE WHEEL COMPANY. [No. 460.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 336, 154 Fed. 358.

Messrs. John C. Spooner, Chas. Quarles, and J. L. Bishop for petitioner.

Mr. Augustine L. Humes for respondent.

October 21, 1907. Granted.

CONTRACTORS' SUPPLY & EQUIPMENT COMPANY et al., Petitioners, v. T. E. HILL COMPANY et al. [No. 461.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 78 C. C. A. 522, 148 Fed. 832.

Mr. Lloyd C. Whitman for petitioners.

Mr. Charles P. Abbey for respondents.

October 21, 1907. Denied.

ÆTNA INDEMNITY COMPANY, Petitioner, v. J. R. CROWE COAL & MINING COMPANY. [No. 464.]

Petition for a Writ of Certiorari to the [590] United States Circuit *Court of Appeals for the Eighth Circuit.

See same case below, 83 C. C. A. 431, 154 Fed. 545.

Messrs. James S. Botsford and Wm. B. Homer for petitioner.

Messrs. L. C. Boyle and W. F. Guthrie for respondent.

October 21, 1907. Denied.

HENRY WINEMAN, JR., Petitioner, v. M. M. DRAKE et al. [No. 466.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 505, 154 Fed. 933.

Mr. C. E. Kremer for petitioner.

Messrs. Harvey D. Goulder and F. S. Masten for respondents.

October 21, 1907. Denied.

ARMOUR PACKING COMPANY, Petitioner, v. UNITED STATES [No. 467]; SWIFT & COMPANY, Petitioner, v. UNITED STATES [No. 468]; MORRIS & COMPANY, Petitioner, v. UNITED STATES [No. 469]; CUDAHY PACKING COMPANY, Petitioner, v. UNITED STATES [No. 470].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Frank Hagerman, A. R. Urion, and John C. Cowin for petitioners.

The Attorney General, the Solicitor General,. and Assistant to the Attorney General Purdy for respondent.

October 21, 1907. Granted.

CHARLES NELSON COMPANY, Claimant, etc., Petitioner, v. STANDARD THEATRE COMPANY. [No. 476.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs A. B. Browne and Alex. Britton for petitioner.

No opposition.

October 21, 1907. Denied.

GREAT SOUTHERN GAS & OIL COMPANY, Petitioner, v. LOGAN NATURAL GAS & FUEL CO. [No. 479.]

*Petition for a Writ of Certiorari to the [591] United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 83 C. C. A. 574, 155 Fed. 114.

Messrs. Wm. B. Sanders and A. R. Sheriff for petitioner.

Messrs. James H. Beal, C. H. Grosvenor, John G. Reeves, and M. A. Daugherty for respondent.

October 21, 1907. Denied.

MOLLIE E. DUPREE et al., Petitioners, v. C. W. MANSUR. [No. 380.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. J. J. Darlington for petitioners.

Mr. J. M. McCormick for respondent.

October 28, 1907. Granted.

EUGENE C. KREIGH, Petitioner, v. WESTINGHOUSE, CHURCH, KERR, & COMPANY. [No. 475.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. James S. Botsford for petitioner.

No opposition.

October 28, 1907. Granted.

ELIZABETH PECK, Petitioner, v. TRIBUNE COMPANY. [No. 480.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Rufus S. Simmons and S. C. Irving for petitioner.

Mr. John Barton Payne for respondent.

October 28, 1907. Granted.

ALBERTA J. SHARPE et al., Petitioners, v. EDWARD W. RANNELS. [No. 309.]

Petition for a Writ of Certiorari to the [592]United States Circuit Court of Appeals *for the Eighth Circuit.

See same case below, 74 C. C. A. 376, 145 Fed. 296.

Messrs W. H. H. Miller, John B. Jones, Augustin Boice, U. M. Rose, G. B. Rose, W. E. Hemingway, and Herbert R. Marlatt for petitioners.

Mr. C. C. Calhoun for respondent.

October 28, 1907. Denied.

JOHN BLAKELY, Petitioner, v. FIDELITY MUTUAL LIFE INSURANCE COMPANY. [No. 332.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 83 C. C. A. 155, 154 Fed. 43.

Messrs. W. B. Linn and George H. Stein for petitioner.

Mr. Ira Jewell Williams for respondent.

October 28, 1907. Denied.

RUMFORD CHEMICAL WORKS, Petitioner, v. HYGIENIC CHEMICAL COMPANY. [No. 412.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 83 C. C. A. 177, 154 Fed. 65.

Mr. Philip Mauro for petitioner.

Mr. Willard Parker Butler for respondent.

October 28, 1907. Denied.

C. K. McINTOSH and JAMES P. BROWN, Trustees, etc., Petitioners, v. PETALUMA SAVINGS BANK et al. [No. 444.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 80 C. C. A. 250, 150 Fed. 546.

Mr. Wm. A. Coulter for petitioners.

Mr. A. B. Browne for respondents.

October 28, 1907. Denied.

FREDERICK S. GOSHORN et al., Petitioners, v. ROYAL TRUST COMPANY et al. [No. 462.]

Petition for a Writ of Certiorari to the United States Circuit Court of *Appeals for [593] the Seventh Circuit.

Mr. Henry W. Leman for petitioners.

Messrs. Frank H. Scott and Edgar A. Bancroft for respondents.

October 28, 1907. Denied.

SAMUEL PECK et al., Petitioners, v. JAMES HAMILTON LEWIS. [No. 463.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 211, 154 Fed. 273.

Mr. Levi Davis for petitioners.

Mr. Holmes Conrad for respondent.

November 4, 1907. Denied.

ERIE RAILROAD COMPANY, Petitioner, v. MARY E. KANE, Administratrix, etc. [No. 484.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 83 C. C. A. 564, 155 Fed. 118.

Mr. Wm. E. Cushing for petitioner.

Mr. Geo. F. Arrel for respondent.

November 11, 1907. Denied.

ESTILL COUNTY, KENTUCKY, Petitioner, v. TALTON EMBRY. [No. 191.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 75 C. C. A. 654, 144 Fed. 913.

Mr. Chas. W. Friend for petitioner.

Mr. Harry L. Gordon for respondent.

November 18, 1907. Denied.

ARNOLD-LOUCHHEIM & Co. et al., Petitioners, v. JAMES WATSON BOYD. [No. 443.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 79 C. C. A. 135, 149 Fed. 187.

Mr. A. C. Prendergast for petitioners.

No opposition.

November 18, 1907. Denied.

[594]*GREAT NORTHERN RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 491.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Wm. R. Begg, Rome G. Brown, and C. S. Albert for petitioner.

The Attorney General and Assistant to the Attorney General Purdy for respondent.

November 18, 1907. Granted.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Petitioner, v. J. WILLCOX BROWN. [No. 300.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Wm. B. Hornblower and Allan McCulloh for petitioner.

Messrs. John R. DosPassos and Jos. DeF. Junkin for respondent.

December 9, 1907. Granted.

GRAND TRUNK WESTERN RAILWAY CO., Petitioner, v. WILLIAM H. GRAY. [No. 496.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 156 Fed. 736.

Mr. George W. Kretzinger for petitioner.

Mr. John A. Brown for respondent.

December 9, 1907. Denied.

MACKIE-LOVEJOY MANUFACTURING COMPANY, Petitioner, v. MARION H. CAZIER. [No 506.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 71 C. C. A. 104, 138 Fed. 654.

Mr. L. S. Bacon for petitioner.

No opposition.

December 9, 1907. Denied.

HAIGHT & FREESE COMPANY, Petitioner, v. ANNA L. H. WEISS, Administratrix, etc., et al. [No. 507.]

[595]*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 156 Fed. 328.

Mr. Albert I. Sire for petitioner.

No opposition.

December 9, 1907. Denied.

DEMETRIUS M. STEWARD et al., Petitioners, v. AMERICAN LAVA COMPANY et al. [No. 508]; MORITZ KIRCHBERGER et al., Petitioners, v. AMERICAN LAVA COMPANY et al [No. 509].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Louis C. Raegener for petitioners.

Mr. Charles Neave for respondents.

December 16, 1907. Granted.

JOHNSON & JOHNSON, Petitioner, v. UNITED STATES. [No. 517.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 83 C. C. A. 151, 154 Fed. 39.

Mr. Edward S. Hatch for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Sanford for respondent.

December 16, 1907. Denied.

UNITED STATES, Petitioner, v. JAMES A. HAYES & COMPANY. [No. 520.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 80 C. C. A. 17, 150 Fed. 63.

The Attorney General and the Solicitor General for petitioner.

Messrs. Albert H. Washburn, J. S. Tompkins, and Chas. P. Searle for respondent.

December 16, 1907. Denied.

OLD NICK WILLIAMS COMPANY, Petitioner, v. UNITED STATES. [No. 501.]

Petition for a *Writ of Certiorari to the[596] United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Charles A. Moore for petitioner.

No opposition.

December 23, 1907. Granted.

CORSICANA PETROLEUM COMPANY, Petitioner, v. W. H. STALEY. [No. 409.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. W. J. McKie and Frederick S. Tyler for petitioner.

Messrs. E. St. Clair Thompson and Robert S. Neblett for respondent.

December 23, 1907. Denied.

RICHARD COHEN et al., Petitioners, v. UNITED STATES. [No. 504.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 157 Fed. 651.

Mr. Joel M. Marx for petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Cooley for respondent.

December 23, 1907. Denied.

BENJAMIN D. GREENE and JOHN F. GAYNOR, Petitioners, v. UNITED STATES. [No. 505.]

Petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 154 Fed. 401.

Messrs. Frederic R. Coudert, Howard Taylor and Benj. F. Tracy for Greene.

Messrs. Alexander A. Lawrence, Wm. W. Osborne, Wm. Garrard, and P. W. Meldrim for Gaynor.

The Attorney General, the Solicitor General, and Marion Erwin for respondent.

December 23, 1907. Denied.

MILLS TRANSPORTATION COMPANY, Petitioner, v. GREAT LAKES TOWING COMPANY. [No. 525.]

[597]*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 83 C. C. A. 607, 155 Fed. 11.

Mr. F. H. Canfield for petitioner.

Messrs. Harvey D. Goulder, Frank S. Masten, and S. H. Holding for respondent.

December 23, 1907. Denied.

JAMES C. WHITTAKER, Administrator, etc., Petitioner, v. A. B. BAXTER & COMPANY [No. 527]; ADOLPH JOSEPH, Petitioner, v. A. B. BAXTER & COMPANY [No. 528].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 81 C. C. A. 359, 152 Fed. 141.

Mr. Frederick M. Czaki for petitioner.

Mr. Edward Jacobs for respondent.

December 23, 1907. Denied.

UTAH CONSOLIDATED MINING COMPANY, Petitioner, v. JAMES GODFREY et al. [No. 536.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 158 Fed. 225.

Messrs. Louis Marshall, Waldeman Van Cote, Samuel Untermeyer, and Geo. Sutherland for petitioner.

Messrs. Joseph L. Rawlins and Wm. H. King for respondents.

December 23, 1907. Denied.

BRADLEY W. PALMER et al., Petitioners, v. STATE OF TEXAS et al. [No. 535.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Moorfield Storey and J. L. Thorndike for petitioners.

Messrs. T. W. Gregory, R. V. Davidson, Jewel P. Lightfoot, and G. W. Allen for respondents.

January 6, 1908. Granted.

LAWRENCE E. SEXTON, Receiver, etc., Petitioner, v. ARMSTRONG CORK COMPANY. [No. 542.]

*Petition for a Writ of Certiorari to the[598] United States Circuit Court of Appeals for the Second Circuit.

See same case below, 158 Fed. 744.

Mr. William D. Guthrie for petitioner.

Messrs. Herbert Noble and James R. Sloane for respondent.

January 6, 1908. Denied.

A. R. STUART, Plaintiff in Error, v. UNITED STATES. [No. 133.]

In Error to the Supreme Court of the Philippine Islands.

Messrs. W. W. Dudley and L. T. Michener for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

October 14, 1907. Dismissed, on motion of Mr. L. T. Michener, for the plaintiff in error.

JOHN C. ORRELL et al., Plaintiffs in Error, v. BAY MANUFACTURING COMPANY. [No. 52.]

In Error to the Supreme Court of the State of Mississippi.

See same case below, 87 Miss. 632, 40 So. 429.

Mr. E. M. Barber for plaintiffs in error.

Mr. E. J. Bowers for defendant in error.

October 14, 1907. Dismissed with costs, on motion of counsel for plaintiffs in error.

HELEN ROWLAND, Plaintiff in Error, v. FRANK GODFREY, Trustee. [No. 134.]

In Error to the Supreme Court of the Territory of Hawaii.

See same case below, 17 How. 577.

Mr. E. B. McClanahan for plaintiff in error.

Messrs. A. G. M. Robertson and Chas. F. Clemons, for defendant in error.

October 14, 1907. Dismissed, per stipulation.

[599]*ALBERT K. HISCOCK, Trustee, etc., Appellant, v. AMERICAN WOOLEN COMPANY OF NEW YORK. [No. 148.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Mr. Will B. Crowley for appellant.

Mr. Lee M. Friedman for appellee.

October 14, 1907. Dismissed, per stipulation.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appellant, v. TERRITORY OF OKLAHOMA. [Nos. 182, 183.]

Appeals from the District Court of Garfield County, Oklahoma Territory.

Mr. M. A. Low for appellant.

No appearance for appellee.

October 14, 1907. Dismissed with costs, on motion of counsel for the appellant.

AMES REALTY COMPANY, Appellant, v. STATE OF MONTANA et al. [No. 279.]

Appeal from the Circuit Court of the United States for the District of Montana.

Mr. N. W. McConnell for appellant.

Mr. Albert J. Galen for appellees.

October 14, 1907. Dismissed, per stipulation.

ARTHUR U. DENNIS et al., Plaintiffs in Error, v. SYRENUS DAVIS et al. [No. 483.]

In Error to the Supreme Court of the State of Washington.

Mr. John Sidney Webb for defendants in error.

October 15, 1907. Docketed and dismissed with costs, on motion of Mr. John Sidney Webb for the defendants in error.

ABE STRAUSS, Plaintiff in Error, v. COMMONWEALTH OF MASSACHUSETTS. [No. 66.]

In Error to the Superior Court of the State of Massachusetts.

See same case below, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136.

Mr. Junius Parker for plaintiff in error.

Mr. Dana Malone for defendant in error.

[600]October 15, 1907. Dismissed *with costs, per stipulation, on motion of Mr. Dana Malone, for the defendant in error.

TONY KERSCH, Plaintiff in Error, v. CITY OF TOPEKA. [No. 3.]

In Error to the Supreme Court of the State of Kansas.

See same case below, 70 Kan. 840, 79 Pac. 681, 80 Pac. 29.

Messrs. G. C. Clemens and C. A. Magaw for plaintiff in error.

No appearance for defendant in error.

October 15, 1907. Dismisssed with costs, on motion of Mr. C. A. Magaw for the plaintiff in error.

JAMES SHEASLEY, Plaintiff in Error, v. STATE OF KANSAS. [No. 10.]

In Error to the Supreme Court of the State of Kansas.

Messrs. G. C. Clemens and C. A. Magaw for plaintiff in error.

Mr. C. C. Coleman for defendant in error.

October 15, 1907. Dismissed with costs, on motion of Mr. C. A. Magaw, the case having abated by reason of death of plaintiff in error.

UNITED STATES, Plaintiff in Error, v. CLARA ALFONSO Y BUENAVENTURA. [No. 349.]

In Error to the Supreme Court of the Philippine Islands.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

October 21, 1907. Dismissed on motion of Mr. Attorney General Bonaparte for the plaintiff in error.

FERDINAND HOPP, Plaintiff in Error, v. THOMAS H. PICKFORD. [No. 486.]

In Error to the Court of Appeals of the District *of Columbia. [601]

Mr. H. Prescott Gatley for defendant in error.

October 21, 1907. Docketed and dismissed with costs, on motion of Mr. H. Prescott Gatley, for the defendant in error.

AGUSTIN CASTELLO, Appellant, v. ERNEST RUFFER et al. [No. 1.]

Appeal from the District Court of the United States for Porto Rico.

See same case below, 1 Porto Rico Fed. Rep. 357.

Messrs. James S. Harlan and John Maynard Harlan for appellant.

Mr. N. B. K. Pettingill for appellees.

October 28, 1907. Dismissed with costs, pursuant to the Fifteenth Rule, on motion of Mr. George H. Lamar, in behalf of counsel for the appellees.

Arizona Eastern Railroad Company, Appellant, v. Phœnix & Eastern Railroad Company. [No. 100.]

Appeal from the Supreme Court of the Territory of Arizona.

See same case below, 9 Ariz. 434, 84 Pac. 1097.

Messrs. Eugene S. Ives and Maxwell Evarts for appellant.

Messrs. Robert Dunlap, T. J. Norton, and E. W. Camp for appellee.

October 29, 1907. Dismissed per stipulation.

Evalyn S. France, Formerly Evalyn S. Tome, Appellant, v. Joseph M. Coleman et al. [No. 296.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Geo. E. Hamilton, M. J. Colbert, and J. J. Hamilton for appellant.

No appearance for appellees.

October 29, 1907. Dismissed with costs, on motion of counsel for appellant.

Govan Beard, Plaintiff in Error, v. State [602] *of Arkansas. [No. 93.]

In Error to the Supreme Court of the State of Arkansas.

See same case below, 79 Ark. 293, 95 S. W. 995, 97 S. W. 667.

Mr. Baldy Vinson for plaintiff in error.

No appearance for defendant in error.

November 5, 1907. Case having abated by reason of the death of plaintiff in error, writ of error dismissed.

Henry T. Anderson, Appellant, v. Andrew J. Zaring. [No. 146.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. S. H. Harris for appellant.

No appearance for appellee.

November 11, 1907. Dismissed with costs, on motion of counsel for the appellant.

Modesto Munitiz Aguirre, Appellant, v. Sobrinos de Ezquiaga. [No. 58.]

Appeal from the Supreme Court of Porto Rico.

Mr. Charles Hartzell for appellant.

Messrs. James S. Harlan and John Maynard Harlan for appellee.

November 12, 1907. Dismissed with costs, pursuant to the Tenth Rule.

Chicago, Rock Island, & Pacific Railway Company, Plaintiff in Error, v. John Stibbs. [No. 153.]

In Error to the Supreme Court of the Territory of Oklahoma.

See same case below, 17 Okla. 97, 87 Pac. 293.

Mr. M. A. Low for plaintiff in error.

Mr. P. C. Simons for defendant in error.

December 2, 1907. Dismissed per stipulation.

Nicolas Arceo, Plaintiff in Error, v. United States. [No. 192.]

In Error to the Supreme Court of the Philippine Islands.

Mr. Nicolas Arceo *in propria persona.*

The Attorney General and the Solicitor general for defendant in error.

December 2, 1907. Dismissed pursuant to the Tenth Rule.

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*Eugenio Buitrago, Appellant, v. People of [603] Porto Rico. [No. 534.]

Appeal from the Supreme Court of Porto Rico.

Mr. Henry M. Hoyt for appellees.

December 16, 1907. Docketed and dismissed with costs on motion of Mr. Henry M. Hoyt for appellees.

John A. Curtin, Trustee, Appellant, v. Gertrude F. Tucker. [No. 50.]

Appeal from the United States Circuit Court of Appeals for the First Circuit.

See same case below, 78 C. C. A. 557, 148 Fed. 929.

Messrs. Lee M. Friedman and Robert K. Dickerman for appellant.

Messrs. W. Hall Harris and John H. Sherburne, Jr., for appellee.

December 16, 1907. Dismissed per stipulation.

J. I. Case Threshing Machine Company, Petitioner, v. Indiana Manufacturing Company. [No. 335.]

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 343, 154 Fed. 365.

Messrs. R. S. Taylor, I. K. Boyesen, and Jas. H. Peirce for petitioner.

Messrs. W. H. H. Miller, Charles K. Offield, Chas. C. Linthicum, Chester Bradford, and Harold Taylor for respondent.

December 17, 1907. Dismissed without costs to either party, per stipulation, on motion of Mr. Melville Church in behalf of counsel.

JOHN SHALEEN, Plaintiff in Error, v. COMMONWEALTH OF PENNSYLVANIA. [No. 86.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. Wm. S. Opdyke for plaintiff in error.

Messrs. John R. Jones and Wm. John Barr for defendant in error.

December 17, 1907. Dismissed with costs pursuant to the Tenth Rule.

*REVERE WATER CO., Plaintiff in Error, v. [604] INHABITANTS OF THE TOWN OF WINTHROP. [No. 131.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

See same case below, 192 Mass. 455, 78 N. E. 497.

Mr. A. E. Pillsbury for plaintiff in error.

Mr. Lauriston L. Scaife for defendants in error.

September 21, 1907. Dismissed pursuant to 28th rule.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1907.

Vol. 208.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1907.

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[1]*FRANK DE L. CARRINGTON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1–7.)

Officers — Army officer as public official — criminal liability.

The acceptance by an Army officer on the active list, detached to command a battalion of Philippine scouts, of a small sum from the civil government of the Philippine Islands, to be used by him in connection with his military command in the preparation and display of an exhibit at the Louisiana Purchase Exposition, did not make him a civil officer, so as to be amenable to P. I. Penal Code, art. 300, punishing the falsification of a public document by a public official.

[No. 223.]

Argued December 16, 1907. Decided January 6, 1908.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment convicting an Army officer of the crime of falsification of a public document by a public official, on an appeal from the Court of First Instance in the City of Manila. Reversed.

See same case below, 5 Philippine, 725.

The facts are stated in the opinion.

Mr. **Holmes Conrad** argued the cause and filed a brief for plaintiff in error.

Messrs. John M. Thurston and R. A. Ballinger also filed a brief for plaintiff in error.

Solicitor General **Hoyt** argued the cause and filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

The plaintiff in error was convicted in the court of first instance, and, on appeal, by the supreme court of the Philippine Islands, of the crime of falsification of a public document by a public official. He brings the case here by writ of error, setting up rights under the Constitution and statutes of the United States that were denied by the decision below.

The complaint alleges that the plaintiff in error "being then and there a public official of the United States civil government of the Philippine Islands, to wit, a duly appointed and commissioned major of the First Infantry, United States Army, and the duly designated, qualified, and acting commander of the Provisional Battalion of the Philippine Scouts, and a duly appointed, qualified, and acting disbursing officer for public funds of the said United States civil government of the Philippine Islands, appropriated on account of said Provisional Battalion and on account of the Louisiana Purchase Exposition *at St. Louis," made a [5] false voucher for the payment of 770 pesos.

The plaintiff in error denies that he was a public official within the meaning of the Philippine Penal Code, art. 300, or that, under the act of March 3, 1883, chap. 134, 22 Stat. at L. 567 (see Rev. Stat. § 1222, U. S. Comp. Stat. 1901, p. 860; Rev. Stat. § 1860), he could be, while he remained an officer in the Army on the active list. The facts are as follows: In October, 1903, the plaintiff in error wrote a letter to the executive secretary of the insular government, suggesting that, as the Second Battalion of Philippine Scouts was expected to take part in the Louisiana Purchase Exposition, it would be well to allow the writer, with his scouts, to put up a model administration building of native materials for his use, at St. Louis, decorated with native arms, etc. and estimating that he could do this work for $3,000, gold. Governor Taft referred his letter to the exposition board, recommending the project, and the board accepted it. In November the civil commission passed a resolution, authorizing the transfer "to the credit of Major F. L. Carrington, 1st United States Infantry, commanding the Provisional Battalion of Philippine Scouts, to be transported to St. Louis in 1904 in connection with the Philippine exhibit," the sum of $3,000, "to be used and accounted for by Major Carrington in the construction" of a model administration building. It was resolved further that the disbursing officers of the Philippine exposition board should deposit to the credit of Major Carrington the further sum of $500, with which to pay some of the expenses of families of scouts allowed to accompany them to St. Louis, and that, on the approval of the resolutions by certain officials, the civil governor might "designate Major Carrington as disbursing officer to receive the funds mentioned." The resolutions were approved, and Governor Taft in the same month addressed a letter to "Major Frank de L. Carrington, 1st U. S. Infantry, commanding Provisional Battalion Philippine Scouts," saying: "You are hereby designated to withdraw, receive, expend, and account for, [6]the funds" above mentioned, *"to be expended in the preparation and display of a scout exhibit at the Louisiana Purchase Exposition, as set forth in said resolution." These are all the facts that are supposed to constitute the plaintiff in error a public official within the Philippine Penal Code, although it should be added that, in signing the false document, he added, after his name, "Maj. 1st Infantry, D. O.;" the last letters meaning, it may be presumed, disbursing officer.

At this time the plaintiff in error was an officer of the Army on the active list, detached to command a battalion of Philippine scouts, admitted to be a part of the military establishment of the United States. Leaving names on one side, what happened was that he received $3,500 from civil sources, to be used by him in connection with his military command, in the performance of duties incident to that command. On the face of it the proposition is extravagant that the receipt of a small sum to be spent and done with forthwith in this way made him an officer of the civil government, notwithstanding the source from which it came, or the fact that he sent his accounts to the same quarter. An office commonly requires something more permanent than a single transitory act or transaction to call it into being. The letter of Governor Taft which designated Major Carrington to receive the fund says nothing about appointing him a civil or any kind of officer, nor did he qualify as one in any way. He was addressed by Governor Taft, and he acted, in his military capacity and under his military responsibility. He has been held to that responsibility by a court-martial. The only color for an additional liability is in the words quoted from the resolution of the civil commission, authorizing the civil governor to designate Major Carrington as disbursing officer,—words which the governor wisely did not adopt,—and in the fact that the plaintiff in error gave himself that name. It is unnecessary to inquire whether he could have made himself a civil officer if he had tried, in view of the act of Congress absolutely prohibiting it. Act of March 3, 1883, chap. 134, 22 Stat. at L. 567. No one dreamed *that he was attempting it, [7] and if he could have succeeded at the expense of his place in the Army, under Rev. Stat. § 1222, U. S. Comp. Stat. 1901, p. 860, no one supposed that he had done so, but he continued in his military command undisturbed.

We think it entirely plain that the acceptance of the duty of spending and accounting for this small fund did not amount to holding a civil office within the statutes of the United States. We see no sufficient reason to believe that the Philippine Penal Code, art. 300, purports or attempts to reach a case like that of the plaintiff in error. The provision in art. 401, that, for this purpose, everyone shall be considered a public official who, by popular election, or appointment by competent authority, takes part in the exercise of public functions, does not help art. 300. That also seems to contemplate an office having some degree of permanence. But however that may be, the plaintiff in error was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money. As a soldier he was not an official of the Philippines, but of the United States. If the Philippine legislation attempted to add to the immediate responsibilities of the soldier in the course and performance of his duty under the paramount authority from which that legislation derives its right to be, we should have to inquire whether we could gather from any act of Congress the intention to permit what might become the instrument of dangerous attacks upon its power. It is a wholly different question from that where a soldier, not in the performance of his duty, commits an ordinary crime. But we do not understand the Penal Code to have the suggested scope.

Judgment reversed.

The same judgment will be entered in Nos. 224 and 225, which were to abide the result of this case.

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[8] *CHIN LOW, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 8–13.)

Habeas corpus — in Chinese exclusion cases.

Habeas corpus should be granted by the Federal courts to a Chinese person, claiming to be a citizen of the United States, who has arbitrarily been denied such a hearing and opportunity to prove his right to enter the United States as the exclusion acts demand, and has been placed in custody of a steamship company, to be returned to China, pursuant to the decisions of the commissioner of immigration and the Department of Commerce and Labor.

[No. 76.]

Submitted December 13, 1907. Decided January 6, 1908.

APPEAL from the District Court of the United States for the Northern District of California to review an order denying the petition for a writ of habeas corpus in behalf of a Chinese person in the custody of a steamship company for deportation. Reversed with directions to issue the writ.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** submitted the cause for appellant.

Assistant Attorney General **Cooley** submitted the cause for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition for habeas corpus by a Chinese person, alleging that he is detained unlawfully by the general manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of [11] the United *States, born in San Francisco of parents domiciled there, but it discloses that the commissioner of immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal, and the order allowing the same. But the petition further alleges that the petitioner was prevented by the officials of the commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing, and such an opportunity to prove his right to enter the country, as the statute meant that he should have. The question is whether he is entitled to a writ of habeas corpus on such a case as that.

Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the district court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and *Labor did not [12] accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the district judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what, we must analyze a little.

If we regard the petitioner, as in Ju Toy's Case it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction (198 U. S. 263, 49 L. ed. 1044, 25 Sup. Ct. Rep. 644), still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in Bird v. Jones, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of en-[13]trance by being allowed to pass the *frontier in custody for the determination of his case. But, on the question whether he is wrongly imprisoned, we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in United States v. Sing Tuck, 194 U. S. 161, 169, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed.

Writ of habeas corpus to issue.

Mr. Justice **Brewer** concurs in the result.

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*PEOPLE OF THE STATE OF NEW YORK [14]
EX REL. EDWARD AND JOHN BURKE, LIMITED, Plff. in Err.,
v.
JAMES L. WELLS, William S. Cogswell, George J. Gillespie, Samuel Strasbourger, and Rufus Scott, as Commissioners of Taxes and Assessments of the City of New York.

(See S. C. Reporter's ed. 14-25.)

Commerce — state tax on imports.

The cash on hand and notes owned by a foreign corporation, doing business in the state as importers, which are the proceeds of the sale of imported goods in the unbroken original packages, may be taxed under N. Y. Laws 1896, chap. 908, § 7, as capital employed in business within the state, without infringing the prohibition of U. S. Const. art. 1, § 10, against taxing imports, although the bulk of the proceeds of such sales is remitted to the home office in Ireland, where it is customary to hold the notes in New York for collection, and to retain there sufficient sums to meet the local expenses of the business and to pay the duties on subsequent importations.

[No. 39.]

Argued November 5 and 6, 1907. Decided January 6, 1908.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York, to review a judgment entered pursuant to a mandate of the Court of Appeals of that state, affirming the order of the Appellate Division of the Supreme Court, First Department, which had, in turn, affirmed an order of the Supreme Court at Special Term, dismissing a writ of certiorari to review an assessment for taxation on the capital of a foreign corporation, employed in business within the state. Affirmed.

See same case below in Court of Appeals, 184 N. Y. 275, 12 L.R.A.(N.S.) 905, 77 N. E. 19.

Statement by Mr. Justice **Day:**

This is a writ of error to the supreme court of the state of New York to review the judgment rendered upon a remittitur from the court of appeals of the same state, wherein an assessment of taxes against the plaintiff in error, imposed by the board of taxes and assessments of the city of New York, who are the defendants in error, was affirmed. The taxes were for the year 1903, and were imposed under the statutes of the state of New York taxing nonresidents of the state doing business in the state, on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state. N. Y. General Tax Law, chap. 908, Laws of 1896, § 7.

The respondents, in the return to the [15] writ of certiorari issued *by the supreme court of New York, stated that the method by which the assessment for the year 1903 was arrived at was as follows:

"On the statement submitted to us (schedule A), it appeared that the relator was a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that it had procured a certificate authorizing it to do business in this state, that the business of the corporation proposed to be carried on within this state, stated in its application under the provisions of chapter 687 of the Laws of 1892, was importers, that the place within the state named in said application as its principal place of business was 409 West Fourteenth street, that the company transacted business within this state at No. 409 West Fourteenth street, in the city of New York, borough of Manhattan, and that the company was assessed by the state comptroller for $124,000.

"It further appeared that the relator kept a wareroom and offices in the borough of Manhattan, to which it sent its products from Ireland in unbroken original packages to be sold, that on all these goods it paid duties to the United States, that the proceeds of the goods were at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in the city of New York, that the value of the goods on hand, as shown in the statement, was about the average amount of the goods usually kept here for sale, that the greater part of the cash on hand and in bank was in process of transmission to the main office, that the bank account was, to a very large extent, kept to cover the payment of duties on the goods shipped here for sale, and that the entire amount of bills receivable resulted from the sales of imported goods in unbroken original packages, as did the cash on hand and in bank.

The amount receivable on notes and open accounts was stated to be	$111,751 53
The value of goods, wares, and merchandise in this state	45,841 21
[16] *The value of safes, fixtures, and furniture in this state	797 68
Cash on hand and in bank	6,122 63
Cost price of imported goods on hand in unbroken original packages	45,841 21
Amount of bills and accounts payable, incurred for items included in the sales and assets enumerated	24,053 91

"It was admitted that the amount invested in business in this state was $797.68, which was the value of the relator's safes, fixtures, and furniture in this state.

"From all this evidence we determined that the relator had, on the second Monday of January, 1903, established and was conducting a permanent and continuous business in this state.

"We further determined that the amount receivable on notes and open accounts, and the cash on hand and in bank, constituted capital of the relator invested in its business in this state, and that such items were properly assessable by us. We accordingly fixed the assessment against the relator for the year 1903 for capital invested in business in this state at the sum of $94,000, which amount was approximately the aggregate value of the amount receivable on notes and open accounts, the safes, fixtures, and furniture in this state, and the cash on hand and in bank, less the amount of bills and accounts payable incurred for the items included in the sales and assets enumerated in said statement."

The assessment was confirmed when brought for review upon certiorari before the New York supreme court, which judgment was affirmed in the appellate division, and the latter judgment was affirmed by the court of appeals (184 N. Y. 275, 77 N. E. 19), from which judgment, upon remittitur, the judgment was rendered in the supreme court, to which this writ of error is prosecuted.

Mr. **Edmund Wetmore** argued the cause and filed a brief for plaintiff in error:

A state tax upon the proceeds received for the sale of an article in original and unbroken packages, imported only for sale, and upon which duties have been paid, and where the only disposition made of said proceeds is to collect them and at once remit them to the importer abroad, after deducting the amount of duties paid and the expenses necessarily incident to said importation and sale, is a tax upon imports, and a violation of the Constitution of the United States.

Brown v. Maryland, 12 Wheat. 436, 442, 444, 448, 6 L. ed. 684, 686-688; Fairbank v. United States, 181 U. S. 283, 295, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648; People v. Maring, 3 Keyes, 376; Cook v. Pennsylvania, 97 U. S. 566, 571, 573, 24 L. ed. 1015, 1017, 1018; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The tax cannot be sustained simply as a tax on business.

Crandall v. Nevada, supra.

The proceeds in question had not become part of the common mass of the property within the state.

Hibernia Sav. & L. Soc. v. San Francisco, 200 U. S. 310, 50 L. ed. 495, 26 Sup. Ct. Rep. 265; People ex rel. National Sewing Mach. Co. v. Feitner (March 15, 1899; N. Y. L. J.).

Mr. **George S. Coleman** argued the cause, and, with Mr. Francis K. Pendleton, filed a brief for defendants in error:

The tax imposed upon the credits and moneys representing proceeds of sales did not contravene the provisions of the Federal Constitution.

New York v. McLean, 170 N. Y. 374, 63 N. E. 380; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Waring v. Mobile, 8 Wall. 110, 19 L. ed. 342; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 402, 51 L. ed. 856, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 403, 51 L. ed. 1112, 27 Sup. Ct. Rep. 712.

Mr. Justice **Day** delivered the opinion of the court:

It is the contention of the plaintiff in error that the assessment upon $94,617.93, made upon office furniture, cash on hand and in bank, and the amount receivable upon bills and accounts payable, is void, except as to the item of office furniture, because of the protection afforded by the Constitution of the United States against taxes by states upon imports.

As to the open accounts which might be included in the bills receivable, the court of appeals declined to pass upon the *validity [20] of the taxes on them, as, according to the practice in that state, it was incumbent upon the relator to point out what part of the bills receivable were of that class, but did hold that the cash, and the notes which, it was admitted, were held in New York until maturity, although the proceeds of sale of goods imported and sold in the original packages, were properly within the taxing power of the state of New York under the section of the statute referred to, and that such exercise of power did not violate the Constitution of the United States.

The section of the Constitution relied upon by the plaintiff in error in the argument in this court is article 1, § 10, which provides:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The contention of the learned counsel for plaintiff in error is succinctly stated in his brief as follows:

"The ground taken by the plaintiff in error is that the tax on the proceeds of the goods in original packages in the course of transmission to the owner abroad is, in essence and effect, a tax upon the sale of said goods, and, therefore, a tax upon imports and a violation of the Constitution under the principle laid down in Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, and the cases following that decision."

The case referred to (Brown v. Maryland) is the leading one upon this subject, and has been cited perhaps as often as any of the great decisions of Chief Justice Marshall, and not attempted to be modified in the subsequent decisions of this court. In that case this section, as well as article 1, § 8, the commerce clause of the Constitution, were given consideration by the court. It was held that an act of the state of Maryland, *which required an importer of foreign mer- [21] chandise, under certain penalties, to take out a license from the state, for which he should be taxed $50, before he should be authorized to sell the imported articles in the original packages, was in violation of the commerce clause of the Constitution and within the prohibition on the states of the right to levy duty on importations. And in this connection the Chief Justice discussed and laid down certain general principles by which to determine whether an act of the legislature does interfere with the paramount purpose of the Constitution in these respects.

In a late case in this court, Brown v. Maryland is fully considered, and the following propositions are said to be established in that case:

"1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right to sell cannot be forbidden or impaired by a state.

"2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, 'in his warehouse, in the original form or package in which it was imported,' is a duty on imports within the meaning of the Constitution; and

"3. That a state cannot, in the form of a license or otherwise, tax the right of the importer to sell; but, when the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the state in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate." May v. New Orleans, 178 U. S. 496-507, 44 L. ed. 1165-1169, 20 Sup. Ct. Rep. 976-980.

In Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015, it was held that the tax by the state on the amount of sales of goods made by sales by an auctioneer of imported goods, before incorporation in-[22]to *the general property in the state, was a tax on the goods themselves. Previous cases were reviewed by Mr. Justice Miller, and the result of them stated to be:

"The tax on sales made by an auctioneer is a tax on the goods sold within the terms of this last decision, and, indeed, within all the cases cited; and, when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."

And in the late case of American Steel & Wire Co. v. Speed, 192 U. S. 518, 48 L. ed. 545, 24 Sup. Ct. Rep. 365, the distinction was pointed out between taxes upon goods imported from abroad—imported in the legal sense—and those sent from another state; as to which latter class of merchandise the states have the power, after the goods reach their destination and are held for sale, to tax them. Whereas, following Brown v. Maryland, where goods are imported in the strict sense, they preserve their character as imports so long as they are not sold in the original packages in which they are imported, or by the act of the importer incorporated into the general property of the state.

It may be stated as the result of the decision that, as to imported goods, the state may not impose taxes directly upon the goods or upon the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original package unincorporated into the general property. All such attempts at taxation are in violation of the Constitution and void.

But in Brown v. Maryland, and in subsequent cases in this court, the principle is recognized, as was stated by Chief Justice Marshall in the original case, that this prohibition in the Constitution should be carried "no further than to prevent the states from doing that which it was the great object of the Constitution to prevent;"—which was interference with either the collection of duties upon imports or the right of the importer, who has paid duty, to sell the imported goods in the unbroken packages in which they were imported.

*The Chief Justice instanced the case of [23] the peddler who carried goods unpacked from the original packages for sale through the country, and the case of the importer of plate for his own use, whose privileges did not extend beyond the protection of the right of the importer to sell in the original packages, and whose conduct in reference to the goods had been such as to destroy their character as original packages and mingle them with the goods and property of the country, and thus, notwithstanding their importation, to make them, for the purpose of taxation, part of the general property of the country and liable to contribute, in consideration of the protection received, to the general welfare, by way of taxes levied for public purposes. This right of taxation by the state was distinctly recognized in May v. New Orleans, supra, where the goods imported in the original packages were separated therefrom and placed on the shelves and counters of the importing merchant.

The exact question in this case is, Has a condition of facts arisen which renders applicable the principle that the thing taxed has lost its distinctive character as an import in such sense that it has become subject to the taxing power of the state?

The power of the state of New York to impose a tax upon the cash and these notes as capital employed in a business within the state, laying aside for the moment the question as to their character as proceeds of the sale of imports, cannot be doubted in view of the previous decisions of this court. Particularly the recent case of Metropolitan L. Ins. Co. v. New Orleans, decided at the last term (205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499), wherein it was held that those engaged in the business of lending money in a state, being nonresidents of the same, might be taxed upon the capital employed in such business, precisely as the state could tax the capital of its own citizens.

The constitutional protection, as we have seen, is intended to secure the right to bring [24]in, and to sell in the original packages, *the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied; and the decision in Brown v. Maryland recognizes that the importer may lose this right of protection by mingling such goods with other property, and altering their character as importations in original packages, and making them by his conduet subject to the taxing power of the state. And we think the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.

And we think such a case is presented in the facts now before us. The plaintiffs in error have established a warehouse and place of business in the state of New York for the sale of their imported goods. This business is of a permanent character; the goods are constantly received and sold and replaced by other goods. Cash is deposited in bank in New York, and is subject to use as the needs of the business may require. In this business it takes notes for sales of such goods. These notes are not directly transmitted to its home office in Dublin, but are held for collection in connection with the business in New York; and while the bulk of the proceeds may be sent abroad, sufficient sums are retained to meet the expenses of the business and pay duties on subsequent importations of goods.

We think the constitutional protection afforded the importer against state action does not require the property thus held and used to be exempted from state taxation. While it is true that a large proportion of proceeds of the notes after collection are sent to the home office of the plaintiffs in error, they are not taxed in transit as the proceeds of sale of imported goods; for the notes are held in New York for collection, and, when paid, a part of the proceeds are held for other purposes in connection with the business, and the balance remitted to the home office.

*By reason of this course of conduct, we[25] thinks these proceeds have lost that distinctive character which would give them the right to the protection of the Federal Constitution under the clause invoked, and the cash taxed and the amount of these notes have become capital invested in business in the state of New York, which business is carried on under the protection of the laws of that state, and, so far as the capital is invested in it, is subject to taxation by the laws of the state.

We think the Court of Appeals did not err, and the judgment of the Supreme Court rendered upon remittitur from the Court of Appeals is affirmed.

YOSEMITE GOLD MINING & MILLING COMPANY, Plff. in Err.,
v.
E. L. EMERSON, Mrs. A. L. Emerson, F. F. Britton, Jacob Miller, F. L. Argall, and Harry Argall.

(See S. C. Reporter's ed. 25-32.)

Mines — lack of notice of location — who may raise objection.

1. One who attempts to relocate a mining claim on the theory that the required amount of annual assessment work has not been done, with full knowledge of the location and boundaries of the claim, cannot assert a forfeiture of title for failure, on the part of the original locators, to comply with the mining rules respecting notices of location.

Error to state court — questions reviewable — review of facts.

2. The decision of the highest court of a state that the determination of the trial court, based on conflicting testimony, that the original locators of a mining claim had resumed their assessment work within the meaning of U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, before an attempted adverse relocation, was conclusive on appeal, does not amount to a denial of the right of relocation claimed under that section, so as to permit a review in the Supreme Court of the United States on writ of error.

[No. 69.]

Argued December 13, 1907. Decided January 6, 1908.

NOTE.—As to relocation of mining claim as abandoned or forfeited—see note to Wilson v. Freeman, 68 L.R.A. 833.

As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts, see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

IN ERROR to the Supreme Court of the State of California to review a judgment which, on a second appeal, affirmed a judgment of the Superior Court of Toulumne County, in that state, quieting title to a mining claim. Affirmed.

See same case below, 149 Cal. 50, 85 Pac. 122.

The facts are stated in the opinion.

Mr. **W. C. Kennedy** argued the cause, and, with Mr. A. H. Jarman, filed a brief for plaintiff in error.

Mr. **John E. Laskey** argued the cause, and, with Mr. J. P. O'Brien, filed a brief for defendants in error.

Mr. Justice **Day** delivered the opinion of the court:

This case originated in an action brought to quiet title to a certain mining claim called the Slap Jack Mine, situated in Tuolumne county, California. The case was twice in the supreme court of California. In the first trial the superior court of Tuolumne county gave judgment in favor of the then defendant McWhirter; on appeal this judgment was reversed. 133 Cal. 510, 65 Pac. 1036. After the case went back, the present plaintiff in error, the Yosemite Gold Mining & Milling Company, as the successors in interest to McWhirter and defendants Argall, was made a defendant.

As to the Argall interest, covering nine twentieths of the property, based on the same location. While judgment was rendered in the court below, as to this interest, against the present plaintiff in error, in the supreme court a new trial was awarded and the case remanded, and with that interest we have nothing to do upon this writ of error.

As to the remaining eleven twentieths, the court rendered a final judgment against the present plaintiff in error, Yosemite Gold Mining & Milling Company, decreeing that the defendants in error F. F. Britton and Anne L. Emerson were each the owner of one undivided fourth part of the claim, and defendant in error Miller the owner of the one undivided twentieth part thereof. 149 Cal. 50, 85 Pac. 122. To this judgment the present writ of error is prosecuted.

We proceed to examine the questions which are now in this court. The mining claim of the Yosemite Gold Mining & Milling Company, plaintiff in error, is based upon the attempted location thereof within the same limits as the original Slap Jack Mine, made by McWhirter on January 1, 1899, shortly after midnight. McWhirter undertook to "jump" the former claim upon the theory that the assessment work for the year [29]*1898 required by § 2324, Rev. Stat., as amended 1880, U. S. Comp. Stat. 1901, p. 1426, had not been done.

The first contention made by the plaintiff in error is that one Coyle, under whom the defendants in error claim title, never made a valid location of the mining claim, because he posted but one notice of location upon the claim. Under the authority of § 2324, Revised Statutes, supra, the miners of every mining district are given authority to make regulations not in conflict with the laws of the United States or any state or territory in which the district is situated. U. S. Comp. Stat. 1901, p. 1426. Section 3 of the mining rules and regulations of Tuolumne mining district of Tuolumne county, California, provides:

"Sec. 3. Mining claims hereafter located in said district upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner, to wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. Said notice may be in the following form, to wit:

" 'Notice is hereby given that the undersigned have taken up — hundred feet of this vein or lode, and that the claim so taken up is described as follows: (Here insert description.) Dated — day of ——, 18 —.

A. B.
C. D.' "

The supreme court of California held that its decision in the present case upon this question was concluded by the ruling made upon the first appeal, which decision continued to be the law of the case. Upon the first appeal (133 Cal. 510, 65 Pac. 1036) it was held that the failure to comply with the mining *rules in this respect would not [30] work a forfeiture of title, inasmuch as there was nothing in the rules which made noncompliance a cause of forfeiture; that, unless the rule so provided, the failure to comply with its requirements would not work a forfeiture. The court cited other California cases to the same point and cases from the supreme court of Arizona (Rush v. French, 1 Ariz. 99, 25 Pac. 816; Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. 130); also the decision of Judge Sawyer in Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666. There seems to be a conflict in state decisions upon this subject. The supreme court of Montana differs with the supreme court of California. King v. Edwards, 1 Mont. 235–241. As does also the supreme court of Nevada. Mallett v. Uncle Sam Gold & S. Min. Co. 1 Nev. 188, 90 Am. Dec. 484. Lindley, in his work on Mines, seems to prefer the California rule as a "safe and conservative rule of decision, tending to the permanency and security of mining titles." I Lindley, Mines, 2d ed. § 274. But, in view of the facts of this case, we do not deem it necessary to decide whether a forfeiture will arise simply from a violation of this mining regulation.

It appears in this record that McWhirter's location was made about three years after the Coyle location, and after the record of the notice and the marking of the claim on the grounds so that the boundaries could be readily seen. Furthermore it appears from the testimony of McWhirter:

"I knew the Jim Blaine Mine, formerly the Slap Jack Mine. I went on the property first on Saturday, December 31st, 1898. I went with James Paul. I looked over the ground. Mr. Paul showed me the boundaries of the claim. I ascertained the different points of the claim and the monuments. . . . When I attempted to locate the claim known as the Jim Blaine Mine, I was attempting to 'jump' or relocate the Slap Jack Mine. The ground embraced within the exterior boundaries of the Jim Blaine Mine was the same ground included within the exterior boundaries of the Slap Jack Mine. When I was on the ground on December 31, 1898, I knew the boundaries [31] of *the Slap Jack Mine. They were pointed out to me by Mr. Paul on December 31, 1898."

In further course of examination he testifies that he was sent up by another party to jump the Slap Jack Mine. McWhirter was not undertaking to take advantage of the want of notice, but was "jumping" the claim on the theory that the required amount of assessment work for 1898 had not been done. To hold that the want of notice under such circumstances would work a forfeiture would be to permit the rule to work gross injustice and to subvert the very purpose for which it was enacted. The object of posting the preliminary notice of the claim is to make known the purpose of the discoverer to claim title to the same to the extent described, and to warn others of the prior appropriation. Lindley, Mines, 2d ed. § 350. In this case the locator had gone beyond this preliminary notice; the outlines of the claim had been marked, and the extent of the claim was fully known to McWhirter when he attempted his location. He knew all about the location and boundaries of the claim that any notice could have given him. He undertook to locate his new claim precisely within the boundaries of the old one, and was seeking to take advantage of the want of compliance with the statutory requirement as to the amount of annual assessment work to be done. Having this knowledge, we hold that McWhirter, and those claiming under him, could not claim a forfeiture of title for want of preliminary notice under the former location. We thus dispose of the only question which could be held to raise a Federal question. Upon the other points made as to the McWhirter interest, we think this case presents no Federal question.

The contention is made that the assessment work required by § 2324, Revised Statutes, was not done for the year 1898. As pointed out by the supreme court of California, § 2324 provides: The mine "shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal *representatives, [32] have not resumed work upon the claim after failure and before such location." The trial court found that the work had been resumed before the attempted adverse location. After reciting the conflict of testimony in the trial court as to whether the work had been resumed within the meaning of the statute, so as to prevent such adverse location, the supreme court said: "It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal."

In thus deciding, the supreme court of the state did not, within the meaning of § 709 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 575, decide any right of Federal origin adversely to the plaintiff in error. It simply held that there was a conflict of testimony in the record upon this subject, and that the conclusion of the court below upon this matter of fact was conclusive upon the appellate court. This does not amount to a denial of a Federal right, concerning which the plaintiff in error had especially set up his claim so as to give the right of review of the decision of the state supreme court in this court. Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, and cases therein cited.

The judgment of the Supreme Court of California is affirmed.

UNITED STATES, Appt.,
v.
WILLIAM G. MILLER.

(See S. C. Reporter's ed. 32–38.)

Navy — extra pay — of flag lieutenant as aid to rear admiral.

1. A lieutenant in the Navy, assigned to

duty on the personal staff of a rear admiral as flag lieutenant, is entitled to the extra pay due an aid of the rear admiral, although he is not technically designated as an aid in the provisions of the Navy Regulations of 1896, §§ 343–345, authorizing such selection, and although such regulations expressly provide for the selection of juniors to the flag lieutenant to serve as aids.

Navy — longevity pay.

2. Longevity pay of a naval lieutenant is not to be based upon his increased allowance as an aid to a rear admiral, under the act of June 30, 1882 (22 Stat. at L. 118, chap. 254, U. S. Comp. Stat. 1901, p. 896), providing that such pay shall be computed on the yearly pay of the grade.

[No. 90.]

Submitted December 16, 1907. Decided January 6, 1908.

APPEAL from the Court of Claims to review a judgment awarding extra pay, and longevity pay based upon such extra pay; to a lieutenant in the Navy, assigned to duty on the personal staff of a rear admiral as flag lieutenant. Modified by disallowing longevity pay so far as based upon the additional pay, and as so modified affirmed.

See same case below, 41 Ct. Cl. 400.

The facts are stated in the opinion.

Solicitor General **Hoyt**, Assistant Attorney General **Van Orsdel**, and Mr. **John Q. Thompson** submitted the cause for appellant.

Messrs. **George A. King** and **William B. King** submitted the cause for appellee.

Mr. Justice **Day** delivered the opinion of the court:

This case is an action in the court of claims, brought by William G. Miller, a lieutenant in the Navy, and who served as flag lieutenant on the personal staff of Rear Admiral Kautz from July 1, 1899, to March 2, 1900, for which period he claims that he is entitled to recover pay at the additional rate of $200 a year, as an aid to the rear admiral, and, secondly, an additional sum for longevity increase, based upon this additional allowance. The facts were found by the court of claims and judgment rendered in favor of the claimant upon both branches of his claim. 41 Ct. Cl. 400. From this judgment the United States appeals.

It is the contention of counsel for the appellee, claimant below, that this case is ruled by the decision of this court in United States v. Crosley, 196 U. S. 327, 49 L. ed. 497, 25 Sup. Ct. Rep. 261, upon both branches.

From the findings of fact, it appears that the claimant was a lieutenant in the Navy from July 1, 1899, to March 2, 1900, of more than fifteen years' service. On October 15, 1898, he reported, by order of the Secretary of the Navy, to Rear Admiral Kautz, commander in chief of the Pacific division, *for such duty as might be assigned [34] him on the flagship. On that day he was assigned to duty on the personal staff of the commander in chief as flag lieutenant, where he continued to serve until March 2, 1900. During that time the personal staff of Rear Admiral Kautz consisted of two officers, one, the claimant, Miller, designated as flag lieutenant, and the other, flag secretary or clerk.

In the findings of fact the duties of the officers constituting the personal staff are set forth in a letter from the Secretary of the Navy, which we shall have occasion to notice later.

The claim for additional pay, as aid to Rear Admiral Kautz was predicated upon §§ 1098 and 1261 of the Revised Statutes, U. S. Comp. Stat. 1901, pp. 807 and 893, providing aids to major generals, and fixing an allowance of $200 a year in addition to the pay of the rank of such aid, and the opening clause of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1004, chap. 413, U. S. Comp. Stat. 1901, p. 982), giving to commissioned officers of the line of the Navy and of the Medical and Pay Corps the same pay and allowances, except forage, as are or may be provided for officers of corresponding rank in the Army. These sections of the statutes were considered in United States v. Crosley, supra, and it was held that the allowance of extra pay was due to the aid of the rear admiral, corresponding to the extra pay allowed to the aid of the major general in the Army. The difference in this respect between the Crosley Case and the one now under consideration is, that the claimant in that case was designated as an aid, while in the present case the claimant was assigned to duty on the personal staff of the commander in chief as flag lieutenant; it is therefore claimed that he is not entitled to the extra compensation due only to an aid to the rear admiral. This argument is predicated on §§ 343, 344, and 345 of the regulations of the government of the Navy, 1896, which are as follows:

"Sec. 343. The chief of staff, flag lieutenant, clerk, and aids shall constitute the personal staff of a flag officer.

"Sec. 344. (1) A flag officer, when ordered to a command afloat, may, at his discretion, nominate to the Secretary of the

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NOTE.—As to extra pay or compensation to officers—see note to United States v. Macdaniel, 8 L. ed. U. S. 587.

[35]*Navy a line officer not above the rank of lieutenant to serve on his staff as flag lieutenant, and a line officer not above the rank of lieutenant, junior grade, to serve as clerk.

"(2) The flag lieutenant, in addition to his other duties, shall be the fleet signal officer.

"Sec. 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344.

"(2) He may also, when necessary, select other line officers junior to the flag lieutenant, to serve on his personal staff as aids, but shall not assign naval cadets to such duty." Regulations for the Government of the Navy of the United States, 1896–97.

It is the contention of the counsel for the government that this language clearly indicates that a flag lieutenant on the staff of a rear admiral, designated in paragraph 1, § 345, is to be distinguished from aids junior to the flag lieutenant designated in paragraph 2 of the section. But we think it would be giving a too narrow interpretation of the purpose of Congress to give naval officers the same pay as officers of corresponding rank in the Army, to construe this regulation to deny such pay to a flag lieutenant because he may not have been technically designated as an aid. And, taking the regulation literally, it does not necessarily follow that because the rear admiral may select a junior to the flag lieutenant to serve on his personal staff as aid, that the one designated as flag lieutenant or clerk might not also be regarded as an aid. Be this as it may, we think the statute should be construed so as to effect the purpose of Congress, and that a determination of who are aids should be arrived at by a consideration of the nature and character of the duties of the officers constituting the personal staff of a flag officer. Referring to the letter of the Secretary of the Navy, embodied in the finding of facts, we find:

"As in the case of a general officer of the Army, these officers, including the flag lieutenant, are, in every acceptation of the [36]*word, aids for assisting the commander in chief, in the performance of his duties. The number of officers thus assigned is limited only by the actual necessities of the case. In very large fleets, where the staff work is especially heavy, two or three so-called aids may be necessary in addition to the flag lieutenant and the secretary. They are all, from flag lieutenant to the lowest aid in point of rank, aids in every sense of the term to the flag officer. The senior aid of the flag officer is, in ninety-nine cases out of a hundred, chosen by the flag officer personally as a flag lieutenant. The term 'flag lieutenant' in itself by no means indicates all the duties which the officer so appointed performs. Different flag officers distribute their duties among the members of the personal staff in different ways. Some have charge of one thing, or set of things, another has charge of other things; but, from time immemorial, in other naval services as well as our own, it has been customary to term the senior aid of the flag officer the 'flag lieutenant,' because, from time immemorial also, that aid has been placed in charge, as one of his duties only, of the signal work of the fleet or squadron in which he may happen to be serving.

. . . . . .

"It will be seen from this that the flag lieutenant is in every respect the aid, peculiarly, of the flag officer, and his duties, in comparison with those of an aid to a general officer, more nearly conform to those performed by a military aid than do those of any other officer on the personal staff of a flag officer."

In view of the character of the duties thus required of a flag lieutenant, who is to all intents an aid to the rear admiral, we are of opinion that the court of claims did not err in its decision on this branch of the case, that the claimant was entitled to the increased pay awarded to the aid of a major general, at the rate of $200 a year.

As to the contention that longevity pay should be computed on the whole amount of the claimant's pay, including this allowance as aid, we think the court of claims was in error. Indeed, there is a strong indication in the opinion of the learned *judge[37] delivering the opinion in that court that this allowance would not have been made but for the supposed ruling in United States v. Crosley, supra. It is true that in Crosley's Case the longevity pay, as computed, was based upon the $200 additional allowance on account of services as aid, but the correctness of this method of computation was not disputed. Two questions were made in that case: First, as to the right of the claimant to the extra $200 allowed to the aid of a major general in the Army; second, as to whether he was entitled to "mounted pay" allowance to major generals' aids. Upon well-settled principles the case could not be authority for a point neither made nor discussed nor directly decided, and only incidentally involved, therein.

Considering the question as one of first impression, we think the statute makes it perfectly plain that longevity pay is not to be based upon the increased allowance to an aid. The Revised Statutes, § 1262, U. S. Comp. Stat. 1901, p. 896, provides:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

In the case of United States v. Tyler, 105 U. S. 244, 26 L. ed. 985, this court held that current yearly pay upon which longevity increase was to be computed should include previous longevity increases, and in United States v. Mills, 197 U. S. 223, 49 L. ed. 732, 25 Sup. Ct. Rep. 434, it was held that the 10 per cent increase upon "pay proper" of the compensation of officers serving beyond the continental limits should be computed upon the total amount which the officer was entitled to receive at the time of such service, both for longevity pay and the pay provided by § 1261 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 893). But we have to deal in this case with the statute of June 30, 1882 (22 Stat. at L. 118, chap. 254, U. S. Comp. Stat. 1901, p. 896), which provides:

"That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by section twelve [38] hundred *and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four of the Revised Statutes."

This statute was doubtless passed to prevent the computation of longevity pay by compounding previous pay for that purpose, which had the effect to give the increase on the pay of the grade, and also on the previous longevity increase. This amendatory act distinctly limits the computation of increase pay for length of service to yearly pay of the grade or rank of the officer entitled thereto. The allowance of $200 a year under § 1261, Revised Statutes, in "addition to the pay of his rank," is manifestly not the yearly pay of the grade. The purpose of the additional allowance is to compensate the officer during the time he is designated for a special service as aid. His longevity pay is to be computed on the yearly pay affixed by law to the grade or rank to which the officer belongs.

The judgment of the Court of Claims, based upon computation of longevity pay upon the additional allowance for pay as aid, cannot be sustained, in view of the statutory provision, and to that extent the judgment of the Court of Claims must be modified, and, as so modified, affirmed.

WABASH RAILROAD COMPANY, Plff. in Err.,
v.
ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY et al.

(See S. C. Reporter's ed. 38-59.)

Courts — conflict of jurisdiction — when state jurisdiction excluded.

1. The exclusive jurisdiction of a Federal circuit court arising out of the possession of the *res* in a suit to foreclose a railroad mortgage may be so continued, after the delivery of the property to the purchaser under the foreclosure decree and the discharge of the receiver, by reserving in such decree jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale, as to prevent a state court from thereafter decreeing a sale of the property to satisfy the lien of certain equipment bonds in a suit begun before the property was taken into the possession of the Federal court.

Judgment — conclusiveness as to persons not parties — representative suit.

2. A decree of a Federal circuit court, dismissing, for want of equity, a bill filed by several holders of railroad equipment bonds "on their own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of, and join in the prosecution of, this suit," to obtain a sale of the railroad property to satisfy the lien of such bonds, is not a bar to the claim for a lien of holders of the equipment bonds who were not parties to that suit.

[No. 40.]

Argued November 6, 7, 1907. Decided January 6, 1908.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Circuit Court of Lucas County, in that state, rendered on an appeal from the Court of Common Pleas of that county, ordering a sale of railroad property in satisfaction of a lien of certain equipment bonds. Reversed.

See same case below, 74 Ohio St. 483, 78 N. E. 1141.

Statement by Mr. Justice Moody:

This is a writ of error directed to the supreme court of the state of Ohio. In that court the defendants in error obtained a decree declaring that certain negotiable notes held by them, which had been made by the Toledo & Wabash Railway Company, were entitled to a lien on property once owned by that company and now owned by the plaintiff in error, and ordering a sale in satisfaction of that lien. The Federal questions presented and such facts as are deemed material to their decision are stated in the opinion.

Mr. **Rush Taggart** argued the cause and filed a brief for plaintiff in error:

The prior and exclusive jurisdiction of all the property involved in this case was in the Federal court from the time of the appointment of the receivers of the Wabash Railroad proper, in May, 1884, and the taking possession by such receivers of all the property, and the Federal court has never relinquished such jurisdiction, and, therefore, the state court could have no jurisdiction to determine the questions presented in this case, and the state court completely failed to give due force and effect to the decree of foreclosure entered in the Federal court on the 23d of March, 1889.

Hagan v. Lucas, 10 Pet. 400, 403, 9 L. ed. 470, 471; Williams v. Benedict, 8 How. 107, 112, 12 L. ed. 1007, 1008; Peale v. Phipps, 14 How. 368, 375, 14 L. ed. 459, 461; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Heidritter v. Elizabeth Oil-Cloth Co. 112 U. S. 294, 304, 28 L. ed. 729, 732, 5 Sup. Ct. Rep. 135; Pulliam v. Osborne, 17 How. 471, 475, 15 L. ed. 154, 155; Williams v. Benedict, 8 How. 107, 12 L. ed. 1007; Taylor v. Carryl, 20 How. 583, 616, 617, 15 L. ed. 1028, 1040, 1041; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; People's Bank v. Calhoun (People's Bank v. Winslow) 102 U. S. 256, 261, 262, 26 L. ed. 101–103; Covell v. Heyman, 111 U. S. 176, 182, 183, 28 L. ed. 390, 392, 393, 4 Sup. Ct. Rep. 355; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; Bispham, Eq. §§ 413, 414; Hogue v. Curtis, 1 Jac. & W. 449; Fennings v. Humphery, 4 Beav. 1; Kerr, Inj. 103, 106; Schoole v. Sall, 1 Sch. & Lef. 176; Taylor v. Waters, 1 Myl. & C. 266; French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 857; Peek v. Jenness, 7 How. 624, 625, 12 L. ed. 846, 847.

As to the power of the court to render a decree with such reservations as appear in the decree of March 23, 1889, there can be no question whatever.

Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

The state court failed to give due force to the decree of the circuit court of the United States for the district of Indiana in the case of Ham and others against the Wabash, St. Louis, & Pacific Railway Company.

When causes are dismissed upon final hearing, and the dismissal signed by the Lord Chancellor, such action shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of a bill of review.

Ordinances of Lord Bacon, No. 13; Barton's Suit in Equity, p. 207.

The decisions of this court are in conformity with the principle thus announced by Lord Bacon.

Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. Rep. 691.

This Ham suit was a litigation brought under the well-recognized rule that where a proceeding is one of common interest, and the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue for the benefit of all.

1 Dan. Ch. Pl. & Pr. pp. 239, 240; Smith v. Swormstedt, 16 How. 303, 14 L. ed. 948; Pennock v. Coe, 23 How. 117, 16 L. ed. 436; Re Chickering, 56 Vt. 89; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Willink v. Morris Canal & Bkg. Co. 4 N. J. Eq. 377; New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Shaw v. Norfolk County R. Co. 5 Gray, 162; Campbell v. Texas & N. O. R. Co. 1 Woods, 376, Fed. Cas. No. 2,366; Richmond v. Irons, 121 U. S. 27, 44, 30 L. ed. 864, 869, 7 Sup. Ct. Rep. 788; Belmont Nail Co. v. Columbia Iron & Steel Co. 46 Fed. 336; Small v. Attwood, Younge, Exch. 458; Chancey v. May, Prec. in Ch. 582; Adair v. New River Co. 11 Ves. Jr. 444; Carpenter v. Cincinnati & W. Canal Co. 35 Ohio St. 307; Quinlan v. Myers, 29 Ohio St. 510; Matheny v. Golden, 5 Ohio St. 361; Adler v. Whitbeck, 44 Ohio St. 555, 9 N. E. 672; Cincinnati Street R. Co. v. Smith, 29 Ohio St. 303; Hurlburt v. Butenop, 27 Cal. 50; McIntosh v. Pittsburg, 112 Fed. 705; Sewer Comrs. v. Gellatly, L. R. 3 Ch. Div. 610; Willoughby v. Chicago Junction R. & Union Stock-Yards Co. 50 N. J. Eq. 656, 25 Atl. 277; Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; Dewey v. St. Albans Trust Co. 60 Vt. 1, 6 Am. St. Rep. 84, 12 Atl. 224; Beach, Modern Eq. Pr. § 66.

Mr. **John W. Warrington** argued the cause, and, with Messrs. John C. F. Gardner, Thomas B. Paxton, Jr., and Murray Seasongood, filed a brief for defendants in error:

The Federal question asserted must have merit.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783.

The Ohio courts cannot be said to have refused to give due effect to the Federal decree and deed; the Ohio judgments merely decide that the Federal court decree could not reach a matter like this, which was not before it.

Avery v. Popper, 179 U. S. 305, 314, 45 L. ed. 203, 206, 21 Sup. Ct. Rep. 94.

The possession and exclusive control of the Wabash property ended in the United States courts when the property was conveyed by the master commissioners to the purchasing committee and the receivers were discharged.

Compton v. Jesup, 167 U. S. 1, 31, 34, 42 L. ed. 55, 66, 67, 17 Sup. Ct. Rep. 795.

Holders of liens have a choice of forums (their citizenship or other condition being such as to enable them to exercise a choice), and no court can adjudicate such liens or the rights thereunder without the presence, either actual or constructive, of the parties.

Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; Borer v. Chapman, 119 U. S. 587, 599, 30 L. ed. 532, 536, 7 Sup. Ct. Rep. 342.

Before any question could arise here as to what effect the Ohio courts in this cause gave to the judgment of dismissal in the Ham case, this court would have to determine whether the Ham suit was a class case. It is a question of general law, not a Federal matter, whether the Ham case was a class suit. If it was not, then the defendants in error could not be bound by it at all; nor were the courts of Ohio obliged to acquiesce in the judgment of dismissal of the Federal court in Indiana.

Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 390, 36 L. ed. 191, 199, 12 Sup. Ct. Rep. 530; San Francisco v. Itsell, 133 U. S. 65, 67, 33 L. ed. 570, 571, 10 Sup. Ct. Rep. 241; Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 548, 31 L. ed. 235, 238, 8 Sup. Ct. Rep. 211; Adams County v. Burlington & M. River R. Co. 112 U. S. 123, 127, 28 L. ed. 678, 680, 5 Sup. Ct. Rep. 77; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

The receivership and foreclosure proceedings in the Federal courts from 1884 to July, 1889, have no effect upon the case at bar, which was begun in the Ohio courts prior thereto, and the issues were not finally made up or trial had of the case in the state court until after the receivership and foreclosure proceedings had ended and the property been conveyed and delivered to the plaintiff in error.

Compton v. Jesup, 167 U. S. 1, 42 L. ed. 55, 17 Sup. Ct. Rep. 795; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Heidritter v. Elizabeth Oil-Cloth Co. 112 U. S. 294, 304, 28 L. ed. 729, 732, 5 Sup. Ct. Rep. 135; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; Attleborough Nat. Bank v. Northwestern Mfg. & Car Co. 28 Fed. 113; Shields v. Coleman, 157 U. S. 168, 178, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; United States v. Eisenbeis, 50 C. C. A. 179, 112 Fed. 196; Stanton v. Embrey, 93 U. S. 548, 554, 23 L. ed. 983, 984; Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 592, 593, 24 L. ed. 737, 739, 740; Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. ed. 383, 386; Beekman v. Hudson River W. S. R. Co. 35 Fed. 10; Weaver v. Field, 4 Woods, 152, 16 Fed. 22.

The Ham suit never was a representative suit.

Pugh v. Fairmount Gold & S. Min. Co. 112 U. S. 238, 244, 28 L. ed. 684, 687, 5 Sup. Ct. Rep. 131; Brooks v. Vermont C. R. Co. 14 Blatchf. 466, Fed. Cas. No. 1,964; Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; Coann v. Atlanta Cotton Factory Co. 4 Woods, 503, 14 Fed. 4; Powell v. Wright, 7 Beav. 449; Gates v. Bucki, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 968.

Mr. Justice **Moody** delivered the opinion of the court:

In 1862 the Toledo & Wabash Railroad Company owned and operated a railroad in Ohio and Indiana, and was incorporated under the laws of both states. That part of the property situated in Ohio was then encumbered by two mortgages, one to the Farmers' Loan & Trust Company for $900,000, and one to Edwin D. Morgan, trustee, for $1,000,000. That part of the property situated in Indiana was then encumbered by two mortgages, one to the Farmer's Loan & Trust Company for $2,500,000, and one to Edwin D. Morgan, trustee, for $1,500,000. In that year the company issued and sold unsecured sealed negotiable notes to the amount of $600,000, called equipment bonds. In 1865 this company consolidated with certain Illinois railroad corporations, thus creating the Toledo, Wabash, & Western Railway Company. This consolidation was authorized by and in part effected under a statute of Ohio. The holders of the equipment bonds have contended that the result of this consolidation was to give to these hitherto unsecured obligations an equitable lien upon the property of the corporation which issued them, and that the equity of redemption of that property went into the hands of the consolidated corporation encumbered by that lien. Upon this *question [44] this court and the supreme court of Ohio have, in the past, arrived at opposite conclusions; this court holding (114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081) that the equipment bonds remained unsecured, and the Ohio court holding (45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380) that the effect of the consolidation was to create the lien claimed. This suit was brought by the defendants in error, holders of some of the equipment bonds, in the courts of Ohio for the purpose of enforcing the lien stated. They prevailed by the judgment of the supreme court of the state, which affirmed a decree of a lower court establishing the indebtedness upon the bonds, declaring a lien to secure the payment of that indebtedness upon the property owned, subject to the mortgages hereinbefore stated, by the Toledo & Wabash Railway Company in 1865, and directing a sale of such of that property as was within the state of Ohio, in satisfaction of the lien.

The case is here upon a writ of error to the supreme court of Ohio to review this judgment. There are two Federal questions, it is contended, which were erroneously decided in the court below. The plaintiff in error insists: First, that the Ohio court had no jurisdiction to render the decree entered in the case, because the property affected by that decree was in the possession of a circuit court of the United States, and the questions litigated in this case were within the exclusive jurisdiction of the latter court. Second, that the decree of the circuit court of the United States for the district of Indiana in the case of Ham v. Wabash, St. L. & P. R. Co. was a final adjudication of the issues in the case at bar, binding upon the defendants in error, and conclusive against their right to maintain this suit. The defendants in error contend that these questions were not properly raised in the court below, or, if properly raised, that they are so unsubstantial as to be frivolous, and therefore move that the writ of error be dismissed. But the questions were clearly presented by the answer in the Ohio courts, the decree rendered could not have been made without deciding them against [45] the contention of the railroad *company, and we think that they are substantial and important. The motion to dismiss is therefore overruled, and we proceed to the discussion of the merits of the questions.

1. The first question is whether a circuit court of the United States had exclusive jurisdiction of the issues determined by the Ohio court in the case at bar. Before beginning the discussion of that question it is necessary to state the facts out of which it arises. The Toledo, Wabash, & Western Railway Company, whose property was encumbered, as we have seen, by mortgages of the Toledo & Wabash, for $5,900,000, and by the claim of lien of the equipment bonds, and by other mortgages upon the property of other corporations which entered into the consolidation, itself executed two mortgages upon all its property. By the foreclosure of one of these mortgages the property became vested in the Wabash Railway Company. This company, after executing a mortgage on its property, consolidated with another railway company, creating the Wabash, St. Louis, & Pacific Railway Company. This company executed in 1880 a mortgage on its property to the Central Trust Company of New York and James Cheney for $50,000,000. On May 27, 1884, the Wabash, St. Louis, & Pacific Railway Company, having fallen into financial difficulties, filed a bill in the Federal courts in six states, alleging its insolvency and asking the appointment of receivers. Thereupon receivers were appointed, qualified, and took possession of the property. Thereafter the Central Trust Company and Cheney began proceedings in several state courts for the foreclosure of their mortgage of $50,000,000. These proceedings were removed to the Federal courts, and upon them a sale, under the direction of those courts, was made in 1886 to a purchasing committee. Before this sale, however, on October 17, 1884, the circuit court of the United States for the western division of the northern district of Ohio dismissed the bills for receivership and for the foreclosure of the Cheney mortgage as to all parties who claimed liens prior to that mortgage. After the sale upon the foreclosure of the Cheney mortgage, *pro- [46] ceedings for foreclosure of several other mortgages prior to it were begun in the circuit courts of the United States, consolidated, and resulted in decrees for foreclosure and sale under all the mortgages. These decrees were entered in the various circuit courts on March 23, 1889. In the meantime the property remained in the possession of the circuit court, through its receivers. The sale under these decrees was made to a purchasing committee, by whom it was conveyed to a new corporation, the Wabash Railroad Company, the plaintiff in error. By order of the circuit court for the northern district of Ohio, made on June 18, 1889, possession of the property was delivered by the receiver to the purchasing committee, and he was discharged. Since August, 1889, the plaintiff in error, the Wabash Railroad Company, has been in possession of the property under the terms of the decrees of March 23, which presently will be stated. None of the defendants in error were parties to the proceedings in the circuit courts of the United States, and an attempt to remove this case from the Ohio courts to the circuit court of the United States, resisted by the defendants in error, failed. Joy v.

Adelbert College, 146 U. S. 355, 36 L. ed. 1003, 13 Sup. Ct. Rep. 186.

It appears from this statement that the railroad property affected by this controversy was in the actual possession, through receivers, of circuit courts of the United States from the date of the appointment of receivers, May 27, 1884, to the date of their discharge and the delivery of the property to the purchasing committee, which was ordered on June 18, 1889, and was accomplished about July 1, 1889. It cannot be and apparently is not disputed that, during that period, the property was in the possession of the circuit courts of the United States, and that that possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property. But it is earnestly contended that, when the property passed out of the actual possession of the United States courts, in conformity with their decrees, into the hands of the purchasers under the decrees, the exclusive [47]*jurisdiction of the United States courts came to an end. The applicability of this contention to the case at bar will appear upon a fuller statement of the origin and progress of the case at bar in the courts of Ohio. The suit was begun on April 28, 1883, by Adelbert College alone, which was the owner of two of the equipment bonds, each of the par value of $500, and prayed for the decree which, with some variations, not material to be stated, was finally given. Nothing of moment, beyond the service of process and the filing of pleadings, occurred until 1889, when several other holders of the equipment bonds joined in the suit as coplaintiffs, by filing, with leave of court, what is denominated an answer and cross petition, in which they prayed relief similar to that sought by the original plaintiff. This petition is verified on January 2, 1889, but the date of its filing does not appear in the record. Later, other similar cross petitions were filed by leave of court. Pleadings continued to be filed from time to time by the different parties to the suit, the last appearing in the record being one verified March 9, 1896, thirteen years after the beginning of the suit and seven years after the discharge of the receiver by the Federal court. The cause was then heard by the court of common pleas, and judgment was rendered for the bondholders in July, 1897, which, after affirmance by an intermediate court, was affirmed by the supreme court of the state. It appears, therefore, that the trial and judgment in the state courts were long after the Federal courts had transferred the railroad property to the purchasers under the decrees for foreclosure, and had discharged the receiver. Since the Federal courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decrees under which the property was sold and conveyed which preserved to the courts the control of the property for the purpose of giving full effect to its judgments. We are brought, then, to the consideration of the terms of those decrees. Upon their proper interpretation and true effect our *decision must rest. For the cor-[48] rect understanding of the decrees, and especially of the reservations contained in them, it is necessary to ascertain the progress and present status of still another litigation. James Compton, an owner of some of the equipment bonds, in a suit brought upon them in the Ohio courts in 1880, obtained a decree by the judgment of the supreme court of the state, ascertaining the amount due him in respect of the bonds and accrued interest, declaring that he was entitled to an equitable lien on the property owned by the Toledo & Wabash Railway Company at the time of the consolidation of 1865, subject to the mortgages upon that property then existing, and ordering, in default of payment of the sum found due, a sale of that part of the property which was within the state of Ohio. Compton v. Wabash, St. L. & P. R. Co. 45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380. The entry of judgment on the mandate of the supreme court was made in the court of common pleas in October, 1888. Thereupon the circuit court for the northern district of Ohio, western division, made Compton a party to the consolidated foreclosure suit, and ordered him to appear and plead, answer or demur. Compton appeared specially and set up his Ohio judgment. Various proceedings have been had with respect to his claim, including a judgment in this court in May, 1897 (Compton v. Jesup, 167 U. S. 1, 42 L. ed. 55, 17 Sup. Ct. Rep. 795), affirming Compton's lien and right to a sale in satisfaction of it. After the decision of this court, Compton's claim was sent to a master, who, after some ten years, made a report, which is now pending on exceptions in the circuit court. At the time of the decrees of foreclosure of March, 1889, the questions concerning Compton's claim were, of course, undecided, and account of them had to be taken in these decrees.

The decree of March 23, 1889, is very elaborate. The parts of it material here may be stated with comparative brevity. It ordered the foreclosure of all the mortgages upon the railroad property in the possession of the court, and the sale of the property, and the disposition of the proceeds among those adjudged to be rightfully entitled to it. After reciting that *the property is in[49]

the possession of the court through its receiver, the decree directs that, in default of payment, within ten days, of mortgage bonds and their coupons, scrip certificates, funded debt bonds, and their coupons, amounting altogether to some fourteen millions of dollars, the property should be sold at public auction to the highest bidder. It was ordered that the separate divisions should first be offered for sale separately, that afterward the whole property should be offered for sale as a unit, and that the method of sale which resulted in the better price should stand. The special masters appointed to conduct the sale were directed, on confirmation of the sale and payment of the purchase price, to execute a deed or deeds which "shall vest in the grantee or grantees all the right, title, estate, interest, property, and equity of redemption, *except as hereby reserved*, of, in, and to" the property in fee simple. The decree then proceeds to define what is "hereby reserved." The part of the decree which expresses the reservation is so vital in the determination of the case that it is printed in full in the margin.†
[50] In ascertaining its true *meaning and effect the whole situation, as it could be and doubtless was seen by the court, must be kept in view. The property had been in the possession of the court and managed *through its receiver for five years. It was [51] desirable that it should pass into the hands of responsible owners, freed, as far *as possible, [52] from all prior liens and encumbrances. The question whether Compton had a lien and right of sale to satisfy it was unsettled, and would naturally be so for some time to come. He was a party to the suit. Many other holders of the equipment bonds, whose primary rights were like his, were seeking in the Ohio courts to obtain the same judgment which had there been awarded to him. None of them were parties to the suit in the United States courts, but their claims and the relief which the state court might give them could not be overlooked by a discerning court or a prudent purchaser. These facts and the considerations which arose out of them called upon the court to continue its grasp upon the property and its control of exclusive jurisdiction over it, both for the sake of those who had just claims upon it and for the sake of those

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†All other questions arising under the pleadings or proceedings herein, not hereby disposed of or determined, are hereby reserved for future adjudication, including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time, on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection, and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance in the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the supreme court of the state of Ohio in the suit brought by said James Compton against The Wabash, St. Louis, & Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered, and affected of the said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the supreme court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor, by a resale of such property or otherwise, as this court may direct.

And it is further ordered and adjudged that, notwithstanding the entry of this decree, the said issue concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul, or abridge any right, claim, interest, or lien which the said James Compton may have in, to, or upon the premises hereby directed to be sold or any part thereof, or in, to, or upon any property whatsoever embraced in this decree; it being the intention to hereby prewho might purchase under the decree. A sale could not properly or safely be made upon any other conditions. The decree reserves: 1. All questions arising under the pleadings and proceedings for further adjudications. 2. The rights of Compton, which, when determined, may be enforced, after a resumption of possession by the court, by a resale of the property or otherwise. 3. The costs, expenses, debts, and liabilities of the receivers, which are made a charge upon the property, to be enforced by a retaking and sale of the property. All the foregoing reservations are clearly and unmistakably made, the purchasers are warned that they must take title subject to the rights thereafter to be ascertained, to which the reservations relate, and the jurisdiction of the court over the questions and the right of the court to retake and resell the property are in terms preserved. Moreover, we are of the opinion that the decree, fairly interpreted in the light of the circumstances, made a still broader reservation. It is ordered that "any sale . . . of the railway and property . . . shall not have the effect of discharging any part of said property from the payment, or contribution to the payment, . . . upon intervening claims allowed, or to be allowed, or upon any other claims or allowances that have been, or may hereafter *be, charged against [53] the property;" and that the "jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property . . . shall be fully paid;" and that the reservations shall not have the effect "to give to any claims that may exist any validity, character, or status superior to what they now have, nor to decide or imply that any such claims exist;" and that "the effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist." This sweeping language, colored as it is by the last paragraph quoted, with its reference to claims which have liens prior in right to the mortgages, must be held to

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serve the rights of said Compton in the relation in which he now stands towards the mortgagees, parties hereto.

Any sale, conveyance, or assignment of the railway and property hereinabove described, made under this decree, shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property, and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis, & Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis, & Pacific Railway Company, or any part thereof, or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors, either by this court or by the circuit court of the United States for the eastern district of Missouri, or by any United States circuit court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis, & Pacific Railway Company, or any part thereof, or by any United States circuit court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis, & Pacific Railway Company and others in the circuit court of the United States for the eastern district of Missouri, including the receivers, have been by the said circuit court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court, or otherwise.

Nor shall any such sale, conveyance, transfer, or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property, in whole or from time to time in part, to be released to the purchaser or purchasers thereof, or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts, and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors, shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis, & Pacific Railway Company or any part thereor, or said receivers, by order of said courts, shall be fully paid and discharged.

The provisions aforesaid shall apply to the purchasers of the same under this decree, include claims under the equipment bonds. Such a reservation would be natural, in view of the facts that the rights under the equipment bonds were uncertain, and their holders not parties to the suit, and therefore not affected by the foreclosure. Wiswall v. Sampson, 14 How. 52, 67, 14 L. ed. 322, 328; United Lines Teleg. Co. v. Boston Safe Deposit & T. Co. 147 U. S. 431, 448, 37 L. ed. 231, 237, 13 Sup. Ct. Rep. 396; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 515, 43 L. ed. 528, 535, 19 Sup. Ct. Rep. 238. The effect of the decree is to say to any purchaser under it, you must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making this statement good the court reserves jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale. It is obvious, therefore, that the court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. We may now consider the question whether the state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered.

[54] *When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union. Hagan v. Lucas, 11 Pet. 400, 9 L. ed. 470; Williams v. Benedict, 8 How. 107, 12 L. ed. 1007; Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Peale v. Phipps, 14 How. 368, 14 L. ed. 459; Pulliam v. Osborne, 17 How. 471, 15 L. ed. 154; Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; People's Bank v. Calhoun (People's Bank v. Winslow) 102 U. S. 256, 26 L. ed. 101; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Krippendorf v. *Hyde, 110 U. S. 276, 28 L. [55] ed. 145, 4 Sup. Ct. Rep. 27; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; Heidritter v. Elizabeth Oil-Cloth Co. 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Johnson v. Christian, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008.

The state courts in the case at bar, in deference, it is said by counsel, to these well-established principles, deferred action until after the property had been conveyed

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and all persons taking such property through or under them, but the foregoing provisions shall not, nor shall any reservation in this decree contained, have the effect or be construed, nor are they or any of them intended, to give to any claims that may exist any validity, character, or status superior to what they now have, nor to decide or imply that any such claims exist.

The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances, if found and decreed to exist.

And the court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

to the purchasers under the decree of foreclosure and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the circuit court ended, and the right of the state court to resume its normal jurisdiction revived: As this suit was begun before the property was taken into the possession of the circuit court, and when, therefore, the state court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570, the possession of the circuit court and its relation to the *res* had come to an end. But the circuit court attempted, in the decree of March 23, to prolong its control of the property beyond the conveyance to the purchasers and the discharge of the receivers, up to the point of time when the claims therein stated should be ascertained and the just remedy for them applied, and to reserve the right to retake the property for those purposes. The effect of reservations in a decree of foreclosure, which, to say the least, were no broader than those in this decree, was before the court in Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399. The reservations in that case are stated on page 110, and of them the court said (p. 111): "It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser;" and [56] again (p. 112): *"The Federal court, by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court;" and again (p. 113): "The circuit court, by the order made, retained jurisdiction of the case to settle all claims against the property, and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed." Here was a clear determination by this court that the exclusive jurisdiction of claims against a *res*, which had arisen out of the possession of the *res* in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property, for the purpose of deciding what claims were legally chargeable against it. This is precisely what the circuit court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the Julian Case. Under the reservations in that case the circuit court was held to have power to protect the property sold by its order from sale on an execution issued by a state court. The state court was thought to be without power to direct such a sale, even though its judgment was based upon a claim arising after the conveyance of the property, because, under the peculiar facts of the case, the judgment and execution in effect annulled the Federal decree. The principle underlying that case, however, which is material here, is that the jurisdiction over the *res* could be continued by reservations, after the physical possession of the property had been abandoned. This court there said (p. 112): "The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun." It needs but a moment's consideration of the facts in the case at bar to convince that, if the exclusive jurisdiction of the Federal court were denied, every evil which that doctrine was designed to avert would be let in. Sometime, it is to be supposed, there will be a sale by order of the Federal court to satisfy Compton's lien. If the sale by the state court of the same property to satisfy other lienholders of equal rank with *Compton is allowed to proceed, which sale [57] will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions, that Compton has been made a party to this suit in the state court. He is still a party to the proceedings in the Federal court, and he must find satisfaction for his claim there. We are of the opinion that by the effect of the reservation in the decree of March 23, 1889, the exclusive jurisdiction of the Federal court over the property therein dealt with has continued, notwithstanding the conditional conveyance, and that it still exists. The defendants in error must pursue their remedy in that court, which doubtless will consider the decisions of the state courts on questions of state law with the respect which the decisions of this court require. It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed.

2. There remains for decision the question whether the court below erred in declining to hold that the case of Ham v. Wabash, St. L. & P. R. Co. conclusively adjudicated the merits of the claims of the defendants in error.

The record in that case must now be examined. A suit brought in a state court in 1878 by David J. Tyron, a holder of equipment bonds, against the Wabash Railway

Company, then the owner of this railroad property, was removed to the circuit court of the United States for the district of Indiana. The suit was heard on a supplemental bill filed by Benjamin F. Ham and several other persons, who together owned equipment bonds of the par value of $113,500. The complainants alleged that the suit was brought "on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." No notice of the pendency of the suit was given to the other holders of the bonds other than by this allegation in the bill. The circuit court, after due hearing, [58]entered a *decree declaring that the bonds were entitled to a lien on the property owned by the Toledo & Wabash Railroad Company at the time of the consolidation of 1865, to secure the payment of principal and interest, and ordering, in default of payment, a sale of the property in satisfaction of the lien. This decree was reversed by this court. Wabash, St. L. & P. R. Co. v. Ham, 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081. Thereafter the bill was dismissed for want of equity by the circuit court. It is contended that the judgment in this case is a bar to the claim for lien of all the holders of the equipment bonds, whether they were parties or privies to that suit, or not. Accordingly the judgment in the Ham Case was pleaded in the state court in this case as a bar to the suit. The theory of the plea in bar is that the Ham suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. It was held otherwise by the circuit court of appeals with respect to this very judgment (Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263), and in that opinion we concur. We do not deem it necessary to follow the learned counsel for the plaintiff in error in his elaborate discussion of the nature of representative suits, and the effect of judgments in them upon those who are not parties or privies. Nor is it necessary to go beyond the facts of this case, or to consider what suits may be of such a nature and effect. In this suit Ham might have proceeded alone, as Compton did, or with others who chose to join with him. The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join. Some may have preferred another jurisdiction, some perhaps could not join without destroying the diversity of citizenship, upon which alone the jurisdiction was based, or some, possibly, had never heard of the pendency of the suit. It is clear if such suits in the circuit courts of the United States could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged. We find *no controlling authority which leads us[59] to such a conclusion. We think that the Ham suit was not a representative suit in the sense that the judgment in it bound the defendants in error who were not parties to it.

But for the reasons already given the judgment must be reversed.

Mr. Justice **Harlan** and Mr. Justice **Peckham** dissent from that part of the judgment which decides that the jurisdiction of the Federal court was exclusive after the delivery of the property to the purchaser under the foreclosure decree and the discharge of the receiver.

Rehearing denied March 9, 1908. See post, 642.

FRANCIS WINSLOW et al., Trustees, et al.,
Plffs. in Err.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 59–63.)

Estoppel — by accepting award in eminent domain proceeding.

1. By accepting the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are estopped to insist that the petition was not maintainable.

Eminent domain — when proceeding is functus officio — effect of accepting award.

2. A condemnation proceeding becomes *functus officio* where the owners of the condemned property, who originally insisted that the petition could not be maintained, have accepted and received the sum awarded as the value of so much of their lands as was actually taken, and such owners therefore cannot thereafter demand the condemnation of the remaining land, although they have neither asked for nor received the sum awarded as the amount of the damage to the portion of their lands not actually taken.

[No. 59.]

Argued December 9, 10, 1907. Decided January 6, 1908.

NOTE.—As to estoppel by receiving benefits—see note to Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co. 38 L. ed. U. S. 478.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, confirming an award made in condemnation proceedings. Affirmed.

See same case below, 28 App. D. C. 126.

The facts are stated in the opinion.

Mr. **William G. Johnson** argued the cause and filed a brief for plaintiffs in error.

Messrs. **George E. Hamilton** and **John W. Yerkes** argued the cause, and, with Messrs. M. J. Colbert and John J. Hamilton, filed a brief for defendant in error.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to the court of appeals of the District of Columbia. The case under review is a proceeding for the condemnation of land needed for the approach to the Union station in Washington. The plaintiffs in error were the owners of a lot of unimproved land containing 90 acres. It was of irregular shape, and one of its shorter boundary lines was a public highway called Brentwood road. The construction of a union station and the approaches to it of all the steam railroads entering Washington was provided for by two acts of Congress approved February 12, 1901 (31 Stat. at L. 767, 774, chaps. 353, 354), and an act approved February 28, 1903 (32 Stat. at L. 912, chap. 856).

Section 3 of the second of the two acts of 1901 (31 Stat. at L. 775, chap. 354) directed that certain streets be "completely vacated and abandoned by the public and closed to public use." Among them was Brentwood road between S street and Florida avenue. The part of Brentwood road which bounded the plaintiffs in error's land was included in the part thus directed to be closed. Section 5 of the act of 1903 "vacated, abandoned, and closed" certain other streets, including a further portion of Brentwood road, and enacted that "no streets or avenues shall *be closed or abandoned under the [61] provisions of this act or of the acts relating to the Baltimore & Ohio Railroad Company and the Baltimore & Potomac Railroad Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said railroad company or companies or the terminal company referred to herein, either by condemnation or purchase."

In 1904 the defendant in error filed an "Instrument of Appropriation," in which it sought to condemn about 6/10 of an acre of the land of the plaintiffs in error, to carry out the purposes of the act of 1903. This land was a small part of the land of the plaintiffs in error which abutted on Brentwood road, and part of it was desired, according to the allegation of the Instrument of Appropriation, "to be used for relocating and changing" a part of Brentwood road which had been closed by the act of Congress. The plaintiffs in error filed an answer, alleging in substance that the railroad company was without power to condemn part of their land abutting on Brentwood road, but must, in obedience to the act of Congress, condemn the whole, and that the company had no authority to lay out streets or reopen or relocate a street which Congress had directed to be closed, and therefore could not condemn land for that purpose. The answer concluded by asking a dismissal of the proceeding. The objections raised by the answer were heard by a justice of the supreme court of the District, and, on October 18, 1904, overruled by him. To this ruling there was an exception duly taken. There were thus raised upon the record two questions, in the decision of which, it is earnestly and forcibly argued by counsel, there was error. The two questions are: First, whether the statute, under the provisions of which the condemnation proceedings were had, required the taking of all the land in a single ownership, which abutted on a street closed by the act, irrespective of its shape or extent; and, second, whether the railroad company had any authority to change or relocate a street declared by the act of Congress *to be closed [62] and abandoned. We do not think it necessary to decide either of these questions for reasons which will now be stated.

After the ruling just stated three persons were appointed by the court to appraise the damages sustained by the plaintiffs in error by the condemnation proposed. They, having heard the parties, reported that the value of the 6/10 of an acre taken was $35,392.50 and the damage to the remaining part of the lot was $10,000. On April 20, 1905, the court confirmed the award. On the same day the railroad company, having paid the sum awarded into court, the court, on motion of the plaintiffs in error, directed the payment to them of the sum fixed as the value of the land taken. After having asked and accepted the payment of this sum of money, the plaintiffs in error noted an appeal to the court of appeals "from so much of the decree . . . confirming the return and award of the appraisers herein, as fails to require the petitioner, the Baltimore & Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein, and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation." [28 App. D. C. 129.]

If the company was without right to take a part of the land of the plaintiffs in error, unless it took more or all, or if the purpose for which the land was sought to be taken was unlawful, the proper course would be to dismiss the petition. This is what the plaintiffs in error originally asked. But, by accepting the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled; nor do they now wish or seek to do this. They wish to have the condemnation stand and to receive its fruits. What they seek to accomplish appears clearly in the notice of appeal. It is to compel the railroad to acquire the remaining 89 acres of their land. What the plaintiffs in error wish is stated [63]in other words *in the closing sentence of their brief, where it is said that the case ought to be remanded to the supreme court of the District with instructions "there to proceed to the condemnation of the remainder of the land." It is therefore obvious that the plaintiffs in error abide by the logical consequences of their request for and acceptance of the sum found to be the value of the land taken, and waive and abandon the objections to the maintenance of the petition, which they originally interposed. We think that the position which they now occupy, in place of that which they have abandoned, is untenable. This proceeding has been allowed to reach its end. The condemnation which the petition sought to have made has been made. The land described in the petition has been appraised, the compensation to be paid has been deposited with the court, and received by the owners. We do not regard the failure to ask and receive the $10,000 as important. The title to the land has vested in the railroad company. The objections to the maintenance of the petition have been waived. The counsel for the plaintiffs in error asks that the case be remanded to the supreme court of the District with instructions to proceed to the condemnation of the remainder of the land. But he does not disclose how in this proceeding that can be done. This proceeding is *functus officio*. Everything which it asked has been done. The defendant in error is satisfied and will not amend the petition. The court is without power to compel its amendment, and certainly cannot, of its own motion, file a new petition in the name and behalf of the railroad company. Even if we were of the opinion that the railroad company had taken less land than the statute required to be taken, or had taken land for unlawful uses, it would be useless now to express the opinion, and idle to remand this case, which, by the act of the plaintiffs in error, has been put in such a position that our opinion could not be made effective.

These were, in substance, the views of the court below, and its judgment is affirmed.

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*AARON BLUTHENTHAL and Monroe L. Bickart, Copartners as Bluthenthal & Bickart, Plffs. in Err., [64]

v.

ANGUS O. JONES, Administrator of Miles C. Jones, Deceased.

(See S. C. Reporter's ed. 64–67.)

Bankruptcy — discharge.

A debt owing to creditors of a bankrupt, which is provable in the bankruptcy proceedings, is none the less barred by a discharge granted without objection because the bankrupt had been refused a discharge in a prior proceeding, on the objection of the same creditors, in respect of the same indebtedness, where the ground for the refusal does not appear, and the debt is not one which, by the terms of the bankruptcy statutes, is excepted from the operation of the discharge.

[No. 94.]

Submitted December 18, 1907. Decided January 6, 1908.

NOTE.—Effect of failure to obtain a discharge in bankruptcy upon subsequent discharge.

As a general rule, where a discharge in bankruptcy has not been applied for within the required time, the principle of *res judicata* will preclude the petitioner from obtaining a discharge upon a subsequent application in the same proceeding or a subsequent proceeding in bankruptcy, which includes debts scheduled or provable in the first proceeding.

In Re Brockway, 21 Blatchf. 136, 23 Fed. 583, where a bankrupt was refused a discharge because the application was not made within the required time and the time of application was afterward extended and a second application made in the same proceeding, it was held that the matter was *res judicata* between the creditors and the bankrupt, and a bar to a second application.

In Kuntz v. Young, 65 C. C. A. 477, 131 Fed. 719, in which the question of the right to a discharge seems to have been raised by the report of the trustee showing all the facts, it was held that a failure of the bankrupt to apply in due time for a discharge from debts provable in proceedings under one petition in bankruptcy has the

IN ERROR to the Supreme Court of the State of Florida to review a decree which affirmed a decree of the Circuit Court of Polk County, in that state, enjoining sale under execution and levy to satisfy a debt, on the ground that such debt is barred by a discharge in bankruptcy. Affirmed.

See same case below, 51 Fla. 396, 13 L.R.A.(N.S.) 629, 41 So. 533.

The facts are stated in the opinion.

Messrs. **Benjamin Z. Phillips** and **John M. Slaton** submitted the cause for plaintiffs in error. Mr. H. K. Oliphant was on the brief.

M. Slaton submitted the cause for plaintiffs for defendant in error.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to the supreme

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same effect as the denial of an application, to render the question of the right of the bankrupt to a discharge from those debts in a proceeding under a subsequent petition *res judicata.*

So also in Re Weintraub, 133 Fed. 1000; Re Silverman, 157 Fed. 675; and Re Elby, 157 Fed. 935,—it was held that the failure to apply for a discharge within the required time was *res judicata* and a bar to a discharge in respect to the same debts in a second proceeding.

It is equally well settled that a debtor who has been refused a discharge, although he may prosecute a second proceeding to be discharged from debts incurred subsequent to the first adjudication, has no right in such proceeding to be discharged from the debts scheduled in the first proceeding; such rule, however, being subject to the qualification established in BLUTHENTHAL v. JONES.

In Re Claff, 7 Am. Bankr. Rep. 128, where, in one bankruptcy proceeding, a bankrupt had been refused a discharge, and he then, in a second proceeding, applied for his discharge, it was said that his discharge under the second petition, if obtained, would not bar suit on a debt scheduled in the first petition and not proved in the second. But it was held that this did not prevent his filing a second petition and obtaining a discharge for what it was worth, and that in granting such discharge the court would make no exception of the debts scheduled under the first proceeding, but that these would be left for settlement as the question might subsequently arise.

And in Re Royal, 113 Fed. 140, where a debtor had been refused a discharge on his first petition and had filed a second in the same proceeding, it was held that the matter was *res judicata,* and his discharge was refused.

In Re Fiegenbaum, 57 C. C. A. 409, 121 Fed. 69, it was held that where a discharge has been refused on the ground that the bankrupt has fraudulently concealed assets from the trustee, and he has filed a second petition alleging the same facts, he should be restrained from filing and prosecuting a second application for a discharge.

In Re Kuffler, 16 Am. Bankr. Rep. 305, where a refusal to discharge had been made in one proceeding, and a second voluntary petition was filed, it was held that a refusal to discharge in the first proceeding was an adjudication adverse to the bankrupt, and that he could not, in a second proceeding, be discharged from the debts provable in the former.

And in the same case on appeal it was held, in 80 C. C. A. 508, 151 Fed. 12, that the denial of an application for a discharge from debts provable in one proceeding in bankruptcy renders the issue of the right to a discharge *res judicata* as to such debts in a subsequent proceeding, and a failure of the bankrupt to apply for a discharge within twelve months after the adjudication in the earlier proceeding has the same effect, although, if new debts and assets are involved, and a substantial time has elapsed, these may be properly adjudicated in a second proceeding.

And on a motion to stay the bankrupt from applying for a discharge from certain debts which were scheduled in the first proceeding, it was held in Re Kuffler, 155 Fed. 1018, that the matters referring to debts with relation to which a discharge was refused in the first proceeding were *res judicata* as against the bankrupt in so far as the issues involved in the original proceeding affected claims provable in that proceeding; and he was held not entitled to retry these issues in the second proceeding, although the enforcement of the debts had become barred by the statute of limitations.

But in Re Herrman, 102 Fed. 753, Affirmed in 46 C. C. A. 77, 106 Fed. 987, on opinion of court below it was held that while the refusal of a discharge under the act of 1867 would be *res judicata* upon any subsequent application for a discharge under that act, as respects the same debt, such refusal will not preclude the bankrupt from applying for a discharge upon the same facts and as to the same debt under the act of 1898, the provisions regulating discharges being quite different under the two statutes.

In accordance with the principle of the foregoing cases it has also been held that where a discharge has been refused a bankrupt under the Federal act, he may not be discharged from the same debts in a subsequent insolvency proceeding under a state law. Re Smith, 68 Cal. 203, 8 Pac. 881; Fisher v. Currier, 7 Met. 424, in which last case it was held that the right of the creditor may be waived by the actual proof of the claim in the insolvency proceedings.

For a more extended discussion of this question and of the analogous question arising in proceedings under state insolvency laws, see case note in Bluthenthal v. Jones, 13 L.R.A.(N.S.) 629, on binding effect of judgment refusing discharge in bankruptcy or insolvency.

court of the state of Florida. The plaintiffs in error were judgment creditors of Miles C. Jones, the intestate of the defendant in error. The creditors sought to enforce the judgment by a levy of execution. The question in the case is whether Jones was discharged from the debt by a discharge in bankruptcy granted to him on November 7, 1903, by the district court for the southern district of Florida, on proceedings which [65]were begun *on August 3, 1903. The debt was one provable in the bankruptcy proceeding, and, it is conceded, would be barred by the discharge, were it not that there had been a prior proceeding in bankruptcy in another district court, which, it is contended, had the effect of exempting the debt from the operation of the discharge. In the year 1900, Jones filed his petition in bankruptcy in the district court for the southern district of Georgia. Bluthenthal & Bickart, the plaintiffs in error, objected to the discharge in that proceeding, and it was refused on December 3, 1900. Bluthenthal & Bickart, at the time of the first proceeding, were creditors of Jones in respect of what may be assumed, for the purposes of this case, to be the same indebtedness now in question. The ground of the refusal does not appear. It may be assumed to have been, however, one of the two grounds specified in § 14 of the bankruptcy act [30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3427] before it was amended by the act of February 5, 1903 [32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1026]; that is to say, either that the bankrupt has committed an offense punishable by imprisonment, or, with fraudulent intent and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of accounts. Though Bluthenthal & Bickart were notified of the proceedings on the second petition for bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.

Section 1 of the bankruptcy act defines a discharge as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge appears *to have been regu-[66] larly granted, and, as the debt due to Bluthenthal & Bickart is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the district court for the southern district of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection.

Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the district court of Florida, and was not one of the debts exempted by the statute from *the operation of the discharge,[67] it was barred by that discharge. The Supreme Court of the State of Florida so held, and its judgment must be affirmed.

WILLIAM F. PROSSER, Plff. in Err.,
v.
GEORGE L. FINN.

(See S. C. Reporter's ed. 67-75.)

Public lands — entry by employee of Land Office — special agent.

1. A special agent of the General Land

Office is prevented from making a valid timber-culture entry by U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, prohibiting officers, clerks, and employees in the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public land.

Public lands — entry by employee of Land Office — reliance on erroneous ruling of Land Department.

2. Reliance, in making a timber-culture entry, upon the opinion of the Commissioner of the General Land Office, that the provisions of U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, prohibiting officers, clerks, or employees in the General Land Office from entering lands within the public domain, did not embrace a special agent of the Land Office, can confer no interest upon such special agent which will prevent the government, by its proper officer or department, from canceling his entry.

Public lands — entry by employee of Land Office — continued possession after ceasing to be employee.

3. Continuing in possession after ceasing to be a special agent of the Land Office is not the equivalent of a new timber-culture entry, where the original entry was invalid because made in direct violation of U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, while he was such special agent.

[No. 64.]

Submitted December 4, 1907. Decided January 13, 1908.

IN ERROR to the Supreme Court of the State of Washington to review a decree which affirmed a decree of the Superior Court for Yakima County, in that state, sustaining a demurrer to, and dismissing, a complaint in a suit to enforce a trust in lands held under a patent from the United States. Affirmed.

See same case below, 41 Wash. 604, 84 Pac. 404.

The facts are stated in the opinion.

Messrs. **James H. Hayden** and **Robert C. Hayden** submitted the cause for plaintiff in error. Mr. James B. Reavis was on the brief:

The prohibition of the present statute is limited to officers, clerks, and employees in the General Land Office; and, without further legislative enactment or executive regulation having the force of law, that prohibition could not be made to embrace officials or employees of local land offices.

Nebraska v. Dorrington, 2 Copps L. L. 647; Grandy v. Bedell, 2 Land. Dec. 314; Re Lock Lode, 6 Land. Dec. 105.

Special timber agents, because of the manner of their appointment and the nature of their duties, are in no sense officers, clerks, or employees in the General Land Office.

Wells v. Nickles, 104 U. S. 444, 26 L. ed. 825; Re Hall, 2 Land Dec. 814; Re Lawrence, 2 Land Dec. 819; Re Northern P. R. Co. 2 Land Dec. 820; Re Ft. Cameron Reserve, 2 Land Dec. 822; Re Montana Improv. Co. 2 Land Dec. 828; 2 Land Dec. 832; 2 Land Dec. 835; 12 Land Dec. 499; Winans v. Beidler, 15 Land Dec. 266.

As interpreted and administered by the Land Department, when the plaintiff's entry was made, the prohibition contained in U. S. Rev. Stat. § 452, U. S. Comp. Stat. 1901, p. 257, did not extend to special timber agents. This cause must be determined in conformity with the contemporaneous interpretation of the law by the Land Department.

James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; Brown v. United States, 113 U. S. 568, 570, 571, 28 L. ed. 1079, 1080, 5 Sup. Ct. Rep. 648; Iowa v. McFarland, 110 U. S. 471, 484, 485, 28 L. ed. 198, 202, 203, 4 Sup. Ct. Rep. 210; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Moore v. Cormode, 180 U. S. 167, 45 L. ed. 476, 21 Sup. Ct. Rep. 324.

If the plaintiff had been disqualified by law from entering public land when he made his entry upon the land in dispute, the entry would have been validated by the removal of his disability, which occurred four years before the date of the contest wherein his entry was canceled. The removal of his disability, coupled with the fact that plaintiff made his entry in good faith, and in conformity with a decision of the Land Department, and, for a period of seven years subsequent to his entry, and prior to the contest, had done and performed all things requisite for the acquisition of the land, under the land laws of the United States, would have been sufficient to cure the defect in plaintiff's entry, if it had been defective originally.

Mann v. Huk, 3 Land Dec. 452; Re Krogstad, 4 Land Dec. 564; Re Edens, 7 Land Dec. 229; Re Kundert, 7 Land Dec. 362; Lyman v. Elling, 10 Land Dec. 474; Kirkpatrick v. Brinkman, 11 Land Dec. 71; Phillips v. Sero, 14 Land Dec. 568; Kelly v. Quast, 2 Land Dec. 627; St. Paul, M. & M. R. Co. v. Forseth, 3 Land Dec. 446; Pfaff v. Williams, 4 Land Dec. 455; Hollants v. Sullivan, 5 Land Dec. 115; Central P. R. Co. v. Painter, 6 Land Dec. 485; Lord v. Perrin, 8 Land Dec. 536; Leary v. Manuel, 12 Land Dec. 345; Re Bright, 6 Land Dec. 602; Re Baird. 2 Land Dec. 817.

Mr. **B. S. Grosscup** submitted the cause for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

Finn, the defendant in error, holds a patent from the United States for certain lands in Yakima county, state of Washington, for which Prosser, the plaintiff in error, had previously made an entry under what is known as the timber-culture statutes.

[68] *Asserting that, in virtue of such entry, he was entitled, under the acts of Congress, to a patent from the United States, Prosser brought the present suit against Finn in one of the courts of Washington, the relief asked being a decree declaring his right to the lands and requiring the defendant to convey the legal title to him.

The court of original jurisdiction sustained a demurrer to the complaint, and dismissed the suit. And that decree was affirmed by the supreme court of Washington.

The plaintiff in error contends, as he did in the state courts, that the decision that he was not entitled, under the statutes of the United States, to a patent, denied to him a right given by those statutes. The defendant contends that, in view of his official relations to the General Land Office at the time of his entry, Prosser could not legally acquire an interest in these lands.

The case made by the complaint is substantially as follows:

On the 18th day of October, 1882, Prosser made a timber-culture entry at the proper local land office for the lands in question, and thereafter duly planted trees, and, by cultivation in good faith, improved the lands at great labor and expense. His entry complied in all respects with the statutes. 17 Stat. at L. 605, chap. 277; 18 Stat. at L. 21, chap. 55.

More than five years after that entry, on August 30th, 1888, one Grandy filed an affidavit of contest on the ground of noncompliance with the statute. But the contestant failed to prosecute his claim, and at the hearing that contest was dismissed.

Subsequently, October 28th, 1889, one Walker filed against Prosser's entry an affidavit of contest. In that affidavit various grounds of contest were specified, each of which alleged noncompliance with the provisions of the statute in respect of the planting of trees. The affidavit was afterwards amended December 1st, 1889, so as to embrace the charge that Prosser, at the time of his entry, was an acting United States timber inspector, and that, as such inspector, [69] he was prohibited by *law from making said entry; also, that the land was then settled upon and cultivated as required by law. The relief sought by the contestant Walker was the cancelation of Prosser's entry and its forfeiture to the United States.

The local land office sustained Walker's contest and gave a decision against Prosser's entry, based upon his incompetency, as inspector, to make it. In the opinion of the register it was said: "It appears from the testimony adduced at the hearing that Mr. Prosser was appointed special agent of the General Land Office, July 26, 1880, and was performing the duties as such agent at the time of initiating the entry. He was charged with the duty of caring for and protecting the interests of the government in the disposal of its public lands. His duties afforded an opportunity of gaining information of the public domain not extended to the ordinary settler. As a result of this superior advantage he selected a very desirable tract bordering upon the Yakima river at a point where there are falls well adapted to the production of power for running machinery, etc., which rendered the land more valuable than ordinary agricultural tracts. Bad faith cannot, in any wise, be imputed to the entryman, for it appears that he has expended considerable time and money attempting to grow timber on the land, but with meager results. It is situated in a dry, arid section of country, where little or no vegetation will grow without irrigation. The repeated efforts to grow trees evince good faith in an honest endeavor to faithfully comply with the law." Referring, however, to a letter addressed by the Commissioner to the local land officers, under date of July 22d, 1882, and which directed that Prosser be allowed to make payment for the lands entered by him,—in which letter the Commissioner held that a special agent did not come within the inhibition contained in § 452 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 257),—the register (the receiver concurring), said: "We are inclined to the opinion that the Commissioner erred in stating that a special agent does not come within the prohibition of the statute prohibiting employees of the Land Department from entering lands within *the [70] public domain. Of all the officers and employees connected with the General Land Office, special agents, from their peculiar duties, have the best opportunities for gaining information of lands, and we consider it a wise policy to exclude such officers from the privilege of entering lands. A great hardship has been done the contestee in this case, because we have no doubt he was led to make this entry upon the authority of the letter before referred to; but, holding to the doctrine that special agents come within the inhibition of § 452 of the Revised Statutes, we are unable to afford him the relief we would desire to give. We therefore hold that said timber-culture entry was void in its inception and recommend its cancelation."

The section of the Revised Statutes just referred to is in these words: "The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

On appeal to the Commissioner of the General Land Office, that decision was affirmed March 30th, 1892, upon the ground that the statute made it illegal for Prosser to make his entry, he being, at the time, a special agent of the General Land Office. Upon appeal to the Department of the Interior, its First Assistant Secretary, on July 7th, 1893, reversed the decision of the Commissioner and dismissed the contest of Walker, upon the authority of Grandy v. Bedell, 2 Land Dec. 314.

At a later day,—April 16th, 1894,—upon Walker's petition for a rehearing of the case by the Interior Department, Secretary Smith reversed the decision made by the First Assistant Secretary, and affirmed the decision of the Commissioner and local land office.

The complaint alleged that the decision of Secretary Smith was erroneous in law; that, resting on the construction of the statute by the Interior Department at the time of his entry, and upon the special advice of the Commissioner of the Land Office, he made his filing in good faith, diligently and [71]at great *expense and labor planted trees on and cultivated said lands, and intended in all respects to comply with the statute; that long prior to the initiation of said contests he ceased to be a special agent of the General Land Office, or to have any connection whatever with the Land Department, all of which was well known to contestant; that, in pursuance of the erroneous decisions of the Interior Department, Walker was permitted to enter the lands, he having, at the time, full knowledge of plaintiff's entries and rights; that subsequently, a patent was issued to Finn, the present defendant in error.

This case depends upon the construction to be given to § 452 of the Revised Statutes. If Prosser's original entry was forbidden by the above statute, then nothing stood in the way of that entry being canceled by order of the Secretary of the Interior in a proceeding that directly involved its validity. On the other hand, if he acquired any right by virtue of his entry, the judgment to the contrary by the Land Department was an error of law which could be corrected by a decree declaring that the title was held in trust for him by the defendant. The principle is well settled that where "one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title." Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930; *Silver v.[73] Ladd, 7 Wall. 219, 19 L. ed. 138; Cornelius v. Wessel, 128 U. S. 461, 32 L. ed. 484, 9 Sup. Ct. Rep. 122; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244; Re Emblen, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487.

The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk, or employee in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the timber-culture statute, Secretary Smith well said: "When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the act to prevent. It follows from what has herein been set out that the decision of this Department of date July 7, 1893, was in error, and the same is hereby set aside, and the decision of your office is affirmed."

It is not clear from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the Land Office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office, and are under its supervision and control with respect to the administration of the public lands. Wells v. Nickles, 104 U. S. 444, 26 L. ed. 825; 1 Land Dec. 608, 620, 696; Re Hall, 2 Land Dec. 814; Re Lawrence, 2 Land Dec. 819; Re Northern P. R. Co. 2 Land Dec. 820; Re Fond du Lac Reservation, 2 Land Dec. 821; Re Ft. Cameron Reserve, 2 Land Dec. 822; 2 Land Dec. 827; Re Montana Improv. Co. 2 Land Dec. 828; 2 Land Dec. 832; 12 Land Dec. 499. They are, in every substantial sense, employees in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands, or with the investigation of applications for patents, or with hearings before registers and receivers. Being employees in the [74] General Land Office, it *is not for the court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. The provision in question had its origin in the acts of April 25th, 1812, chap. 68, 2 Stat. at L. 716, and of July 4th, 1836, chap. 352, 5 Stat. at L. 107. The first of those acts established a General Land Office, while the last one reorganized that office. Each of those acts made provision for the appointment of certain officers, and each limited the prohibition against the purchasing or becoming interested in the purchasing of public lands to the officers or employees named in them, respectively. But the prohibition in the existing statute is not restricted to any particular officers or particular employees of the Land Office, but embraces "employees in the General Land Office," without excepting any of them.

In the eye of the law his case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who stated, in a letter, that § 452 of the Revised Statutes did not apply to special agents. That view, so far from being approved, was reversed, upon formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the Commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employee in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employee in the Land Office, he could not acquire an interest in the lands that would prevent the government, by its proper officer or department, from canceling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not [75] equivalent *to a new entry. His rights must be determined by the validity of the original entry at the time it was made.

These views dispose of the case adversely to the plaintiff, and require an affirmance of the judgment without reference to other questions discussed by counsel.

Affirmed.

FRANK BLACKLOCK, Executor of Rinaldo P. Smith, Representing the Firm of Smith, Ellett, & Company, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 75–90.)

Claims — against United States — recital in statute permitting presentation as admission.

1. The mere recital that the claimant had a prior lien, contained in the act of May 27, 1902 (32 Stat. at L. 207, 243, chap. 887), empowering the court of claims to hear and determine a claim against the government on account of a sale of real estate to satisfy unpaid internal revenue taxes, is not an admission of that fact, where it is manifest that Congress intended that the claim was to be judicially investigated, and determined according to all the facts as disclosed by the evidence adduced.

Internal revenue — enforcing lien for unpaid taxes — concurrent remedies.

2. The remedy afforded by the act of July 13, 1866 (14 Stat. at L. 98, 107, 108, chap. 184, U. S. Comp. Stat. 1901, pp. 2073, 2074, 2077), of a sale by distraint of whatever interest in real estate a distiller owned when the government's lien for unpaid internal revenue taxes attached, was not superseded by the act of July 20, 1868 (15 Stat. at L. 125, 167, chap. 186, U. S. Comp. Stat. 1901, p. 2081), § 106, empowering the Commissioner of Internal Revenue, if he deems it expedient, to proceed to enforce such lien by a regular suit in equity in a Federal court, in which all persons having liens upon, or claiming any interest in, the premises, can be made parties and can have their rights adjudicated.

[No. 65.]

Argued December 11, 1907. Decided January 13, 1908.

APPEAL from the Court of Claims to review a judgment which dismissed a petition seeking relief on account of the sale to satisfy unpaid internal revenue taxes of certain real property upon which the claimant asserts a lien. Affirmed.

See same case below, 41 Ct. Cl. 89.

The facts are stated in the opinion.

Messrs. **Francis M. Cox** and **John M. Thurston** argued the cause, and, with Mr. Charles C. Lancaster, filed a brief for appellant:

The Federal government, since the passage of the act of July 20, 1868, chap. 186, § 106, cannot enforce a lien for internal revenue taxes against real estate, however clear may be its priority, in derogation of a duly-recorded mortgage lien, through the summary process of distraint; and sale by such summary process can only convey the then-existing interest of the delinquent taxpayer in the real estate so sold.

Mansfield v. Excelsior Ref. Co. 135 U. S. 326, 34 L. ed. 162, 10 Sup. Ct. Rep. 825.

Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised.

Lewis's Sutherland, Stat. Constr. 2d ed. § 636; Rock Island County v. United States, 4 Wall. 435, 18 L. ed. 419; Galena v. Amy (Galena v. United States) 5 Wall. 705, 18 L. ed. 560.

The government never acquired any lien at all on the land in controversy, but only on the distillery premises; and, even if it had acquired such lien, it lost its priority to that of appellant through its long-continued negligence in not collecting its taxes monthly, in conformity to its own mandatory laws, and in not enforcing its rights under the warehousing and official bonds of the distiller.

United States v. Pacific R. Co. 4 Dill. 71, Fed. Cas. No. 15,984.

Mr. **Charles F. Kincheloe** argued the cause, and, with Assistant Attorney General Van Orsdel, filed a brief for appellee:

The provision for sale by proceedings in chancery is purely cumulative and optional with the government officials, leaving it wholly within the discretion of the government in all cases to sell either by distraint or by proceedings in chancery.

Mansfield v. Excelsior Ref. Co. 135 U. S. 326, 34 L. ed. 162, 10 Sup. Ct. Rep. 825; Alkan v. Bean, 8 Biss. 83, Fed. Cas. No. 202.

There is nothing whatever in the statute inconsistent or in conflict with the prior and then-existing provisions of the statutes for sale by distraint; and, such being the case, under a familiar and well-established rule of construction, it must be held not to have modified or restricted the provisions of the prior statute.

Sutherland, Stat. Constr. § 217.

There is also to be considered in the construction or interpretation of this statute the fact of the long-continued and practically unquestioned interpretation and practice of the Treasury Department, extending over a period of nearly forty years, holding its application in the enforcement of such liens on the property of distillers to be optional and within the discretion of the government, and in no wise to preclude enforcement by distraint.

Sutherland, Stat. Constr. § 309; Edwards v. Darby, 12 Wheat. 206, 210, 6 L. ed. 603, 604; United States v. State Bank, 6 Pet. 29, 39, 8 L. ed. 308, 311; United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587; United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; United States v. Finnell, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633.

Mr. Justice **Harlan** delivered the opinion of the court:

This appeal brings up for review a judgment in the court *of claims dismissing a [76] petition filed in that court against the United States.

So far as it is necessary to state the facts, the case is substantially as follows:

Smith, Ellett, & Company, a firm composed of Rinaldo P. Smith and Francis M. Ellett, were engaged in business as leather and commission merchants in Baltimore from some time in 1867 or 1868 to January 1st, 1870.

On the 26th of October, 1869, George J. Stephens, a distiller and tanner in Virginia, was indebted to Smith, Ellett, & Company in the sum of $7,000, already due, and in the further sum of $2,000, to become due in the course of future dealings. On the same day a certain deed was executed between Stephens of the first part, Beazley, trustee, of the second part, and Smith and Ellett, doing business as Smith, Ellett, & Company, of the third part. It recited that Stephens was indebted to Smith, Ellett, & Company in the sum of $4,000, evidenced by the bond or demand note of Stephens dated October 26th, 1869, and that Smith, Ellett, & Company had accepted, for the accommodation of Stephens, a draft for $3,000, and had agreed to accept a further accommodation draft for $2,000. In order that said acceptances in addition to the note for $4,000 might be secured, Stephens, by deed dated October 26th, 1869, conveyed to Beazley a tract of land containing about 400 acres, more or less, in Greene county, Virginia, upon which Stephens then resided, with the mansion house and all buildings thereon, including a tannery and distillery, and all things appurtenant thereto, "in trust to secure the said bond of $4,000, and all the acceptances already made and given as aforesaid, now current and to become payable, and all acceptances to be hereafter made and given as aforesaid, and all which may be made and given for renewal of former ones, or to replace the money paid by the party of the first part in taking up former ones as aforesaid, or in any other manner as stated in the premises, so as the same shall not exceed the sum of $5,000."

The property conveyed was worth more than $3,000. The *deed was duly acknowl- [77]

edged and recorded on the 30th day of October, 1869.

When that deed of trust was executed and recorded there was due from Stephens to the United States government internal revenue taxes which had accrued from July, 1867, to October 26th, 1869, amounting to $4,000.

On the 25th of January, 1870, Smith and Ellett executed the following instrument of writing: "Baltimore, January 25, '70. We hereby give our consent to the use of the distillery premises of Geo. J. Stephens, situated on the Harrisonburg turnpike, about 4 miles from Stannardsville, and which premises contain about 3 acres of land, more or less, immediately surrounding the distillery building, and which building is contained thereon or comprised therein by said Geo. J. Stephens, subject to the provisions of the internal rev. law, and that the lien of the United States for taxes and penalties hereafter incurred shall have priority, to the extent of the above-mentioned premises, of a certain deed of trust executed by said Geo. J. Stephens for our benefit, and whereof Wyatt S. Beazley is trustee, and that in case of the forfeiture of the said distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from said deed of trust."

In order to satisfy the above taxes and the penalties authorized by law, the collector of internal revenue for Virginia, by his deputy, Lawson, during December, 1870, distrained the distillery building and about 3 acres (of the 400-acre tract) upon which the distillery stood, and advertised the property for sale. Prior to any sale the distillery buildings and contents, including a quantity of whisky, were destroyed by fire. The collector thereupon, before the day of sale, extended his distraint so as to include the balance of Stephens's land, amounting in all to about 525 acres, which included the land embraced by the trust deed to Smith, Ellett, & Company, and advertised all of said land for sale. Pursuant to the advertisement, the deputy collector, on January 12th, 1871, offered the whole of Stephens's land for sale

[78] at public auction. Smith, being present *as a member of Smith, Ellett, & Company, gave formal notice of the above deed of trust, asserting a prior lien under it to that of the government, and protesting against the sale of the land except subject to that lien. The deputy collector proceeded with the sale and the property was bid in for the government for $4,239.50, that being the amount of delinquent taxes, penalties for nonpayment thereof, and costs of distraint and sale. One year thereafter, January 12th, 1872, that officer executed a deed to the United States, which was duly acknowledged and recorded on November 25th, 1873.

Under the authority conferred upon the Commissioner of Internal Revenue by § 3208 of the Revised Statutes, as amended by the act of March 1st, 1879, and with the approval of the Secretary of the Treasury, the lands so purchased were sold, at public auction, by order of the Commissioner, on the 12th day of June, 1888, and Miss Stephens became the purchaser at the price of $500. She died after the sale, and on October 6th, 1888, the United States, by the Commissioner of Internal Revenue, executed a quitclaim deed to the devisees of the purchaser, conveying to them "all right, title, and interest of the United States at the time of said last-named sale in the premises aforesaid, and free from any claim on the part of the United States."

By an act of Congress of May 27th, 1902 (32 Stat. at L. 207, 243, chap. 887), it was provided: "That jurisdiction is hereby conferred on the court of claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the government of the United States, on account of the sale, purchase, or occupation by the government, through its internal revenue office or others, of certain real estate of one George J. Stephens in Greene county, Virginia, upon which the late firm of Smith, Ellett, & Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the government to plead the statute of limitations in bar of said claims is hereby waived: Provided, That said claimant file his petition within sixty days from the passage of this act, in said court of claims, either at *law or in equity, as he may deem [79] the rights of his case shall require; and the government shall, upon notice served according to the rules and practice of said court, appear and defend against said suit, and the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law."

The present action was brought in 1904 by the executor of Smith under the authority of that act.

The petition sets forth certain facts connected with the claim, and, among other things, it alleged the following: 9. "The petitioner is advised and believes, and so charges, that the proceeding and sale above recited, whereby the United States acquired the title to said land and defeated the lien of said firm, was in open violation of § 3207 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2081), which was then in full force and should have governed the proceeding of the United States in the premises; and that the officers of the United States, having abundant notice of the prior lien of the said Smith, Ellett, & Company, should have commenced a proceeding in the United States district court for said district, in conformity with the provisions of the statute above cited, to which proceeding the said Smith, Ellett, & Company should have been made parties, and whereby their prior lien should have been audited, adjusted, and paid out of the proceeds of such sale in preference to the claim of the United States, as provided by such statute; and that, by adopting the summary proceeding which was resorted to in the sale of said land, being the same authorized by §§ 3197 and 3198, Revised Statutes (U. S. Comp. Stat. 1901, pp. 2077, 2078), in cases where no prior liens exist, the United States practically proclaimed to the whole world, just as its agent who made the sale actually did, that there was no valid prior lien on said land and that a clear title was passed by the sale. 10. That the United States accepted the conveyance so made, and held the property by virtue thereof for many years, collecting the rents and profits, and that the first notice this petitioner had of its relinquishment of its holdings was through an official letter from Acting Com- [80] missioner of Internal Revenue Wilson,* bearing date January 7, 1895, in which it was stated that, by a conveyance made in October, 1888, the United States had devested itself of its title to said land. 11. That, after the sale and conveyance aforesaid, the said Smith did, as the representative of his said firm, make every effort to collect the said debt from the said George J. Stephens in said Greene county, and to that end, at considerable expense, retained counsel learned in the law; but he was advised that the United States, by its summary proceeding, had taken over the title to the mortgage land and defeated his lien thereon, and the said Stephens, having no other property against which he could proceed, his only recourse lay, first, in redeeming the property within one year, under the provision of § 3202, Revised Statutes (U. S. Comp. Stat. 1901, p. 2079), by paying to the deputy collector the full amount of $4,229.50, claimed to be due from said Stephens to the United States, or, second, in a demand of indemnity from the United States; but the said firm, being wholly unable pecuniarily to advance that large sum of money, and having serious doubts whether the mortgaged property was at that time fairly worth that amount in addition to their mortgage lien, and they were, therefore, unable to redeem said property, and neither the said firms nor this petitioner has ever, directly or indirectly, received any portion of said debt so due from the said Stephens as aforesaid, but the same is still due and unpaid in the full amount above stated. 12. That at the time of said sale and conveyance to the United States, the land of said Stephens, to which the said lien of the said Smith, Ellett, & Company attached, was amply worth the amount of their said lien, and would have brought that amount and more at any fair and regular sale thereof at auction or otherwise. 13. That on the 1st day of January, A. D. 1875, the partnership existing between the said Rinaldo P. Smith and the said Francis M. Ellett and a certain William F. Larrabee, who had, in the meantime, become a partner, expired by limitation in the articles of copartnership and was dissolved by mutual consent, and thereupon all the partnership assets of the old firm, including the debt due from Stephens, as aforesaid, *passed to [81] this petitioner by authority of the firm as settling partner, with the exclusive right to collect the same and sign valid acquittance therefor; and although this petitioner has repeatedly made demand upon the proper officers of the Treasury Department for payment of his said claim, the same has never been paid, or any part thereof, but, on the contrary, allowance and payment thereof has been refused."

The relief sought was a judgment against the United States for $8,666.44, with interest thereon from January 12th, 1871.

The government answered, denying all the allegations of the petition, and asking for judgment dismissing the suit.

We have seen that before the execution of the deed of trust under which the plaintiff claims, taxes to the amount of $4,000 had accrued to the United States against the distiller Stephens, which he neglected, upon demand, to pay. What were the rights of the United States after such demand and failure to pay? This question depends upon the scope and effect of certain statutory provisions, as follows:

1. That part of the 1st section of the internal revenue act of July 13th, 1866 (14 Stat. at L. 98, 107 108, chap, 184, U. S. Comp. Stat. 1901, pp. 2073, 2074, 2077), which declares that "if any person, bank, association, company, or corporation liable to pay any tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition *thereto, upon all property [83] and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for nonpayment,

and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. . . . That in any case where goods, chattels, or effects sufficient to satisfy the taxes imposed by law upon any person liable to pay the same shall not be found by the collector or deputy collector whose duty it may be to collect the same, he is hereby authorized to collect the same by seizure and sale of real estate," etc.

2. That part of § 32 of the same act, which provides "that there shall be levied, collected, and paid on all distilled spirits upon which no tax has been paid according to law, the tax of two dollars, on each and every proof gallon [reduced to 50 cents by act of July 20th, 1868, chap. 186, 15 Stat. at L. 125], to be paid by the distiller, owner, or any person having possession thereof; and the tax shall be a lien on the spirits distilled, on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, and on the interest of said distiller in the lot or tract of land whereon the said distillery is situated, from the time said spirits are distilled until the said tax shall be paid."

3. That part of § 106 of the act of July 20th, 1868 (15 Stat. at L. 125, 167, chap. 186, U. S. Comp. Stat. 1901, p. 2081), which provides that "in any case where there has been a refusal or neglect to pay any tax imposed by the internal revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed in a district or circuit court of the United States, to enforce the lien of the United States for tax [84] upon any real estate, or to subject any *real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall be brought into court, as provided in other suits in chancery in said courts. And the said courts shall have, and are hereby given, jurisdiction in all such cases, and shall, at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States therein shall be established, decree a sale, by the proper officer of the court, of such real estate, and a distribution of the proceeds of such sale, according to the findings of the court in respect to the interests of the parties and of the United States." This section is substantially preserved in § 3207 of the Revised Statutes, except that the latter omits the words "if he deems it expedient," found in the above section of the act of 1868.

Before considering these statutory provisions it is proper to refer to one point. The plaintiff insists that, in view of the words of the act under which this suit was brought, it must be taken that the lien created by the trust deed of October 26th, 1869, was prior to any then existing in behalf of the government. This contention rests entirely on the statement in that act that the late firm of Smith, Ellett, & Company, represented by Smith, "had a prior lien." But, plainly, from the context and the admitted facts, that was merely by way of recital, and as showing what that firm or Smith claimed. It could not have been intended as an admission by Congress that no lien existed in favor of the United States at the time that deed of trust was executed. The findings expressly state that, when the deed was executed, taxes had accrued against the distiller in favor of the United States from July, 1867, to August, 1869, amounting *to [85] $4,000, and that a demand was made for their payment prior to the execution of the deed of trust under which the plaintiff claims. By the statute of 1866 it is provided that if any delinquent, liable to taxes, shall neglect or refuse to pay them after demand, there shall be a lien in favor of the United States from the time it was due "upon all property and rights to property" belonging to the delinquent. In Kinkead v. United States, 150 U. S. 483, 497, 37 L. ed. 1152, 1157, 14 Sup. Ct. Rep. 172, 177, the court said it was well settled "that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case." No such intention is to be imputed in this case to Congress. On the contrary, it is manifest that Congress intended that the claim of the parties was to be judicially investigated and determined according to all the facts as disclosed by the evidence adduced. We are clear that whatever the legal effect of the fact, it must be taken that the lien of the United States for its unpaid taxes attached before the trust deed was executed and recorded. That the government acquired a lien on the property in question after the failure of the distiller to pay, upon demand, the taxes due to the United States, is too manifest, under the words of the statute, to admit of doubt. And this lien, we have seen, attached before the execution of the deed of trust of October 26th, 1869.

It is to be observed that the statute gave to the government, in order to secure its taxes, not only a sweeping lien "upon all property or rights to property" belonging to the delinquent, but a specific or special lien on spirits for the gallon taxes. It was therefore said by Solicitor General Phillips: "It may be true that because of the *greater definiteness* of the special provision for a lien for the tax upon spirits there is rarely occasion for calling in the provision for a lien for taxes in general, but there is nothing to forbid that general policy to apply in all cases where there is nothing in the special policy to contradict." 16 Ops. Atty. Gen. 634, 636.

The plaintiff contends that the act of [86]1868 superseded the *provision of the previous law giving the remedy of distraint, and that, after the passage of that act, the United States could only proceed, in case of conflicting liens, by a regular suit in equity in a Federal court. On the part of the government it is contended that the remedy given by that act is not exclusive, but can be used by the United States whenever it sees proper to pursue that remedy rather than the remedy of distraint.

We are of opinion that the government correctly interprets the act of 1868. If Congress had intended to prescribe a formal suit in equity as the only mode by which the government could sell real estate upon which it had a lien for internal revenue taxes, and upon which private parties also had liens by mortgage or deed of trust, it would have done so in clear words, particularly as Congress knew at the time of the then-existing remedy by distraint. The words used do not show that Congress intended a suit in equity as exclusive of all other methods in such cases. It seems to have taken care not to so prescribe. The two remedies could well coexist. The act of 1868 declared that the Commissioner of Internal Revenue *may*, "if he deems it expedient," proceed by bill in chancery, without using any words implying a purpose to withdraw from the government the right then existing to resort to distraint and sale. Congress, we assume, doubtless thought that cases might arise in which it would be desirable that all questions of title to property to be sold for taxes should be cleared up before a sale took place. Hence the provision which authorized, but did not require, a suit in equity, and which left untouched the right of the government to proceed by distraint. We must not be understood as saying that if the words "if he deems it expedient" had not been in the statute, that the result would have been different. But those words are significant as tending to remove all doubt as to the correct interpretation of the statute, and make it evident that Congress did not intend to take away the remedy by distraint and make the remedy by suit exclusive, but only to give another and cumulative remedy for the enforcement of liens and taxes.

*This was the view taken of the statute[87] by the circuit court of the United States for the eastern district of Wisconsin in Alkan v. Bean, 8 Biss. 83, 89, Fed. Cas. No. 202. Judge Dyer, delivering the judgment of the court in that case, held that the remedy given by the act of 1868 (Rev. Stat. § 3207) and that given by distraint were concurrent, neither remedy being exclusive.

It is said that these views are inconsistent with the judgment of this court in Mansfield v. Excelsior Ref. Co. 135 U. S. 326, 34 L. ed. 162, 10 Sup. Ct. Rep. 825. We do not think so. In that case the principal question was, What title passed by a collector's sale for delinquent taxes due from a distiller who held, at the time of sale, only a leasehold interest in the property seized? It was held that the collector could only sell by distraint the interest of the distiller, and that his deed to the purchaser should be regarded as conveying only such interest as the collector was entitled to sell; the court, in that case, recognizing the right of the government to enforce by distraint whatever lien it had for unpaid taxes, subject to the rights of other lienholders. It said: "But in what mode may the government enforce its prior lien? In order to collect the taxes due from Hinds, the distiller, it might have instituted a suit in equity, to which not only the distiller, who had simply a leasehold interest, but all persons having liens upon, or claiming any interest in, the premises, could be made parties; in which suit it would have been the duty of the court to determine finally the merits of all claims to and liens upon the property, and to order a sale, distributing the proceeds among the parties according to their respective interests. Of course, the United States, having, by stipulation, priority of lien, would have been first paid out of the proceeds. But no such course was pursued. The officers of the government preferred to adopt the summary method of sale by the collector upon notice and publication, as provided for in § 3197 (U. S. Comp. Stat. 1901, p. 2077). It may be conceded that if the distiller had been the owner of the fee, a sale in that mode would have passed his interest, subject to the rights of any prior encumbrancer, and subject to the right of any subsequent *encumbrancer, to redeem[88] the premises. But the delinquent distiller had no interest except a leasehold interest, and that expired, as we have seen, on the 1st of May, 1877. We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the statute (§ 3194), transfers to the purchaser the right, title, and interest of the *delinquent* in the property sold. When he sells real estate for taxes, the statute, in terms equally explicit (§ 3199), declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title, and interest the *party delinquent* had in the real estate so sold. Now, if Congress intended to invest the collector with authority to sell, by the summary process of notice and publication, the interest of any other person than the delinquent distiller, the statute would have described a certificate that would pass the interest of such person in the property sold. The provision that the certificate of purchase shall pass the interest of the delinquent in the property sold by the collector excludes, by necessary implication, the interest of any other person. This is made clear by the fact that the statute, in the case of a sale by the collector, requires notice to 'the person whose estate it is proposed to sell' (§ 3197), which person is, of course, the one who is delinquent in the matter of taxes. Any other construction would impute to Congress the purpose, in order that the taxes against the delinquent distiller, having only a leasehold interest, might be collected, to seize and sell the interest of the owner of the fee, and to destroy the lien of an encumbrancer, without giving either an opportunity to be heard."

While the Mansfield Case recognized the right of the government to proceed by a regular suit in equity, it also distinctly recognized its right to proceed by distraint, and to sell the interest of the delinquent taxpayer, whatever such interest was, saving, of course, the rights of encumbrancers. In [89]the *present case the distiller was the owner of the fee when the lien of the government for taxes accrued,—a fact which distinguishes this from the Mansfield Case. When that lien accrued there was on the property no encumbrance whatever. The encumbrance arising from the deed of trust of 1869 arose after the lien of the government attached. Therefore the government had the right, by distraint, to sell such interest in the lands as the delinquent distiller owned at the time its lien attached,—which was the fee,—just as the collector had the right, in the Mansfield Case, to sell the leasehold interest of the distiller. As the leasehold interest of the distiller passed by the sale in the Mansfield Case, so the interest which the distiller in this case had when the government's lien attached passed by the sale of the collector, subject, of course, to the right of the holder of the subsequent encumbrance created by the deed of trust of 1869, to redeem the property from the sale. By the statute under which the sale took place, it was provided. "Any person whose estate may be proceeded against as aforesaid shall have the right to pay the amount due, together with the costs and charges thereon, to the collector or deputy collector at any time prior to the sale thereof, and all further proceedings shall cease from the time of such payment. The owners of any real estate sold as aforesaid, their heirs, executors, or administrators, or *any person having any interest therein, or a lien thereon,* or any person in their behalf, shall be permitted to redeem the land sold as aforesaid, or any particular tract thereof, at any time within one year after the sale thereof, upon payment to the purchaser, or, in case he cannot be found in the county in which the land to be redeemed is situate, then to the collector of the district in which the land is situate, for the use of the purchaser, his heirs or assigns, the amount paid by the said purchaser, and interest thereon at the rate of twenty per centum per annum." [14 Stat. at L. 109, chap. 184, § 9, U. S. Comp. Stat. 1901, p. 2079.] So that neither the distiller nor the holder of the lien created by the deed of trust of 1869 was without remedy. The lienholder, under the deed of trust of 1869, could have prevented the sale *by paying the amount of taxes due [90] the United States, with costs and charges; or, after sale, could have redeemed the land in the mode prescribed by the statute. But neither of those courses was pursued, because, as the petition states, the firm represented by Smith was pecuniarily unable to pay the amount necessary for the redemption of the land from the sale. But that was the misfortune of the parties concerned. The fact could not affect the right of the United States to have the interest of the distiller, whatever that was at the time its lien attached, sold for the taxes.

These views dispose of the case; for it cannot be that any liability rests upon the United States to pay the debt secured by the deed of trust of 1869, if it be true, and we hold it to be true, that whatever the government did in the collection of the taxes due to it was in pursuance of its rights under the law. We are unable to perceive that either the distiller Stephens or anyone asserting rights under the above deed of trust had or has any ground of action against the government.

Passing, as unnecessary to decide, many of the questions discussed by counsel, we affirm the judgment.

Affirmed.

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†IN THE MATTER OF FRANCIS S. REISENBERG and Daniel Gallagher for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York. (No 11, Original.)

IN THE MATTER OF THE APPLICATION OF JOSEPH KONRAD, Individually and as Administrator of Paul Planovsky, Deceased, for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York. (No. 12, Original.)

(See S. C. Reporter's ed. 90–112.)

Jurisdiction of Federal circuit court — justiciable controversy — effect of admitting averments of bill.

1. A suit by Pennsylvania and New Jersey corporations against a New York corporation operating a street railway system in the city of New York, the bill in which avers an unsatisfied indebtedness due each complainant from the defendant, substantially involves a controversy between citizens of different states within the meaning of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, pp. 507, 508), § 1, defining the jurisdiction of the Federal circuit courts, although the defendant admits the indebtedness and the other allegations of the bill, and joins with the complainants in a request that receivers be appointed.

Pleading — waiver of defense.

2. The consent of defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounts to a waiver of that defense.

Jurisdiction of Federal circuit court — collusion.

3. Collusion requiring the dismissal, pursuant to the act of March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 511) § 5, of a suit against a street railway company in a Federal circuit court, cannot be inferred because the parties desired that the administration of the railway affairs be taken in hand by the court, to which end the defendant admitted the averments in the bill and united with complainants in their request for the appointment of receivers, where no claim is made that the averments in the bill were untrue, or that the debts named therein as owing to the complainants did not in fact exist, and there is no question made as to the citizenship of the complainants, and not the slightest evidence of any fraud practised for the purpose of thereby creating a case to give jurisdiction to the Federal court.

Intervention — in receivership.

4. A Federal circuit court which has acquired jurisdiction over a street railway company, and has appointed receivers for it, may, in its discretion, permit another street railway company to intervene, making it a party defendant, and extending the receivership to it, where the two companies sustained respectively the relation of lessee and lessor, and their interests are inextricably bound together.

[Nos. 11, 12, Original.]

Argued December 9, 1907. Decided January 13, 1908.

ORIGINAL APPLICATIONS for leave to file a petition for mandamus, or, in the alternative, for a prohibition, addressed to one of the Circuit Judges of the United States for the Second Circuit, commanding him and the Circuit Court to dismiss a suit and all proceedings therein, and to vacate injunctions therein and orders appointing receivers. Rules discharged and petitions dismissed.

For the decisions of the circuit judge in Pennsylvania Steel Co. v. New York City R. Co. see 157 Fed. 440.

Statement by Mr. Justice **Peckham**:

These are original applications to this court for leave to file a petition for a mandamus, or, in the alternative, for a prohibition, addressed to the Honorable E. Henry Lacombe, one of the circuit judges of the second circuit, commanding him and the circuit court to dismiss the bill of complaint against the railroad companies hereinafter mentioned, and all proceedings *therein, and [92] to vacate injunctions therein issued by such judge, and also to vacate the orders appointing the receivers of such railroads, and to desist from exercising any further jurisdiction over such roads in such suit, or, in the alternative, commanding the judge to allow petitioners' intervention, or that a writ of prohibition might issue to obtain the same relief.

It is alleged in the petition in No. 11 that the petitioners are creditors of the Metropolitan Street Railway Company on account of injuries alleged to have been received by each, through the negligence of the company's servants,—in one case some time prior to June 27, 1895, and in the other on or about June 13, 1892. Actions had been brought by each, and are still pending at the time of this application.

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†These cases are reported by the official Reporter under the title of "Re Metropolitan Railway Receivership."

NOTE.—For diverse citizenship as ground of Federal jurisdiction—see notes to Shipp v. Williams, 10 C. C. A. 249; and Mason v. Dullagham, 27 C. C. A. 298.

In No. 12 it is alleged that the petitioner is the administrator of one Paul Planovsky, deceased, and as such he recovered a judgment for damages for the death of the decedent against the New York City Street Railway Company for over $8,000, which is still unpaid, the company having appealed from the judgment to the appellate division of the supreme court of the state of New York, and the appeal is still pending. The petitioner also alleged a cause of action in his own behalf, arising out of the refusal of the company to give him tickets entitling him to transfers, by which he was, as he alleged, damaged by the payment of additional fares to the amount of at least $200.

The further facts set up in each of the petitions are substantially identical.

Upon reading the petitions, orders were made allowing them to be filed, and rules to show cause why the petitions should not be granted were thereupon entered, returnable before this court on the 9th of December, 1907.

On that day there was duly filed a return of the circuit judge in each proceeding, who gave therein a short history of the litigation culminating in the appointment of receivers of the railroads mentioned, and [93] stating the then condition of such *litigation. There were filed, as a part of such returns, copies of the bill of complaint under which the receivers were appointed, and of the answer of the New York City Railway Company, and also copies of certain affidavits made in behalf of complainants and defendant in the suit.

It is upon the case made by the petition for a mandamus and the return of the circuit judge that the questions arise for the decision of this court.

It appears from such record that in September, 1907, the New York City Railway Company and the Metropolitan Railway Company were corporations organized under the laws of the state of New York, and that the New York City Railway Company was operating a system of surface street railroads in New York county, as the owner of some and the lessee of others. The Metropolitan Railway Company was interested, either as owner or as lessee of some eighteen separate and independent railroads, all of which it had leased to the New York City Railway Company, by lease dated February 14, 1902, for 999 years.

While the New York City Railway Company was operating these various railways a bill against it was filed September 24, 1907, in the United States circuit court for the southern district of New York, by the Pennsylvania Steel Company, a citizen of Pennsylvania, and by the Degnon Contracting Company, a citizen of New Jersey, as complainants, in which the complainants alleged an indebtedness due from the railway company of over $30,000 to the steel company and over $11,000 to the Degnon Company, for rails and other track material and for labor done for the company, at its request, and that payment of the debts had been demanded of the railway company by each of the complainants, and refused. It also appeared that the defendant was insolvent; that it was operating—as owner of some and lessee of other portions—a system of some 500 miles of track, covering substantially all the surface railroads in New York, comprising many different companies, which owned many different railroads, *which had been leased to the Metropolitan [94] Railway Company and by it leased to the defendant company; that all the roads which had been leased to the defendant company were covered by many separate and independent mortgages for different sums, maturing at different times; the New York City Railway Company was under obligations to pay the interest on the funded debt of its lessor, by reason of the lease from the Metropolitan Railway Company under which it was operating these various roads. Failure to meet the interest on the funded indebtedness as it matured would operate as a default and would render the mortgages enforceable.

One of these mortgages was for over twelve and another for over sixteen millions of dollars, and other mortgages increased the whole mortgage debt, on all the lines, to about one hundred millions of dollars. The New York City Railway Company, as lessee, had expended more than twenty millions of dollars in improvements, and was also indebted in other large sums, aggregating between five and ten millions of dollars more, by reason of expenditures for equipment and for repairs; also for taxes, and also for a large amount of floating indebtedness, besides which there were a great number of suits pending against it to recover damages for alleged injuries sustained through alleged negligence of its servants, and which were on the calendars of the New York courts, and the plaintiffs therein were pressing for trial. If judgment were obtained in any of these cases, or in any other of the cases where creditors were pressing their demands, it would result in disastrous consequence to the public, by a possible sale and dismemberment of the system under which the railroads were then operated, and might result in sales of portions of the roads to different individuals or corporations, by reason of which it would be impossible to continue the transfer of passengers from one road to another for one fare, such as was then in operation; and a sale of the roads would probably be for a sum greatly beneath their value, and thus the security for all the creditors for the ultimate payment of their [95]claims would be impaired and very *greatly injured. The defendant was, as it is stated, unable to pay these various obligations as they matured.

For these, and other reasons stated with great detail in the bill, it was asked that the court would take the road into its possession, and that the creditors of the defendant might be ascertained and the court fully administer the fund, consisting of the entire railroad system and other assets of the defendant; that the assets should be marshaled and the respective liens and priorities existing therein should be ascertained, and that the court should enforce and decree the rights, liens, and equities of all the creditors of the defendant, as the same might be finally ascertained by the court; that, for the purpose of preserving the unity of the system, a receiver might be appointed, with power to collect all the assets of the company, and with authority to run and operate the railroads and collect and receive all the rents due and apply the income thereof, under the direction of the court, for such period as the court should order; and for the purpose of protecting and preserving the railroads and assets and property, real and personal, from being sacrificed under proceedings liable to be taken, which might prejudice the same; and that, temporarily and pending the suit, an injunction might issue against the defendant and all persons claiming to act by, through, or under it, and all other persons, restraining them from interfering with the receiver taking possession of the property, and that complainants might have such further relief as was proper.

Upon the filing of this bill a subpœna was duly issued and served upon the defendant, the New York City Railway Company, and an answer was put in by that company, which admitted all the allegations of the bill, and it joined in the prayer of the bill that the court should take possession, by receiver, of the system of railroads operated by the defendant, and that the receiver should, after taking possession of the entire property, preserve, manage, operate, and control the same, and should pay all the indebtedness due or to become due, and *other-[96] wise discharge all the duties imposed by courts upon receivers in similar cases.

Upon this bill and answer an application was made to the circuit judge for the appointment of a receiver, and such application was granted, and receivers were duly appointed, with directions to operate the road. They were given power to borrow money, if needful in their judgment, in order to comply with the order, and make appropriate payments on account of accruing rent and other necessary charges, so far as might be necessary to pay off current expenses for labor and supplies, but for no other purpose without the order of the court. The defendant and its officers, and all persons claiming to act under the defendant, and all other persons, were enjoined from interfering in any way with the possession and management of the property by the receivers; and it was ordered that the defendant should show cause on the 7th of October, 1907, why the receivership should not be continued during the pendency of the suit; and upon the hearing thereon, it was ordered that any other creditors of the defendant, or any other party in interest, might be heard.

Prior to the 7th of October, 1907, the Metropolitan Railway Company presented a petition to the circuit court, wherein it asked to be made a party to the original suit of the steel company and others against the New York City Railway Company, and that the receivership under the bill might be extended so as to expressly embrace the interests of the Metropolitan Railway Company in the property. The petition showed the foregoing facts in relation to the lease of the property to the New York City Railway Company, and it averred that, by reason of these leases and the various mortgages upon portions of the property, and the operation of all the miles of railroad as one system, and because of the fact that the property of the Metropolitan Railway Company was all of it so leased to the New York City Railway Company that it had to depend on the solvency of the latter company in order that payment might be made on the various mortgages on the *various[97] roads for which the Metropolitan Railway Company was responsible as lessee, and which it had also leased to the New York City Company, the two companies were so inextricably bound together that if the New York City Railway Company went into the hands of a receiver, and all its property were taken possession of by that officer, it was necessary, in the interest of all concerned, that the Metropolitan Railway Company should also be made a party to the suit and the receivership extended to it. Under this petition the court granted an order making the Metropolitan Railway Company a party defendant and extending the receivership to it, and the injunction was also extended so as to enjoin that company from interfering with the possession of the receivers.

In October, 1907, an application was made to the circuit court on the part of those who are now petitioners in this court, in which application it was alleged that the bill of complaint in the above-mentioned suit, and the answer consenting to the appointment of receivers, and admitting the allegations in the bill, were filed collusively for the purpose of avoiding the jurisdiction of the courts of the state, and for the purpose of creating a case cognizable under the judiciary act of the United States by the United States courts. And it was averred that the suit in which the bill and answer were filed did not and does not really and substantially involve any dispute between the parties, nor did it involve any real or substantial controversy between them, or any dispute between them which was within the jurisdiction of the court. All these averments were reiterated in the petitions presented to this court. Various other facts were included in the petition to the circuit court, and it was prayed that an order might be made dismissing the bill in equity for fraud, collusion, and want of jurisdiction, and setting aside the order appointing a receiver, or, in case that application was denied, then that the order appointing a receiver should be amended by providing that liabilities for personal injuries and for causing the death of individuals should have the
[98]preference over other claims on *the distribution of the assets. The petition was subsequently amended so as to add a further prayer that the petitioner, individually and as administrator, might be allowed to intervene in the suit on behalf of himself individually and as administrator and on behalf of all other judgment creditors of the defendant who might come in and contribute to the defense of the suit.

In opposition to this application affidavits were presented by the persons who had verified the original bill of complaint in behalf of the two companies against the New York City Railway Company (and copies of these affidavits are made parts of the returns of the circuit judge), denying that the purpose of the suit or of the application for the receivership was for stock jobbing or other improper purposes, and each admitted that the suit was brought in the circuit court of the United States for the purpose of having that court take jurisdiction, and denied that there was any impropriety or collusion or anything else wrongful in the conduct of the complainants. Each affidavit contained an averment that, as nonresidents of the state of New York, complainants had an absolute right to decide whether to bring the suit in the courts of the United States or in the courts of the state of New York; and it was denied that the object of the suit was anything else than appears on the face of the bill; namely, the administration of the assets of the defendant in a proper court having jurisdiction thereof. All charges of collusion and suppression of facts and of wrongdoing were denied absolutely. And a similar affidavit was made by the officers of the New York City Railway Company who had verified the answer to the bill of complaint, and copies thereof are also made part of the returns of the circuit judge. The application was denied.

On October 25, 1907, a decree was entered adjudging the New York City Railway Company to be insolvent and ordering a reference to a master to take proof of claims and report to the court, providing that all claims should be presented to the master on or before November 30, 1907, and that the *master should give public notice accordingly,[99] the notice to contain a statement of the time and place of first hearing before the master.

On the 9th of November, 1907, the court made a similar order, adjudging the Metropolitan Railway Company insolvent, and adjudging that its assets should be marshaled, and appointing a master as in the other case.

The order containing the appointment of the receivers permitted all pending suits against the New York City Railway Company and the Metropolitan Railway Company, which were begun before the receivers were appointed, to be prosecuted to judgment. In regard to claims for damages resulting from accidents before the receivers had been appointed, but in which suit had not been commenced at the time of such appointment, it was provided that they might be filed with the receivers, and might go to a master for adjustment, and, in any case, it was ordered that if the plaintiff wished a jury trial he might have it, and the claim, if judgment were obtained, would thereby be liquidated, and would rank with claims already in suit.

As a reason for commencing these proceedings petitioners averred that they could not appeal from the order of the circuit court denying their application for leave to intervene in the suit commenced by the Pennsylvania Steel Company, and others, nor could they take any steps in that suit, and, as they were enjoined from taking any proceeding in regard to the possession by the receivers of the property of the two railway companies, they were without any remedy looking toward a review of the orders and decrees of the circuit court, other than by the application to this court in the manner they are proceeding.

In the course of his decision on the application to make the receivers permanent the circuit judge said, in relation to the allegations of collusion, as follows:

"There is no collusion apparent in any legal sense. It is of course manifest that complainants and defendants were entirely [100]*in accord, and arranged together that the suit should be brought to the Federal court, and that the averments of the bill should be admitted by the answer. But there was no colorable assignment of some claim to a citizen of another state, nor any misrepresentation or distortion of facts to mislead the court. On the contrary, examination of the books shows that the financial situation is precisely such as was averred in the complaint."

And in relation to extending the receivership to the Metropolitan Railway Company and allowing that company to be made a party defendant, the court said:

"Having taken its entire property into possession of the court under conditions which left it powerless to recover the same for a year, the receivership left it wholly without means to meet its obligations, and it seems to be clearly the duty of the court which has thus deprived it of its resources to protect it against execution while receivers handle and distribute those resources."

Mr. **Roger Foster** argued the cause and filed a brief for petitioners:

When the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed.

Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 181, 49 L. ed. 713, 716, 25 Sup. Ct. Rep. 420.

The authorities recognize a distinction between "matter in dispute" and "matter in demand."

Hilton v. Dickinson, 108 U. S. 165, 174, 27 L. ed. 688, 691, 2 Sup. Ct. Rep. 424; May v. Jarvis-Conklin Mortg. Trust Co. 138 Mo. 449, 40 S. W. 122; Lozano v. Wehmer, 22 Fed. 757.

There can be no controversy nor matter in dispute if both the parties are agreed.

Gudger v. Western North Carolina R. Co. 21 Fed. 84; Keith v. Levi, 1 McCrary, 343, 2 Fed. 745.

This court has repeatedly held that there was no controversy between citizens of different states, when one of two defendants did not dispute the plaintiff's prayer for relief; and, in determining the question, the parties have been aligned upon the side of the controversy where they properly belonged, irrespective of their position upon the record.

Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Dawson v. Columbia Ave. Sav. Fund S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Cashman v. Amador & S. Canal Co. 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926.

There was collusion between the parties.

Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 677, 687, 689, 43 L. ed. 1130, 1131, 1135, 1136, 19 Sup. Ct. Rep. 827; Texas & P. R. Co. v. Gay, 86 Tex. 571, 25 L.R.A. 52, 26 S. W. 612; Balch v. Beach, 119 Wis. 77, 95 N. W. 137.

The learned judge who granted these orders was misled by the analogy of certain decisions by the inferior Federal courts upon applications for the appointment of receivers of railway companies engaged in interstate commerce, where the bill expressly alleged that the operation of the railways would be prevented by the levy of attachments and executions or other writs, and interstate commerce thus impeded unless receivers were appointed. Such cases manifestly arose under the Constitution and laws of the United States.

Mercantile Trust Co. v. Atlantic & P. R. Co. 70 Fed. 524; Re Lennon, 166 U. S. 548, 553, 41 L. ed. 1110, 1112, 17 Sup. Ct. Rep. 658.

There was not the slightest justification for the extension of the receivership so as to reinclude the assets of the Metropolitan Street Railway Company; nor for the joinder of that company as a party to the suit. All the assets of that corporation, except its causes of action against its lessee, the directors of both companies, and the other persons who had misappropriated and wasted its property, were transferred by the lease to the New York City Railway Company. Those assets were, consequently, already under the protection of the court. The only object of the order extending the receivership over the property of the Metropolitan Street Railway Company was to head off all actions by the state attorney general, the stockholders and creditors of the lessors, that might be brought to compel the lessee and the officers and directors of both parties to the lease to account for the waste of the lessor's property. An action for that purpose, praying a receiver, by the attorney general, was in the course of preparation. Moreover, the receivers could not consistently represent the hostile interests of the lessor and the lessee.

In cases where trustees represented conflicting interests, the courts have always been accustomed to allow interventions.

Farmers' Loan & T. Co. v. Northern P. R. Co. 66 Fed. 169; Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co. 71 Fed. 38; Grand Trunk R. Co. v. Central Vermont R. Co. 88 Fed. 622; Fowler v. Jarvis-Conklin Mortg. Trust Co. 64 Fed. 279; Hamlin v. Toledo, St. L. & K. C. R. Co. 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 672; Jones, Corporate Bonds & Mortgages, § 338.

The collusive bill in equity filed by the Morton Trust Company, and the proceedings thereon, do not strengthen the jurisdiction. That was in its nature a cross bill, although filed in the form of a bill that was original. The relief which it sought, if it could be properly granted at all, could only be decreed upon a cross bill.

Mercantile Trust Co. v. Atlantic & P. R. Co. 70 Fed. 518.

Upon the dismissal of the receivers to the suit, or upon the dismissal of the original suit and a vacation of the receivership, the only ground of Federal jurisdiction will lapse; and the suit must be dismissed with leave to the mortgagee to seek those remedies to which it may be entitled in a state court.

Hamblin v. Chicago, B. & Q. R. Co. 43 Fed. 401; Larrowe-Loisette v. O'Loughlin, 88 Fed. 896; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 677, 45 L. ed. 365, 382, 21 Sup. Ct. Rep. 270; People's Gaslight & Coke Co. v. Chicago, 114 Fed. 388; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 107 Fed. 765.

Should the original bill be dismissed, this proceeding, like that by the Metropolitan Street Railway Company, must follow the fate of the original bill.

Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67; Cross v. De Valle, 1 Wall. 5, 14, 17 L. ed. 515, 518; Blewett v. Blewett (Miss.) 12 So. 249; Stainback v. Junk Bros. Lumber & Mfg. Co. 98 Tenn. 306, 39 S. W. 530; Richman v. Donnell, 53 N. J. Eq. 32, 30 Atl. 533; United States v. California & O. Land Co. 192 U. S. 355, 360, 48 L. ed. 476, 479, 24 Sup. Ct. Rep. 266.

Proof of insolvency of the debtor under the decision in this case is not required. It may be perfectly solvent and yet be able to scale down its indebtedness and readjust the same by repudiation of a part of its honest debts through these tactics. We believe that such proceedings are in violation of the Constitution of the United States.

Farmers' Loan & T. Co. v. Toledo & S. H. R. Co. 43 Fed. 225.

The assumption by the circuit court here of power to appoint a receiver over a lessor corporation because of its previous appointment of a receiver over the property which the corporation had leased was unprecedented and unwarranted.

Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 56 Fed. 365; Metropolitan Trust Co. v. Lake Cities Electric R. Co. 100 Fed. 897; Pressley v. Harrison, 102 Ind. 22, 1 N. E. 188; Jones v. Bank of Leadville, 10 Colo. 473, 17 Pac. 272.

Mr. **J. Parker Kirlin** argued the cause and filed a brief for respondents:

The jurisdiction of the circuit court to entertain the application of the Metropolitan Company for leave to intervene seems plain. It rests on two facts: First, that the subject-matter of the controversy was in the actual possession of receivers appointed by the court (Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Rouse v. Letcher, 156 U. S. 47, 47 L. ed. 341, 15 Sup. Ct. Rep. 266; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; Porter v. Sabin, 149 U. S. 473, 479, 37 L. ed. 815, 818, 13 Sup. Ct. Rep. 1008; Byers v. McAuley, 149 U. S. 608, 618, 37 L. ed. 867, 872, 13 Sup. Ct. Rep. 906; Price v. Abbott, 17 Fed. 506; Armstrong v. Trautman, 36 Fed. 275; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; Lanning v. Osborne, 79 Fed. 662; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 505; Davis v. Martin, 51 C. C. A. 27, 113 Fed. 9); and second, that, as was said by the court in Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 380, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127: "The administration of the assets of an insolvent corporation is within the functions of a court of equity, and, the parties being before the court, it has power to proceed with such administration."

This principle was also recognized in Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 95, 36 L. ed. 632, 636, 12 Sup. Ct. Rep. 787.

The right of the court to permit intervention by a party claiming an interest in the property in the hands of a receiver is not affected by the question of citizenship.

Compton v. Jesup, supra; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642, 36 C. C. A. 155, 95 Fed. 497; Krippendorf v. Hyde, 110 U. S. 276, 284, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27.

A court of equity has an undoubted right, and it is common practice, to permit strangers to the litigation, claiming an interest in the subject-matter, to intervene on their own behalf, and assert their rights. This practice prevails very generally in cases where property is put into the hands of a receiver, and a party applies for leave to intervene for the protection of his rights in the property.

Instances in which interventions have been permitted in receivership proceedings include an application of a trustee of a mortgage, claiming a prior right to income (Atlanta Trust Co. v. Dana, 62 C. C. A. 657, 128 Fed. 209); an application of a contract creditor (Jones v. Sands, 25 C. C. A. 233, 51 U. S. App. 153, 79 Fed. 913); an application by a trustee of a mortgage on a leased line, where the leased line had been included under a receivership of the Wabash system (Central Trust Co. v. Wabash, St. L. & P. R. Co. 46 Fed. 26); an application by a telegraph company, claiming the right to use the right of way of a railway company for the erection of a telegraph line (Mercantile Trust Co. v. Atlantic & P. R. Co. 63 Fed. 513); an application of a lessor of a railroad, leased by receivers, who sought to prevent the cancelation of the lease, and to collect the rentals due under the lease (Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. Rep. 915); applications by lessees of railroads leased to the Wabash system, prior to its insolvency, on claims for rentals, and on motions to prevent cancelation of the leases (Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 259; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. Rep. 795); applications of persons holding mechanic's liens, who claimed priorities on the property (Central Trust Co. v. Bridges, 6 C. C. A. 539, 16 U. S. App. 115, 57 Fed. 753); applications of person claiming to recover damages for the death of next by kin, by negligence (Rouse v. Letcher, supra); application by bondholders (Farmers' Loan & T. Co. v. Northern P. R. Co. 70 Fed. 423).

The propriety of making lessors of railways parties defendant in a suit, either by a creditor, stockholder, or mortgagee, to secure the administration of the assets of an insolvent railway system, where such system includes leased railways, has been repeatedly recognized in the Federal courts. Central Trust Co. v. Wabash, St. L. & P. R. Co. 29 Fed. 618; Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 261; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 85–89, 36 L. ed. 632–634, 12 Sup. Ct. Rep. 787; St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 106, 36 L. ed. 640, 12 Sup. Ct. Rep. 795; Ames v. Union P. R. Co. 60 Fed. 968; Central R. & Bkg. Co. v. Farmers' Loan & T. Co. 79 Fed. 160; Mercantile Trust Co. v. St. Louis & S. F. R. Co. 71 Fed. 602; Mercantile Trust Co. v. Farmers' Loan & T. Co. 26 C. C. A. 383, 49 U. S. App. 462, 81 Fed. 258.

In a number of cases the lessors of branch railroads constituting part of the Wabash system, who had originally been made parties defendant, and whose property was covered by the receivership, were dismissed from the proceeding; yet, subsequently such lessors, or the trustees under the mortgages on such branch railroads, were permitted to intervene and to assert, with respect to rentals and guaranteed interest on the mortgages on the leased lines, a preferred lien on the proceeds of the foreclosure sale under the general mortgage of the Wabash system.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 262; United States Trust Co. v. Wabash Western R. Co. 150 U. S. 287, 293, 37 L. ed. 1085, 1086, 14 Sup. Ct. Rep. 86; Seney v. Wabash Western R. Co. 150 U. S. 310, 37 L. ed. 1092, 14 Sup. Ct. Rep. 94.

The extension of the receivership in the original suit to the property of the Metropolitan Street Railway Company under its petition was a proper exercise of judicial discretion.

Wabash, St. L. & P. R. Co. v. Central Trust Co. 22 Fed. 273; Central Trust Co. v. Wabash, St. L. & P. R. Co. 29 Fed. 618; Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 261; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 95, 36 L. ed. 632, 636, 12 Sup. Ct. Rep. 787; Brassey v. New York & N. E. R. Co. 22 Blatchf. 72, 19 Fed. 663; Milwaukee & M. R. Co. v. Soutter, 154 U. S. 540, and 17 L. ed. 616, 14 Sup. Ct. Rep. 1158; Milwaukee & M. R. Co. v. Soutter, 154 U. S. 541, and 17 L. ed. 604, 14 Sup. Ct. Rep. 1206; Bosworth v. St. Louis Terminal R. Asso. 174 U. S. 182, 186, 187, 43 L. ed. 941–943, 19 Sup. Ct. Rep. 625; Sage v. Memphis & L. R. R. Co. 125 U. S. 361, 375, 376, 31 L. ed. 694, 697, 698, 8 Sup. Ct. Rep. 887.

Mr. **James Byrne** also argued the cause and filed a brief for respondents:

While it is true that a court of equity, on the application of a simple contract creditor, will not appoint a receiver if objection is made by the defendant that the creditor has not obtained a judgment on which execution has been issued and returned unsatisfied, it is equally true that the defense is one which may be waived either expressly or by failure to take the objection, and that, if it is waived, the court has jurisdiction of the parties, and its decree appointing the receiver is valid.

Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 380, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127; Western Electric Co. v. Reedy, 66 Fed. 164; Park v. New York, L. E. & W. R. Co. 70 Fed. 642; Waite v. O'Neil, 72 Fed. 353; Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co. 72 Fed. 959; Temple v. Glasgow, 25 C. C. A. 540, 42 U. S. App. 417, 80 Fed. 444; Schoolfield v. Rhodes, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 157; Enos v. New York & O. R. Co. 103 Fed. 47; Horn v. Pere Marquette R. Co. 151 Fed. 633; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; 1 Dan. Ch. Pl. & Pr. 5th ed. p. 555; Mentz v. Cook, 108 N. Y. 508, 15 N. E. 541; Searight v. Carlisle Deposit Bank, 162 Pa. 504, 29 Atl. 783; People's Nat. Bank v. Loeffert, 184 Pa. 164, 38 Atl. 996; Pennsylvania R. Co. v. Bogert, 209 Pa. 589. 59 Atl. 100; Monumental Mut. L. Ins. Co. v. Wilkinson, 100 Md. 31, 59 Atl. 125; Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733; First Cong. Soc. v. Raynham, 23 Pick. 148.

The defendant corporation having waived any jurisdictional defect, the petitioners, if allowed to intervene as parties, could not overrule such action and reopen the matter of jurisdiction.

Central Trust Co. v. McGeorge, 151 U. S. 131, 135, 38 L. ed. 99, 101, 14 Sup. Ct. Rep. 286; Horn v. Pere Marquette R. Co. 151 Fed. 634; Citizens' Bank & T. Co. v. Union Min. & Gold Co. 106 Fed. 97; Forbes v. Memphis, E. P. & P. R. Co. 2 Woods, 323, Fed. Cas. No. 4,926.

The appointment of receivers by the circuit court was not void on the ground that there was no controversy before the court.

Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747, 756, 31 L. ed. 309, 313, 8 Sup. Ct. Rep. 337; Thomson v. Wooster, 114 U. S. 104, 110, 29 L. ed. 105, 107, 5 Sup. Ct. Rep. 788; Pacific R. Co. v. Ketchum, 101 U. S. 289, 296, 25 L. ed. 932, 936; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 534, 33 L. ed. 1021, 1024, 10 Sup. Ct. Rep. 604; Horn v. Pere Marquette R. Co. 151 Fed. 633; Ohio C. R. Co. v. Central Trust Co. 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235.

There was no collusion.

Dickerman v. Northern Trust Co. 176 U. S. 181, 191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; Blair v. Chicago, 201 U. S. 400, 448, 50 L. ed. 801, 821, 26 Sup. Ct. Rep. 427.

The cases that this court has held to be collusive are:

(a) Cases where the plaintiff was the transferee of claims transferred to him for collection by citizens of the same state as the defendant.

Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; Rosenbaum v. Bauer, 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633; Lake County v. Dudley, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. Rep. 398.

(b) Cases where the plaintiff was the transferee of claims transferred to him for collection by citizens of states other than the state of the defendant, which, by reason of their small amount, could not have been sued on separately in the United States courts.

Waite v. Santa Cruz, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327.

(c) Cases where the plaintiff removed from a state of which the defendant was a citizen to another state, with the sole object of suing in the United States court, and with no purpose of acquiring a domicil or settled home there.

Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289.

(d) A case in principle like (c), where the stockholders of a corporation of one state organized a corporation under the laws of another, and then conveyed their lands in the first state to the new corporation without consideration, and without dissolving the old corporation, for the sole purpose of being able to sue, in the United States court, citizens of the state of which the old corporation was a citizen.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307.

(e) Cases where stockholders, in behalf of a corporation, sued citizens of the same state as the corporation, making the corporation a party defendant on the ground that it had refused to sue, and either the corporation had not refused, or its refusal was a mere pretense, in order to create a case for the United States court.

Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

The jurisdiction of the court below to appoint receivers of the Metropolitan Street Railway Company rests (a) upon the fact that its property was in the actual possession of receivers appointed by the circuit court of the United States (Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Krip-

pendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 505); (b) upon the theory that an insolvent railroad corporation has a standing in a court of equity to surrender its property into the custody of the court, to be preserved and disposed of according to the rights of its various creditors, and, in the meantime, operated in the public interest (Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 95, 36 L. ed. 632, 636, 12 Sup. Ct. Rep. 787).

The jurisdiction of the court below in the suits in which the Morton Trust Company is complainant rests upon the fact that the property covered by its mortgages was, at the time of the beginning of those suits, in the actual possession of receivers appointed by the circuit court of the United States.

Gumbel v. Pitkin, supra; Put-in-Bay Waterworks, Light, & R. Co. v. Ryan, 181 U. S. 409, 432, 433, 45 L. ed. 927, 938, 21 Sup. Ct. Rep. 709; Electrical Supply Co. v. Put-in-Bay Waterworks, Light, & R. Co. 84 Fed. 740.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The petitioners base their application for relief in this court upon the contention that the circuit court had no jurisdiction in the case brought by the Pennsylvania Steel Company, and others, against the New York City Railway Company, to appoint receivers, or to grant any relief asked for in the bill of complaint in that suit. And, as they have been denied leave to intervene therein, and they cannot appeal from the order denying such request (Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636), they assert [**107**] *they are without any remedy, unless it be granted on this application. The basis of their contention, that the circuit court was without jurisdiction, rests upon the assertion that there was no controversy or dispute between the parties to that suit. The counsel for the parties favoring the jurisdiction insist that these petitioners are not entitled to the remedy sought by them in this court, either by mandamus or prohibition, because the case made by them is not such as to authorize the court to issue either writ, as prayed for.

Without going into the question of the right of this court to grant the remedy sought, we prefer to place our decision upon the ground that the circuit court had jurisdiction, and that its action in exercising it was, therefore, valid.

The statutes defining the jurisdiction of the circuit court (act March 3, 1875, chap. 137, § 1, 18 Stat. at L. 470; act March 3, 1887, chap. 373, § 1, 24 Stat. at L. 552; act August 13, 1888, chap. 866, § 1, 25 Stat. at L. 433, U. S. Comp. Stat. 1901, pp. 507, 508) confer it, among other cases, where "there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid" ($2,000).

Although the amount involved in the suit in the circuit court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of a debt due each of complainants had been made and refused. This was not denied and has not been. There was therefore an unsatisfied demand made by complainants and refused by defendants at the time of the filing of the bill. We think that where there is a justiciable claim of some right made by a citizen of one state against a citizen of another state, involving an amount equal to the amount named in the *statute, which claim is not satisfied by [**108**] the party against whom it is made, there is a controversy, or dispute, between the parties, within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the circuit court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso*, or whenever a judgment was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal court existed. Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747-756, 31 L. ed. 309-313, 8 Sup. Ct. Rep. 337; Pacific R. Co. v. Ketchum, 101 U. S. 289-296, 25 L. ed. 932-935. In the latter case the proceeding was "by the consent of all the parties to the suit, through their solicitors of record." It was stated in the opinion by Chief Justice Waite that the defendant had filed an answer under its corporate seal, in which every material allegation of the bill was confessed, and it was stated that the bonds sued for were, in all respects, valid obligations of the company, and the mortgage a subsisting lien. No doubt was expressed as to the jurisdiction of the court, because of the admission of the facts by the defendant and its consent to the judgment. We do not doubt the jurisdiction of the circuit court although the facts were admitted, and the defendant joined with the complainants in a request that receivers should be appointed.

[109] *It is, however, argued, that although there may be jurisdiction in the case of railroads engaged in interstate commerce, yet they are exceptions, because in such a case they arise under the Constitution, although there may not have been an actual controversy between the parties. Such cases, it is said, cannot properly be regarded as precedents for claiming jurisdiction in the case of railroads wholly within the state, and doing no interstate business.

A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact. It only arises under the Constitution or laws or treaties of the United States when it substantially involves a controversy as to the effect or construction of the Constitution, or on the determination of which the result depends. Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Bonin v. Gulf Co. 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652. The appointment of a receiver in the case of a railroad engaged in interstate commerce does not necessarily involve any such controversy. Jurisdiction to appoint a receiver by a circuit court of the United States in cases of railroads engaged in interstate commerce has existed by reason of diversity of citizenship in the various cases between the parties to the litigation, and not because the railroads were engaged in interstate commerce. The necessary diversity of citizenship is alleged to exist in the case before the circuit court, and there is no suspicion as to the truth of the averment.

It is also objected that the circuit court had no jurisdiction because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the circuit court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. Hollins v. Brierfield Coal & I. Co. 150 U. S. 371-380, 37 L. ed. 1113-1115, 14 Sup. Ct. Rep. 127. That the complainant has not exhausted its remedy at law—for example, not having *obtained any judg- [110] ment or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated in the opinion in the above case, and, when waived, the case stands as though the objection never existed.

In the case in the circuit court the consent of the defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense. Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Mentz v. Cook, 108 N. Y. 504-508, 15 N. E. 541; Horn v. Pere Marquette R. Co. 151 Fed. 626-633.

It is asserted also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed, and therefore the suit should have been dismissed by the circuit court under § 5 of the act of 1875, already cited. By that section it must appear to the satisfaction of the circuit court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of that court, or that the parties to that suit have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act, in which case the circuit court is directed to proceed no further therein, but to dismiss the suit on that ground. Whether the suit involved a substantial controversy we have already discussed, and the only question which is left under that act is as to collusion.

In this case we can find no evidence of collusion, and the circuit court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the circuit court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill, and united in the request for the appointment of receivers. This fact is stated by the circuit judge; but there is no claim made that the averments in the bill were untrue, or that the debts named [111]*in the bill as owing to the complainants did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practised for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject-matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant. Dickerman v. Northern Trust Co. 176 U. S. 181–190, 44 L. ed. 423–430, 20 Sup. Ct. Rep. 311; South Dakota v. North Carolina, 192 U. S. 286, 311, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; Blair v. Chicago, 201 U. S. 400–448, 50 L. ed. 801–821, 26 Sup. Ct. Rep. 427; Smithers v. Smith, 204 U. S. 632, 644, 51 L. ed. 656, 661, 27 Sup. Ct. Rep. 297.

The objection to the order permitting the Metropolitan Railway Company to intervene, and making it a party defendant in the circuit court suit, is not of a jurisdictional nature, and the granting of the order was within the discretion of the court. United States v. Philips, 46 C. C. A. 660, 107 Fed. 824; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636. Having jurisdiction over the New York City Railway Company, and receivers having been appointed for it, there was every reason for extending the receivership to the Metropolitan Railway Company. The facts showed that it was so tied up with the New York company that a receivership for the latter ought to be extended to the former. The circuit court judge so held, and we think very properly, upon the peculiar facts of the case. See Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82–95, 36 L. ed. 632, 12 Sup. Ct. Rep. 787; Krippendorf v. Hyde, 110 U. S. 276, 283, 284, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27.

From this review of the various questions presented to us it appears that the circuit court had jurisdiction in the suit brought before it, and therefore the application of the petitioners for a mandamus or for a prohibition must be denied.

While so holding we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a railroad as a going concern, and we feel that the possession of such property by the court through its receivers should not *be[112] unnecessarily prolonged. There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.

The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays shall take place, the court would listen to an application by any creditor, upon due notice to the receivers, for orders requiring the closing of the trust as soon as might be reasonably proper, or else vacating the orders appointing the receivers.

The rules are discharged and the petitions dismissed.

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*I. M. DARNELL & SON COMPANY and[113]
H. D. Minor, Plffs. in Err.,
v.
CITY OF MEMPHIS and Thomas J. Taylor, Trustee.

(See S. C. Reporter's ed. 113–126.)

Commerce — state taxation — discriminating against products of other states.

A tax upon property within the state which is the product of the soil of other

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NOTE.—As to state taxation as affecting interstate commerce—see notes to Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

states, imposed under the authority of Tenn. Const. 1870, art. 2, § § 28-30, and Tenn. Acts 1903, chap. 258, § § 1, 2, which exempt like property when produced from the soil of Tennessee, violates U. S. Const. art. 1, § 8, as directly interfering with interstate commerce.

[No. 75.]

Argued December 16, 1907. Decided January 20, 1908.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which reversed a decree of the Chancery Court of Shelby County, in that state, enjoining the enforcement of a tax on property which is the product of the soil of other states. Reversed and remanded for further proceedings.

See same case below, 116 Tenn. 424, 95 S. W. 816.

The facts are stated in the opinion.

Mr. **Dent Minor** argued the cause, and, with Messrs. C. H. Trimble, C. W. Metcalf, H. B. Anderson, and Metcalf, Minor, & Metcalf, filed a brief for plaintiffs in error:

Logs in the hands of a manufacturer, awaiting conversion into lumber, and the lumber made therefrom, in the hands of the same manufacturer, are within the exemptions of the Tennessee Constitution when cut from Tennessee soil.

Benedict Bros. v. Davidson County, 110 Tenn. 191, 67 S. W. 806.

The state of Tennessee, by exempting from taxation such personalty when taken from its own soil, has thereby precluded itself from taxing similar personalty taken from the soil of other states, for the reason that a state may not, under the Federal Constitution, discriminate in favor of the products of its own soil, or in favor of its own citizens, as against the products or against citizens of other states.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Webber v. Virginia, 103 U. S. 350, 26 L. ed. 567; New York v. Roberts, 171 U. S. 667, 43 L. ed. 327, 19 Sup. Ct. Rep. 58; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

The complainant, a corporation, while not a citizen, is a "person" within the meaning of the state and Federal Constitutions, and is entitled to the protection guaranteed to persons by the 14th Amendment.

Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 250, 28 L.R.A. 796, 32 S. W. 5; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

Mr. **Marion G. Evans**, argued the cause, and, with Messrs. William H. Carroll and Thomas H. Jackson, filed a brief for defendants in error:

There is nothing in the contention of plaintiff in error that the property is protected by the interstate commerce clause of the Federal Constitution, for the reason that the logs were not in transit, but had arrived at their destination. They had been manufactured, or were in process of manufacture, into articles of various kinds, and had become a part of the general property of the state.

American Steel & Wire Co. v. Speed, 110 Tenn. 546, 100 Am. St. Rep. 814, 75 S. W. 1037; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Brown v. Houston, 114 U. S. 623, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Woolman v. State, 2 Swan, 354; Howe Mach. Co. v. Gage, 9 Baxt. 519; Naff v. Russell, 2 Coldw. 36.

The plaintiff in error is a corporation having its place of business in the city of Memphis. A corporation is not a citizen within the meaning of the constitutional provision as to privileges and immunities of citizens.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Paul v. Virginia, 8 Wall. 168, 178, 19 L. ed. 357, 359.

The plaintiff in error is a Tennessee corporation, engaged in manufacturing within the state. It is receiving the benefit of exemption on all articles that it manufactures out of the produce of Tennessee. It is not a case where a citizen of another state is complaining that he is being denied privileges and immunities that are extended to citizens of Tennessee. It is a case where a Tennessee corporation is not content with the exemption it already has, and is contending for more, upon the ground that the state, having exempted articles manufactured of the produce of Tennessee in its hands, must exempt all articles manufactured of the produce of any other state by it and in its hands. One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity.

Red River Valley Nat. Bank v. Craig,

181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Albany County v. Stanley, 105 U. S. 314, 26 L. ed. 1051; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Castillo v. McConnico, 168 U. S. 680, 42 L. ed. 624, 18 Sup. Ct. Rep. 229.

The power of taxation is an incident to sovereignty, is essential to the very existence of government, and is so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of such authority as exercises it.

M'Culloch v. Maryland, 4 Wheat. 316–428, 4 L. ed. 579–606; Cooley, Const. Lim. 678; State Tax on Foreign-held Bonds, 15 Wall. 300–319, 21 L. ed. 179–186.

The purpose of the Constitutional exemption was in the interest of home productions and home industries. The exemptions do not apply alone to citizens of Tennessee. Any person, regardless of his citizenship, can come to Tennessee and get the benefit of them.

Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Blake v. McClung, 172 U. S. 256, 43 L. ed. 438, 19 Sup. Ct. Rep. 165.

The power of the state, expressed either in its organic law or by statute, to foster industries by providing exemptions from taxation both to persons and to certain classes of property within its territory, has been repeatedly recognized by the Supreme Court of the United States.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89–94, 45 L. ed. 102–104, 21 Sup. Ct. Rep. 43; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671.

It has been held by the supreme court of Tennessee repeatedly that nonresidents of the state could not avail themselves of the exemption laws of this state, either as to homestead or personalty.

Hawkins v. Pearce, 11 Humph. 45; Prater v. Prater, 87 Tenn. 83, 10 Am. St. Rep. 623, 9 S. W. 361; Carson v. Memphis & C. R. Co. 88 Tenn. 650, 8 L.R.A. 412, 17 Am. St. Rep. 921, 13 S. W. 588; Farris v. Sipes, 99 Tenn. 298, 41 S. W. 443; Lisenbee v. Holt, 1 Sneed, 50; Emmett v. Emmett, 14 Lea, 370; State v. Davidson County, 96 Tenn. 180, 33 S. W. 924; Cowan v. Carson, 101 Tenn. 523, 50 S. W. 742.

Most of the cases cited by plaintiff in error are cases where a license tax had been charged against a nonresident, or where foreign products had been specifically taxed as such.

See Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

*Mr. Justice **White** delivered the opinion of the court: **[115]**

Article 2 of the Tennessee Constitution of 1870 provides:

"Sec. 28. All property—real, personal, or mixed—shall be taxed, but the legislature may except such as may be held by the state, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.

. . . . . .

"Sec. 30. No article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees."

By chapter 258 of the acts of Tennessee for 1903 it was, among other things, provided:

"Sec. 1. That all property—real, personal, and mixed—shall be assessed for taxation for state, county, and municipal purposes, except such as is declared exempt in the next section.

"Sec. 2. That the property herein enumerated, and none other, shall be exempt from taxation. . . . Sub-sec. 5. All growing crops of whatever nature and kind, the direct product of the soil of this state in the hands of the producer and his immediate vendee, and manufactured articles from the produce of the state in the hands of the manufacturer."

In the recent case of Benedict Bros. v. Davidson County, 110 Tenn. 183, 191, 67 S. W. 806, 808, the supreme court of Tennessee held as follows:

"We are of opinion that, under the facts in this record, the logs upon the yard, in the hands of the mill-operating manufacturer, and his property, and lumber, rough and smooth, cut by him from such logs, grown on Tennessee soil, are articles manufactured from the produce of the state, and exempt, under the provisions of § 30, article 2, of the Constitution; and the demurrer was therefore properly overruled, and complainants, under the allegations of their bill, are en- [116]titled *to recover back the taxes paid the state, and to perpetually enjoin the taxes assessed by the county and city."

For more than three years prior to January 30, 1905, the I. M. Darnell Son & Company, a corporation of Tennessee, was domiciled in Memphis, in that state, and there owned and operated a lumber mill. Shortly prior to the date just named, pursuant to chapter 366 of the acts of Tennessee for 1903 (Tenn. Acts 1903, pp. 1097–1101), the value of the personalty of the Darnell Company was assessed for taxation by the city of Memphis at $44,000. Of this amount $19,325 was the value of logs cut from the soil of states other than Tennessee, which the company had brought into Tennessee from other states, and were held by the company as the immediate purchaser or vendee, awaiting manufacture into lumber, or consisted of lumber already manufactured by the company from logs which had been acquired and brought into the state from other states, as above mentioned, and all of which lumber was lying in the mill yard of the company, awaiting sale. The Darnell Company protested against this assessment, asserting that it was not liable to be taxed on said sum of $19,325, the value of the property owned by it as the immediate purchaser of logs brought from other states, or lumber, the product thereof. The ground of the protest was that the property represented by the valuation in question could not be taxed without discriminating against it, as like property, the product of the soil of Tennessee, was exempt from taxation under the Constitution and laws of that state, and therefore to tax its said property would violate the commerce clause (§ 8, article 1) of the Constitution, and the equal protection clause of the 14th Amendment.

The protest was overruled. Thereupon threat of distress and sale was made by the collecting officer, unless the taxes on all the property were paid. On January 30, 1905, the Darnell Company filed in the chancery court of Shelby county its bill against the city of Memphis and the collecting officer to enjoin the enforcement of the tax as to the [117]logs brought in from other *states, and the lumber, the product thereof, as above stated, on the ground of the repugnancy of the tax to the commerce clause and the 14th Amendment, because of the foregoing alleged discrimination. At the same time it paid into court the amount of the taxes which were not in dispute.. The sufficiency of the bill was challenged by demurrer, asserting in substance that the assessment complained of did not constitute an unlawful discrimination, and was not repugnant either to the Constitution of Tennessee or of the United States. Subsequently, by leave of court, an additional demurrer was filed, which, in effect, asserted that, as the plaintiff company was a citizen of Tennessee, it could not be heard to complain of the tax, and that the enforcement of the same was not repugnant to the 14th Amendment, and that, as the property sought to be taxed was not in transit or awaiting shipment out of the state, but, on the contrary, had reached its destination and was in the hands of the consignee and owner, who was a citizen of Tennessee, and had become a part of the general property of the state, the assessing of the same for taxation was not an interference with commerce between the states. The chancellor overruled the demurrer and decided the case in favor of the Darnell Company, because the court, as stated in the decree, was of the opinion "that the tax in controversy is in contravention of the rights of complainant as guaranteed by the Constitution of the United States, and particularly the interstate commerce clause thereof, and the 14th Amendment thereof, as set out in the complainant's original bill."

On appeal the supreme court of Tennessee, in considering the demurrer, held the disputed tax not to be repugnant to the Constitution of the United States, and reversed the decree of the chancery court. 116 Tenn. 442, 95 S. W. 816. The court entered a decree against the Darnell Company and H. D. Minor, the surety on the appeal bond, for the amount of the disputed tax, penalty, and interest. The company and Minor prosecute this writ of error.

*As all the assignments of error relied on [118] for reversal are but the counterpart of the reasons which led the court below to the conclusion that the tax was not repugnant to the Constitution of the United States, we come at once to consider the affirmative conceptions on that subject expressed in the opinion of the court below, as affording the most direct method of disposing of the issues for decision. Those conceptions are of a twofold character,—one relating to the commerce clause and the other to the equal protection clause of the 14th Amendment.

The court, in its opinion, conceded that the property embraced in the assessment complained of was purchased by the complainant in and brought from other states, or consisted of lumber produced from logs so brought into Tennessee, and that property of like character would not be subject to taxation under the state law if it had been produced from the soil of Tennessee. But the levy of the tax was held not to be a direct burden upon interstate commerce, and hence not repugnant to the commerce clause of the Constitution of the United States, as a result of the interpretation which the court affixed to previous decisions of this court concerning the operation of the commerce clause of the Constitution and the right of a state to impose a tax, even if discriminatory in character, upon property coming from other states, after such property had come at rest within a state and been commingled with the mass of property therein. The court, after stating that the provision of the state Constitution which authorized the exemption of property produced from the soil of Tennessee had its inception in the "first Constitution of this state, adopted on February 6, 1796, and hence formed a part of the fundamental law of the state when it was admitted by the act of Congress, approved June 1, 1796 [1 Stat. at L. 491, chap. 47]," proceeded to state its reasons for holding that the discriminatory tax was not repugnant to the commerce clause, as follows:

"1. Upon the averments of the bill it is manifest that, although the property sought [119] to be taxed was purchased by *complainant in and brought from another state, nevertheless it had become devested of any connection with commerce between the states and was at rest, commingled with and merged into the general mass of property of this state, awaiting sale to purchasers.

"Although the origin of property may be in another state, nevertheless, when it is brought into this state and here merged into the mass of general property, it at once becomes subject to the tax laws of this state. American Steel & Wire Co. v. Speed, 110 Tenn. 524–546, 100 Am. St. Rep. 814, 75 S. W. 1037.

"This principle was recognized and the holding of this court affirmed by the Supreme Court of the United States (192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365), and is in harmony with other adjudications of that court (Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367).

"In Kehrer v. Stewart, 197 U. S. 60–65, 49 L. ed. 663–666, 25 Sup. Ct. Rep. 403, the Supreme Court of the United States, in substance, declared that it can make no difference whence the property came or to whom it should be ultimately sold, because, upon its arrival in the state where it is offered for sale and intermingled with the general property of the state, it becomes and is a part of the taxable property of the state."

As we are of opinion that the question for decision is clearly foreclosed by prior decisions of this court, which demonstrate that the court below misconceived the rulings of this court upon which it relied, we do not stop to analyze the reasoning of the court, considered as an original proposition, but come at once to test its correctness by making a brief review of the decided cases relied upon by the court below, and others, not referred to, which relate to the subject, and which are controlling.

As a prelude to a review of the cases referred to, we observe that while it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce *is at rest within a [120] state and has become commingled with the mass of property therein, it may be taxed by such state without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a state could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.

The leading cases announcing the doctrine that a state may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are Woodruff v. Parham and Brown v. Houston, supra. But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not, include the authority to burden the property brought from another state with a discriminating tax. In American Steel & Wire Co. v. Speed, 192 U. S. 519, 48 L. ed. 546, 24 Sup Ct. Rep. 365, where the doctrine of Woodruff v. Parham and Brown v. Houston was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another state, even after it had come at rest within a state, from being a direct burden upon interstate commerce, property so situated must be taxed "without discrimination, like other property situated within the state."

The statements just made adequately point out the misconception as to the rulings of this court upon which the court below placed its conclusion, since the court took no heed of the express declaration concerning the nullity of any discriminating tax, made in the cases which the court relied on. The importance of the subject, however, and the statement made by the court below as to the long existence in Tennessee of the tax exemption in favor of the products of the soil of Tennessee, leads us to a brief review of other decided cases in this court which have long since clearly es-[121]tablished the want *of power in a state to discriminate by taxation in any form against property brought from other states.

In Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743, the invalidity was adjudged of a municipal ordinance of the city of Baltimore which established rates of wharfage to be charged on vessels resorting to or lying at, "landing, depositing, or transporting goods or articles other than the productions of this state, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the state." The principle settled by earlier decisions, which were referred to (Woodruff v. Parham, supra; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; and Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449), was reaffirmed, the court saying:

"In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired.

. . . . . .

"The state, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other states. The concession of such a power to the states would render wholly nugatory all national control of commerce among the states, and place the trade and business of the country at the mercy of local regulations having for their object to secure exclusive benefits to the citizens and [122]products *of particular states. But it is claimed that a state may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other states wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the state could discriminate against the citizens and products of other states in the use of the public streets or other public highways."

In Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565, a license statute of the state of Virginia was held to be a regulation of commerce and invalid, because the tax was made to depend upon the foreign character of the articles dealt in; that is, upon their having been manufactured without the state. The court said:

"If, by reason of their foreign character, the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states."

In Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, an act of the state of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the state, engaged in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the state, was held to be repugnant to the commerce clause, as being "a discriminating tax levied against persons for selling goods brought into the state from other states or countries." The court said:

"A discriminating tax imposed by a state, operating to the *disadvantage of the prod-[123]ucts of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

And, in the course of the opinion, referring to state decisions announcing a want of authority in the several states to prescribe different regulations in relation to the commerce in certain articles, dependent upon the state from which they were brought, the court thus referred to a decision of the supreme court of Missouri:

"In State v. North, 27 Mo. 464, 471, 476, where an act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, produce, or manufacture of that state, and manufactured articles, the growth or produce of other states, it was held by the supreme court of that state that the law was unconstitutional and void. The court say: 'From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this state and those manufactured in our sister states.' And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court say: 'But, whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufacturers, it is equally a regulation of commerce, and, in effect, an exercise of the power of laying duties on imports; and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? [124] Whatever may be the motive for such *taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures, regardless of the consequences.' "

The principle applied in the foregoing cases was also given effect in Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; and Voight v. Wright, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; and so-called inspection laws of various states were held to be repugnant to the commerce clause of the Constitution because of their discriminating character. In New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, while the tax there considered, imposed by New York upon a corporation of another state, was sustained as a valid tax upon the franchise of doing business as a corporation in New York, the court reaffirmed the authority of its former decisions, declaring the invalidity of all taxes of a discriminating character levied by a state upon the products of other states.

In this connection we excerpt from the opinion in Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, statements which directly relate to the subject in hand and which conclusively demonstrate the unsoundness of the proposition which the court below upheld; that is, that the commerce clause of the Constitution does not protect property brought from another state from being discriminated against after it has arrived and been commingled with the mass of property within the state of its destination. Commenting upon the reasoning of the opinion in State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164, the court said (p. 341):

"When the latter [imported goods] become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the state they are taxed in the same manner as other property *possessed by its citizens, without [125] discrimination or partiality. We held in Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state or because they are the products of another state. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation.' No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it."

As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee, by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause [126]of the *14th Amendment. The judgment below must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SOUTHERN PINE LUMBER COMPANY,
T. L. L. Temple, G. W. R. Chinn, et al.,
Plffs. in Err. and Appts.,
v.
W. B. WARD et al.

(See S. C. Reporter's ed. 126-143.)

Appeal — mode of review.

1. A decree of the supreme court of the territory of Oklahoma, affirming a decree of the trial court, setting aside a sale made under attachment proceedings as a cloud on title, and directing the enforcement of a trust deed by sale, is reviewable in the Supreme Court of the United States only by appeal.

Appeal — dismissal — delay in docketing cause.

2. An appeal to the Federal Supreme Court, allowed on June 12, 1906, to review a judgment of the supreme court of the territory of Oklahoma, rendered on September 7, 1905, will not be dismissed because not docketed until August 10, 1906, for the reason that the counsel who originally forwarded the record were not attorneys of the Federal Supreme Court, and hence not qualified to enter their appearance, where no motion to docket and dismiss under rule 9 was made.

Appeal — parties — substitution.

3. Proceedings to make the representatives of a deceased appellee parties are rightfully taken in the Supreme Court of the United States rather than in the court below, where the appeal had not only been allowed, but the citation issued and acceptance of service thereon made by the attorney of record of such appellee during his lifetime.

Appeal — who may be heard.

4. Parties who have not appealed from the judgment below cannot object, on an appeal sued out by their adversaries, to the failure of the court below to sustain a motion to dismiss the cause.

Appeal from the supreme court of Oklahoma — scope of review.

5. The jurisdiction of the Supreme Court of the United States on an appeal from a decree of the supreme court of the territory of Oklahoma in a case submitted to the trial court by stipulation, without a jury, is confined to determining whether there was evidence tending to support the findings, and whether such findings sustained the judgment; since the trial court, by virtue of Okla. Rev. Stat. 1903, § 279, was empowered to make findings of fact as the basis of its conclusions of law, and the supreme court of the territory was confined to determining whether the findings below sustained the judgment, if there was evidence supporting the findings, and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court.

Pledge — enforcement — rights of third persons.

6. The right of the indorser of a note outstanding and past due, to enforce the collateral held by him to secure him against liability on his indorsement, consisting of a note secured by a trust deed, is a matter solely between himself and the pledgeors, with which the purchasers of the property covered by the trust deed, under a sale made in attachment proceedings, are not concerned, where they have failed to establish their claim that the collateral had been extinguished by payment.

Limitation of actions — laches.

7. The objection of laches on the part of the grantors in attacking a sale in attachment proceedings of property covered by a trust deed is not available to the defendants, in a suit to set aside the attachment proceedings and enforce the trust deed, who claim title to the property under the attachment proceedings, where they do not rest content with defending their alleged title, but make it the basis of an assertion of a right to affirmative relief.

Appeal — from territorial supreme court — review of facts.

8. The action of the trial court in disregarding uncontradicted testimony tending to show the absence of a necessary party will not be disturbed on an appeal from a territorial supreme court to the Supreme Court of the United States, where such testimony squarely conflicts with an averment in a pleading to which the witness is a party, and upon the truth of which averment the whole controversy proceeds.

Appeal — defect of parties below — when objection not available.

9. A suggestion as to want of parties below, made after final judgment, is not available on appeal when that suggestion conflicts with the issues as made up and upon which the case is tried, and which, if the suggestion be correct, will involve reversing the judgment at the request of appellants because of deceit practised by them upon the courts below.

Appeal — from territorial supreme court — error in finding — when not ground for reversal.

10. A decree of a territorial supreme

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal, see note to Wedding v. Mayler, 66 L.R.A. 833.

court setting aside attachment proceedings will not be reversed for errors committed by the trial court in its finding concerning the jurisdictional insufficiency of the affidavits for publication and attachment in the attachment suit, where the conclusion of the supreme court of the territory, based on the findings below as to the fraud in bringing the attachment suit, and the absence of a party plaintiff therein, is ample to sustain the judgment, irrespective of the affidavits for publication and attachment.

Appeal — from territorial supreme court — scope of review — objection not raised on record.

11. Contentions which the record does not show to have been presented, directly or indirectly, to the trial court, by way of pleading or otherwise, before final judgment, and which were not made the subject of complaint in the motion for a new trial, and which were evidently regarded by the supreme court of the territory, on writ of error, as an afterthought, and not open under the state of the record, cannot be considered by the Federal Supreme Court on an appeal from the supreme court of the territory.

[No. 82.]

Submitted December 17, 1907. Decided January 20, 1908.

IN ERROR to and APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Logan County, in that Territory, setting aside a sale made under attachment proceedings as a cloud on title, and directing enforcement of a trust deed by a sale. Writ of error dismissed. Judgment affirmed on appeal.

See same case below, 16 Okla. 131, 85 Pac. 459.

The facts are stated in the opinion.

Messrs. **Arthur A. Birney** and **Henry F. Woodard** submitted the cause for plaintiffs in error and appellants:

The plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's title.

Dick v. Foraker, 155 U. S. 404, 414, 39 L. ed. 201, 205, 15 Sup. Ct. Rep. 124; Orton v. Smith, 18 How. 263, 15 L. ed. 393.

The payment of the note discharged the deed of trust.

Marvin v. Vedder, 5 Cow. 671; 22 Am. & Eng. Enc. Law, 2d ed. p. 608; De La Vergne v. Evertson, 1 Paige, 182, 19 Am. Dec. 411; Carter v. Burr, 113 U. S. 737, 28 L. ed. 1147, 5 Sup. Ct. Rep. 713; Kingston Bank v. Gay, 19 Barb. 459; Peake v. New Orleans, 139 U. S. 375, 35 L. ed. 143, 11 Sup. Ct. Rep. 541.

A surety must have been damnified before he can foreclose a mortgage security. Darst v. Bates, 51 Ill. 439; Stevens v. Hurlburt, 25 Ill. App. 124.

Since the cross bill prays no affirmative relief against the plaintiff, and is purely supplementary to the original bill, it falls with the original bill. The Grigsbys should be remitted to their original proceeding to recover the land. In view of the evident collusion between the plaintiff Ward and the Grigsbys in the filing of the original bill, and in their effort to strengthen Ward's hands by means of the cross bill, they have no right to complain of the application of the rule that the dismissal of the original bill will dismiss the cross bill.

Ladner v. Ogden, 31 Miss. 344; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515; Bound v. South Carolina R. Co. 47 Fed. 33.

The court erred in not dismissing the petition for want of a necessary party.

Merwin, Eq. & Eq. Pl. §§ 950, 953; Herrington v. Hubbard, 2 Ill. 569, 33 Am. Dec. 426; Shields v. Barrow, 17 How. 130–139, 15 L. ed. 158–160; Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Zelle v. Workingmen's Bkg. Co. 10 Ill. App. 335; Rowell v. Jewett, 69 Me. 293.

Messrs. **John C. Moore**, **D. W. Buckner**, and **George W. Buckner** submitted the cause for defendants in error and appellees:

The findings of fact of the court below are conclusive here and cannot be re-examined.

Lloyd v. McWilliams, 137 U. S. 576, 34 L. ed. 788, 11 Sup. Ct. Rep. 173; Cohn v. Daley, 174 U. S. 539, 43 L. ed. 1077, 19 Sup. Ct. Rep. 802.

It must be assumed that the evidence supports the judgment, on appeal from a territorial court, in which there is no statement of facts in the nature of a special verdict, under the act of Congress of April 7, 1874.

Marshall v. Burtis, 172 U. S. 630, 43 L. ed. 579, 19 Sup. Ct. Rep. 290; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Benites v. Hampton, 123 U. S. 519, 31 L. ed. 260, 8 Sup. Ct. Rep. 254.

If the appellants desire to have any questions based upon the sufficiency of the evidence considered, they should have applied to the court of first instance to make findings of fact in the nature of a special verdict, in order that the several supreme courts might review the evidence.

Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Neslin v. Wells, F. & Co. 104 U. S. 429, 26 L. ed. 803; Thompson v. Ferry, 180 U. S. 484, 45 L. ed. 633, 21 Sup. Ct. Rep. 453; Armijo v. Armijo, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 707.

The supreme court of the territory of Oklahoma cannot review the sufficiency of the evidence to sustain the judgment below, in the absence of a finding of fact.

Smith v. Spencer, 8 Okla. 459, 58 Pac. 638.

The finding of the trial court upon controverted questions of fact will, on appeal, be given the same effect as the verdict of a jury.

McKennon v. Pentecost, 8 Okla. 117, 56 Pac. 958.

Where an issue of fact is tried by a court without a jury, and a general finding is made upon such issue by the court upon oral testimony, such finding is a finding of every special thing necessary to be found to sustain the general finding; and, if there be any evidence to sustain such finding, is conclusive upon this court, upon all disputed and doubtful questions of fact.

Waltire v. Carriger, 5 Kan. 672; Nicklisson v. Holman, 17 Kan. 22; Evans v. Lafeyth, 29 Kan. 736.

The Supreme Court of the United States will not consider any question which cannot be and was not considered by the lower court.

Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210.

Messrs. John C. Moore and D. W. Buckner also filed a separate brief for defendants in error and appellees:

Whereas, in this case, the assignment of errors presents questions which were not presented to the lower court for decision, and were not passed upon by the trial court or properly reserved, this court will not consider them.

Comstock v. Eagleton, 196 U. S. 99, 49 L. ed. 402, 25 Sup. Ct. Rep. 210.

This court will not consider assignments of error which relate to the sufficiency of the evidence to support the general findings of the lower courts.

Zeckendorf v. Johnson, 123 U. S. 617, 31 L. ed. 277, 8 Sup. Ct. Rep. 261; Cohn v. Daley, 174 U. S. 539, 43 L. ed. 1077, 19 Sup. Ct. Rep. 802; Smith v. Spencer, 8 Okla. 459, 58 Pac. 638.

Assignments of errors which are not set forth and relied upon in the brief of counsel are considered waived and will not be noticed.

Penny v. Fellner, 6 Okla. 386, 50 Pac. 123.

The assignment of errors based upon an alleged defect of parties cannot be considered here, because no such question was ever presented to the lower court.

United States v. Agee, 47 C. C. A. 152, 108 Fed. 10; Ehret v. Schuylkill River E. S. R. Co. 151 Pa. 158, 24 Atl. 1068; Bell v. Todd, 51 Mich. 21, 16 N. W. 304; Moore v. Waco Bldg. Asso. 19 Tex. Civ. App. 68, 45 S. W. 974.

To hold that the pledgee would have to stand by and let the note secured by the trust deed become barred by the statute of limitations, and thereby lose his security, simply because the debt of his principal had been extended, and was not due and paid, would be an anomaly in the law; but such is not the law; it is not only a right, but the duty of a pledgee, in such cases, to proceed upon the pledge.

Land Title & T. Co. v. Asphalt Co. 121 Fed. 192; Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108.

The judgment is void because of the imposition and fraud practised upon the court in obtaining the judgment.

Freeman, Judgm. 2d ed. § 336; Buchanan v. Bilger, 64 Tex. 590.

If there ever was a case presented in which a court of equity should annul a judgment, it is the case at bar; and in such cases courts of equity always grant relief.

2 Beach, Modern Eq. Pr. § 884; Brewer v. Bowman, 3 J. J. Marsh. 492, 20 Am. Dec. 158; Ralston v. Sharon, 51 Fed. 707; Johnson v. Waters, 111 U. S. 640–667, 28 L. ed. 547–556, 4 Sup. Ct. Rep. 619.

*Mr. Justice White delivered the opinion [127 of the court:

Not unmindful that upon this record we are bound by the findings of fact below made, and are confined to determining whether the facts as found sustain the judgment, if there is evidence supporting the findings, and, without departing from that rule, we at the outset refer, in chronological order, to some facts which are alleged in the pleadings, which are either directly or by necessary implication established by the findings, and as to which there can be no dispute whatever. We do this in order, if possible, to dispel the obscurity resulting from the prolixity of the pleadings, the unnecessary volume and confusion of the record, and the want of accuracy manifested by some of the assignments of error relied upon.

Prior to June, 1891, two partnerships were located in Texas,—one, Grigsby Brothers; the other, the Union Mills Lumber Company, sometimes called the Union Lumber Mills Company. The first (Grigsby Brothers) was composed of G. M. D. Grigsby and D. J. Grigsby; the second (Union Mills Lumber Company) of the two Grigsbys, owning four-fifths interest, and T. L. L. Temple, one-fifth. At the same time there was located in Arkansas a firm known as the Southern Pine Lumber Company, composed of T. L. L. Temple and Benjamin Whitaker. Prior to June, 1891, D. J. and

G. M. D. Grigsby became the recorded owners of the following real estate situated in the city of Oklahoma and in the town of Guthrie, Oklahoma territory, *viz.:* 1st, an undivided four-fifths interest in five lots in block 60, Oklahoma City; 2d, an undivided four-fifths interest in one lot in block 54 of the town of Guthrie proper; an undivided four-fifths interest in and to an undivided one-half interest in block 43 in the town of Guthrie, and a like undivided four-fifths interest in a one-half interest in two lots in block 43 and one lot in block 51, East Guthrie. A like one-fifth undivided interest in the same lots was simultaneously acquired and recorded in the name of T. L. L. Temple. In June, 1891, the National Bank of Jefferson, in Jefferson, Texas, discounted [128] *for Grigsby Brothers a note of that firm for $5,000. The note was dated June 11, 1891; matured in ninety days; bore 12 per cent interest from maturity, and stipulated for a 10 per cent attorney's fee in case of suit to collect. This note was secured by a deed of trust embracing the undivided interest of the Grigsbys in the lots above referred to. E. F. Pentecost, the trustee named in the deed, was empowered, in case of default in payment of the debt of the bank, to sell and apply the proceeds to the payment of the note. This deed was duly recorded in Oklahoma territory. In August, 1891, the American Exchange Bank of St. Louis discounted for T. L. L. Temple a note of the Union Mills Lumber Company, drawn for it by D. J. Grigsby. This note was for $884.90, payable in ninety days; bore 12 per cent interest from maturity, and contained a 10 per cent attorney's fee clause. It was indorsed by T. L. L. Temple individually and by the Southern Pine Lumber Company. This note, not having been paid at maturity, the American Exchange Bank of St. Louis, in November, 1891, sued on the note in a state court at Dallas, Texas. The defendants were the two Grigsbys and Temple as partners in the Union Mills Lumber Company, the maker of the note, Temple and Whitaker as partners in the Southern Pine Lumber Company, the indorsers, and Temple individually, because of his personal indorsement. Judgment was entered against all the defendants, as members of the two firms and individually, for $1,022.38, the principal, interest, and attorneys' fees. An execution was returned in February, 1892, satisfied "by collecting the full amount of principal and costs and interest of this execution from T. L. L. Temple." In September, 1892, a corporation called the Southern Pine Lumber Company was organized under the laws of Arkansas at Texarkana in that state. T. L. L. Temple was one of the incorporators and subscribed to 997 out of a total of 1,000 shares, and he became the president of the company. In October, 1893, at Texarkana, Texas, a corporation called the Southern Pine Lumber Company was organized under the laws of Texas. Temple was an *incorporator [129] and became its president. In November, 1894, in the district court for Logan county, Oklahoma territory, a suit was commenced in the name of the American Exchange Bank of St. Louis against T. L. L. Temple and Benjamin Whitaker as partners in the Southern Pine Lumber Company; the Southern Pine Lumber Company, the Arkansas corporation, D. J. and G. M. D. Grigsby and T. L. L. Temple, as partners of the Union Mills Lumber Company. The petition counted upon two causes of action: First, the judgment which had been rendered in the Texas state court at Dallas, as if that judgment was still due the bank and had not been satisfied; and second, the sum of $294.56, which was an open account, alleged to be due by the Union Mills Lumber Company and the partners thereof, the two Grigsbys and Temple, to the partnership known as the Southern Pine Lumber Company, composed of Temple and Whitaker. This open account, it was alleged, had been transferred by the partnership in 1893 to the Southern Pine Lumber Company, a corporation, which latter, it was averred, had transferred the account to the American Exchange Bank. The defendants, being all nonresidents of Oklahoma, were summoned after affidavit by publication, and upon affidavit attachments were issued. The undivided interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie was attached. Ultimately a judgment was rendered in favor of the American Exchange Bank and against the defendants for the amount of the Texas judgment plus the open account sued upon, with interest and costs. The liens of the attachments were recognized, and under execution the interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie was sold and bought in by "the Southern Pine Lumber Company, a corporation," for a sum less than the judgment debt. In the meanwhile the five thousand dollar note remained unpaid in the hands of the National Bank of Jefferson, the note having been extended from time to time. In 1896 that bank failed, and the note and trust deed were among the assets of the bank in the hands of the receiver appointed by the Comptroller *of the Currency. [130] In December, 1898, with the approval of the Comptroller, sanctioned by an order of the United States district court, there was paid the receiver of the bank, in settlement of the rights of the bank, $2,000, and the receiver, at the time of this payment, by a writing, assigned and transferred in blank all the right, title, and interest of the bank in and to the note and the trust deed securing the payment of the same. The $2,000 was paid by means of a check of a corporation known as the Grigsby Construction Company. With these undisputed facts in hand we now come more immediately to state the case.

This suit was commenced in May, 1900, by a petition filed on behalf of W. B. Ward in the district court of Logan county, Oklahoma, alleging himself to be the owner of the five thousand dollar note originally held by the National Bank of Jefferson. A decree for the sum of the note, principal, interest, and attorney's fees, and for the foreclosure of the trust deed, was prayed. It was alleged that, although the note had been renewed from time to time, but was then past due, Pentecost, the trustee, had declined to act, and therefore he was made a defendant. It was, moreover, alleged that certain persons, who were named, asserted title to the property embraced by the trust deed in virtue of an alleged purchase made under an execution issued to enforce a judgment rendered in favor of the American Exchange Bank, and that said claim was a cloud upon the title to the property embraced by the trust deed, which the plaintiff wished to have removed; that all the proceedings in the attachment suit were without effect upon the rights of the holder of the note, because neither the trustee nor the National Bank of Jefferson were made parties to that suit, although the trustee was, at the time when the suit was brought, a resident of Oklahoma and the trust deed was there duly of record. It was, moreover, alleged that the judgment and sale in the attachment suit were void, because no actual or even constructive notice had been given to the defendants in the suit, and that the purchaser at the sale had [131]knowledge *of the trust deed, of the failure to make the trustee a party, and of the absence of notice, actual or constructive, to the defendants in the attachment suit. A judgment was prayed decreeing the proceedings in the attachment suit and the sale made therein to be void and for an enforcement of the trust deed by a sale of the property to which that deed related. The persons made defendants were Pentecost, the trustee; the Southern Pine Lumber Company, a corporation existing under the laws of the state of Arkansas; T. L. L. Temple and Benjamin Whitaker, partners under the name of the Southern Pine Lumber Company; G. M. D. Grigsby and D. J. Grigsby, composing the firm of Grigsby Brothers; G. W. R. Chinn and his wife, and T. L. L. Temple individually, and other persons whom it is unnecessary to name. The defendants the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and his wife filed a joint answer. The discount of the five thousand dollar note by the National Bank of Jefferson and the execution of the deed of trust securing the same were admitted, but the right of Ward to sue upon the note was denied, it being averred that the note had been extinguished by payment made to the receiver of the National Bank of Jefferson. The proceedings for the sale of the property in the attachment suit were also admitted, and the validity of the purchase made in virtue of the execution issued in that suit was asserted. It was alleged that the answering defendants G. W. R. Chinn and his wife have a complete and perfect title in fee simple to the lots embraced in the trust deed, situated in Oklahoma City, and that "the Southern Pine Lumber Company claims and charges that it has perfect title to all the property described in said trust deed, situated in the city of Guthrie, Oklahoma territory, which they acquired by purchase." The answer admitted that, although the trust deed was of record at the time of the attachment proceedings, as no notice was given to the trustee or the National Bank of Jefferson, those proceedings did not affect the rights secured by the deed, but that all such rights, if any, had ceased to exist in virtue of the payment *of[132] the note, to secure which the trust deed had been executed. Charging that the trust deed, as remaining on the record, was a cloud upon their title, the prayer was not only for a dismissal of the petition of the plaintiff, but for affirmative relief in favor of the defendants by decreeing them to be the owners of the property, free from the operation of the trust deed.

The two Grigsbys answered, admitting the execution of the note and trust deed by which it was secured, and that the note was due by them to Ward, the plaintiff, who held the same, as well as the trust deed, by a valid assignment from the National Bank of Jefferson. By way of answer to the affirmative relief prayed by the other defendants, and as a cross complaint, it was, with great elaboration, alleged that the proceedings in the attachment suit and the sale made thereunder were absolutely void. To support this averment it was charged that the attachment suit was a mere fraudulent scheme devised by Temple for the purpose of defrauding them of their undivided interest in the lots in Oklahoma City and Guthrie; that the judgment sued on in Oklahoma in the name of the American Exchange Bank of St. Louis had, long prior to the bringing of the suit, been satisfied, and that the suit was brought in the name of the American Exchange Bank, without the knowledge of that bank or under its authority, and was therefore actually prosecuted by Temple against himself in order to accomplish the fraud which he had in view. That the alleged open account embraced in the attachment suit had never, in any way, been transferred to the American Exchange Bank, and that that bank had no knowledge of or connection with the account. It was, moreover, alleged that the proceedings in the suit were additionally void, because of the entire absence of legal notice, actual or constructive, to the parties defendant who had interests to protect in that cause. It was averred that the debt represented by the note originally sued on in Texas by the American Exchange Bank was due solely by Temple, and that, in satisfying the judgment which had been rendered on the note, he, Temple, had paid his own debt, because the note had *been given in the name [133] of the Union Mills Lumber Company to Temple as a part of the settlement of the partnership affairs, he coming under the obligation to pay the note; but, if the note could be treated as a liability of the firm, they (the two Grigsbys) would have paid any proportion due by them as partners of the Union Mills Lumber Company, had any notice, actual or constructive, been given them of an alleged claim on the part of Temple against them growing out of the note and the satisfaction by him of the judgment rendered upon the note in the Texas court.

A demurrer was filed by the defendants the Southern Pine Lumber Company and Chinn and wife, to the cross complaint of the Grigsbys, on the ground that it showed no right to relief, that it sought collaterally to attack the judgment rendered in the attachment suit, and that the facts alleged disclosed such laches as estopped from recovery. Immediately afterwards a general denial was filed by the same persons without any reservation of the demurrer. The case by stipulation was submitted upon the evidence taken to the court without a jury. The court decided in favor of Ward, the plaintiff, and in favor of the Grigsbys on their cross complaint. Two formal judgments were entered on the journal, one relating to the claim of Ward and the other to the cross complaint of the Grigsbys. In the judgment in favor of the plaintiff Ward the journal entry recites: "And the court, after hearing the evidence, finds that all of the allegations contained in the plaintiff's petition, filed herein, are true, and that there is due from defendants G. M. D. Grigsby and D. J. Grigsby to the plaintiff W. B. Ward, on the note and mortgage sued on in this action, the sum of $5,100, and that said note specifies that said indebtedness shall bear interest," etc.

Again: "The court finds that the trust deed sued upon in this action, and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby; that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

*Again: "The court further finds that W. [134] B. Ward, the plaintiff in this action, is, at this time, the owner of said note and trust deed."

In considering the proceedings in the attachment suit and the prayer of Ward's petition that the sale under said proceedings be held to be void and the cloud upon his rights created thereby be removed, the court found:

"From the evidence that the judgment in cause number 1524, entitled the American Exchange Bank of St. Louis, Missouri, against the Southern Pine Lumber Co., et al., defendants, rendered in the district court of Logan county, Oklahoma territory, on the 2d day of March, 1895, and all proceedings or transfers of property under and by virtue of said judgment and cause of action, are each null and void and of no force and effect, and that the purchasers at the sale of the property levied upon under such judgment took nothing by their purchase; the court finds that the trust deed sued upon in this action, and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby, that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

And in accordance with these findings a judgment was entered in favor of Ward, the plaintiff, for the amount of the note, principal and interest, directing the sale of the property embraced in the trust deed, and the application of the proceeds, first, to the payment of costs; second, to the payment of Ward of the principal and interest of the note and attorney's fees, and the turning over of the residuum, if any, to the Grigsbys as the owners of the property, and barring all rights of the other defendants in the property.

The judgment disposing of the cross petition of the Grigsbys declared, concerning the debt of Ward, as follows: "The court further finds from the evidence and the pleadings that it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross petitioners in this action, that they are indebted to the plaintiff, W. B. Ward, by reason of the note and trust *deed . . . [135] and that said debt is a legal and subsisting debt as against the defendants, and is a legal charge upon the property involved in this action." Concerning the attachment proceedings and the sale made thereunder it was expressly found from the evidence that the defendants and cross complainants, the Grigsbys, had no knowledge of the pendency of the action in time to appear and make defense thereto, that the affidavits for publication and for attachment were wholly insufficient and did not state facts adequate to confer jurisdiction upon the court, that the petition also failed to state facts sufficient to confer jurisdiction, and that all the steps taken in the attachment suit, including the sale, were wholly void and of no effect. Concerning the averments of fraud in the bringing of the attachment suit in the name of the American Exchange Bank the court found as follows:

"The American Exchange Bank of St. Louis, Missouri, the plaintiff in said action, never at any time brought said suit, or authorized anyone to bring said action in its name, and had no knowledge of the pendency of said action until a long time after the rendition of the judgment therein and the property had been sold thereunder. The court further finds it a fact that the defendants in said action did not owe the plaintiff, the American Exchange Bank, any sum or sums of money; the court further finds as a fact that said action was prosecuted by one of the defendants as against himself and other defendants in the name of the American Exchange Bank, without its knowledge or consent, and for the purpose of defrauding these defendants and cross petitioners out of their property rights involved in this action, and the court further finds that said action was a fraud and an imposition upon the court as well as on the defendants and cross petitioners; the court further finds that the Southern Pine Lumber Company, a corporation, and T. L. L. Temple, and all other persons purchasing at the sheriff's sale under the judgment in said cause number 1524, above referred to, and their grantees, took nothing by their [136] purchase, *by reason of said judgment and proceedings had thereunder being without jurisdiction in the court and absolutely void."

A judgment was entered avoiding the sale made under the attachment proceedings and awarding the Grigsbys the property, subject to the enforcement of the rights of Ward under the deed of trust. After an unsuccessful attempt to obtain a new trial, error was prosecuted to the supreme court of the territory. That court, after elaborately disposing of motions to dismiss, affirmed the judgment. The court held that it was unnecessary to consider the sufficiency of the affidavits for publication and attachment in the attachment suit, as the findings below concerning the fraud in bringing that suit and the absence of a party plaintiff therein sustained the action of the trial court.

"The Southern Pine Lumber Company, a corporation," T. L. L. Temple, and G. W. R. Chinn and his wife, appealed and moreover prosecuted a writ of error. Our jurisdiction to review is by appeal (National Live Stock Bank v. First Nat. Bank, 203 U. S. 296, 305, 51 L. ed. 192, 195, 27 Sup. Ct. Rep. 79, and cases cited), and therefore we dismiss the writ of error from consideration.

On September 15, 1907, a motion to dismiss was postponed to the merits. The grounds are that the cause was not docketed within the time required by rule of this court, because proper parties were not made in the court below, and because the court below erred in not sustaining a motion to dismiss, and, moreover, because the assignments of error here relied on are insufficient.

The judgment was rendered on September 7, 1905. On June 12, 1906, the appeal was allowed. While the record was deposited with the clerk of this court within thirty days, it was not docketed until after thirty days, because the counsel who originally forwarded the record were not attorneys of this court, and hence not qualified to enter their appearance. As the docketing was accomplished soon afterwards (August 10, 1906), and no motion to docket and dismiss under rule 9 was *made, the contention is without [137] merit. Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188; Richardson v. Green, 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443.

Service of citation was accepted by all the appellees. The acceptance on behalf of G. M. D. Grigsby and D. J. Grigsby, late partners as Grigsby Brothers and individually, was made on June 15, 1906, by their attorney of record. On June 30, 1906, G. M. D. Grigsby died. In this court the death of G. M. D. Grigsby was suggested and the proper order for publication was made and the return thereof filed. The contention is that the proceedings to make the representatives of G. M. D. Grigsby parties should have been taken in the court below, and that hence the notice of publication for that purpose had in this court was ineffective. The answer to the proposition is, that the jurisdiction of this court attached upon the allowance of the appeal. Evans v. State Nat. Bank, 134 U. S. 330, 331, 33 L. ed. 917, 918, 10 Sup. Ct. Rep. 493, and cases cited. And, although, by a subsequent failure to duly prosecute, the benefits of the appeal might have been lost (Grigsby v. Purcell, 99 U. S. 505, 508, 25 L. ed. 354, 355), yet, clearly, as not only had the appeal been allowed, but citation had been issued and acceptance of service thereof been made by the attorney of record of the Grigsbys during the lifetime of both, the appeal was pending in this court at the time of the death of G. M. D. Grigsby; and, as the case had been docketed, proceedings were rightfully taken here to make his representative a party.

The remaining grounds, *viz.*, the failure of the court below to dismiss and the inadequacy of the assignments of error, involve no question concerning our jurisdiction. In order, however, to at once dispose of the first contention, we observe that the appellees cannot be heard to assail the judgment below, since they did not appeal. Field v. Barber Asphalt Paving Co. 194 U. S. 618, 621, 48 L. ed. 1142, 1153, 24 Sup. Ct. Rep. 784, and cases cited.

We come to the merits. Before doing so it is necessary to fix accurately the scope of our inquiry. The case was submitted to the trial court by stipulation without a jury. That court, by virtue of the Code of Civil Procedure of Oklahoma, was empowered to make findings of fact as the basis [138] of its *conclusions of law. Rev. Stat. of 1903 (4477) § 279. On the writ of error which was prosecuted to the supreme court of the territory, that court was confined to determining whether the findings of the court below sustained the judgment if there was evidence supporting the findings, and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court. Under these circumstances, notwithstanding the ruling in National Live Stock Bank v. First Nat. Bank, supra, pointing out the difference between the method of reviewing a case coming from the territory of Oklahoma and cases coming from the territories generally, our review in the case before us is confined to determining whether the court below erred; that is, whether that court was mistaken in holding that there was evidence tending to support the findings and that such findings sustained the judgment. Halsell v. Renfrow, 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. Rep. 610.

1st. It is contended that the court below erred because it did not find, as a matter of fact, that the debt was due Ward, but contented itself, as did the trial court, with assuming the debt to be due, merely as a result of a collusive admission made by the Grigsbys to that effect in their answer, thus depriving the defendants of the property acquired by them in the attachment proceedings because of the weakness of their title, and not on account of the establishment of an adverse right in Ward. It being, moreover, insisted that, as the failure to find affirmatively in favor of Ward's debt, irrespective of the admission made by the Grigsbys, required the rejection of Ward's demand, a like result was necessary as to the cross petition of the Grigsbys, since that petition was purely ancillary to the original demand of Ward for relief, and therefore should have shared a like fate.

It is apparent that these contentions rest upon the proposition that no finding was made by the court below concerning the existence of the debt of Ward. The proposition is thus stated in the brief of counsel:

"In the judgment of the district court the only finding as *to Ward's debt is that 'from [139] the evidence and the pleadings it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross petitioners in this action, that they are indebted to the plaintiff,' " etc.

The words thus quoted are taken from the findings and judgment of the trial court disposing of the cross petition of the Grigsbys, but these words immediately follow the passage relied on:

"By reason of the note and trust deed sued on by the plaintiff in this action in the sum of five thousand seven hundred and ninety-seven dollars ($5,797) and that said debt is a legal and subsisting debt as against the defendants and is a legal charge upon the property involved in this action."

But, putting this out of view, the inaccuracy of the statement that the passage referred to is "the only finding as to Ward's debt," is patent on the face of the record. We say this because the statement overlooks the explicit findings which the trial court made, as to the proof of Ward's debt, in the judgment which was entered concerning that debt, which we have previously quoted. In so far as the proposition assails the sufficiency of the evidence to sustain the express findings concerning the debt of Ward, it suffices to say that we think it is beyond question that there was testimony tending to show that the note and trust deed originally held by the National Bank of Jefferson had been acquired by Ward for a valuable consideration. Indeed, that the proposition now relied upon is a mere afterthought is demonstrated by the application for a new trial made in the trial court, since such application, among others, was expressly based upon the ground that the court had erred in finding that Ward's debt had been established. And the same is substantially true of the assignments of error made for the purposes of the writ of error to the supreme court of the territory. In other words, having asserted below that error was committed because the trial court had found that Ward's debt was established by the proof, it is now insisted that the court erred because no such finding was [140]made. *While, if there had been no evidence tending to sustain the claim of Ward other than the admission of the Grigsbys, such admission might not have been adequate as tending to sustain a finding in favor of Ward, clearly such admission, considered in connection with the findings below concerning the proof of the debt of Ward, is sufficient to answer the argument that relief should not have been given Ward, because the note upon which he sued was held by him as collateral security. We say this because, as the note indorsed by Ward, to secure his freedom from liability upon which the collateral was held by him, was outstanding and past due, the right of Ward to enforce the collateral was a matter solely between himself and the Grigsbys, with which the purchasers at the attachment sale were not concerned, as they had failed in establishing their plea that the collateral held by Ward had been extinguished by payment.

2d. It is insisted that the court below erred in not dismissing the action on the ground of the laches of the Grigsbys in assailing the proceedings in the attachment suit. This objection can have no relation to the claim of Ward, since the findings below exclude the conception that Ward's debt was barred by limitation, and, indeed, the case was tried upon the admission of all the defendants that the debt of Ward was due at the time of the bringing of the attachment proceedings, and upon the assertion of Temple, and those who answered with him, that that debt had been, subsequent to the attachment proceedings, extinguished by payment. True it is that laches on the part of the Grigsbys was made one of the grounds of the demurrer filed to their cross petition, but the answer contained no reservation of the demurrer, and the findings of the trial court, as well as the action thereon of the supreme court of the territory, negate the conception that the courts below could have been of the opinion that facts sufficient to show laches had been established. Besides, the contention as to laches disregards the considerations which, in the nature of things, must arise, when it is borne [141]in mind that the defendants, *who claimed title under the attachment proceedings, did not rest content with defending their alleged title, but made that title the basis of an assertion of a right to affirmative relief, since they substantially, by cross petition, invoked such relief to maintain the validity of their title, and to obtain a cancelation of the trust deed upon which Ward relied.

3d. It is urged that the court below erred in passing upon the validity of the attachment proceedings, because there was an absence of a party whose presence was essential to a decision of that question. This is based upon the assertion that T. L. L. Temple, who testified that he was president of both the Southern Pine Lumber Company, the Arkansas corporation, and of the Texas corporation of the same name, also testified that the Arkansas corporation went into liquidation in 1893, and that the Texas corporation was the purchaser at the attachment sale, and was therefore the owner of the property involved in the suit. It is insisted that, as there was no evidence tending to dispute this testimony, there was nothing justifying the conclusion that the Arkansas corporation had an interest in the property, or had the capacity to stand in judgment concerning the validity of the sale in the attachment proceedings and the title to the property held thereunder. We think the proposition is without merit. Ward, by his petition, made the Southern Pine Lumber Company, a corporation organized and existing under the laws of Arkansas, Temple and others, defendants, and did not refer to a Texas corporation, known as the Southern Pine Lumber Company, as having any rights whatever in the property. The answer filed on behalf of Temple and the Southern Pine Lumber Company, the Arkansas corporation, expressly asserted that that corporation owned the property, and, in effect, implied that it was the purchaser at the attachment sale. And the same thing is, in effect, substantially true with reference to the cross petition of the Grigsbys. As, then, on the record, Temple was a party to the pleading which expressly asserted title in the Arkansas corporation, and the whole controversy proceeded upon the truth *of that assertion, we cannot say that there [142] was nothing justifying the trial court in treating the Arkansas corporation as the purchaser at the attachment sale and as the owner of the property, even if, to reach that result, the trial court may have been of the opinion that the testimony of Temple on the subject was not worthy of credit. And additional force to this view results from a consideration of the proceedings intervening subsequent to the findings and judgment of the trial court and the final judgment of the supreme court of the territory. We say this because both the motion for a new trial, made in the trial court on behalf of Temple and the Southern Pine Lumber Company of Arkansas, and the assignments of error on behalf of the same parties, which were made for the purposes of the writ of error from the supreme court of the territory, made no reference to the purchase and ownership by the Texas corporation, but, in effect, asserted the purchase and ownership by the Arkansas corporation. The first assertion upon the record, outside of the testimony of Temple, of any right on the part of the Texas corporation, made its appearance in a motion for a rehearing, filed after the supreme court of the territory had decided the case, and which was reiterated in the assignments of error filed on the appeal to this court. The right of the appellees to the judgment in their favor may not now be destroyed by a suggestion as to want of parties, made by the appellants after final judgment, when that suggestion conflicts with the issues as made up and upon which the case was tried, and which, if the suggestion be correct, would involve reversing the judgment at the request of the appellants because of deceit practised by them upon the territorial courts. Because we dispose of the contention upon the reasons just stated, we must not be understood as deciding that, in view of the relations of Temple to the Texas corporation, as testified to by him, and the other circumstances disclosed by the findings below, it may not be that the judgment below was conclusive upon the Texas corporation, if it had title, although it was not technically a party to [143] the record. *Into a consideration of that subject we do not deem it necessary to enter.

4th. It is insisted that error was committed by the trial court in its finding concerning the jurisdictional insufficiency of the affidavits for publication and attachment in the attachment suit. But the grounds upon which this is based simply go to the weight of the evidence concerning the findings made by the court on those subjects, and that is not open. Further, as we are clearly of the opinion that the conclusion of the supreme court of the territory, based on the findings below, as to the fraud in bringing the attachment suit and the absence of a party plaintiff therein, is ample to sustain the judgment, irrespective of the affidavits for publication and attachment, the claim must be held to be without merit. It is, moreover, urged that the courts below erred in holding the sale void as to the Grigsbys, and in recognizing their equity in the property without condemning them to pay their proportion, as partners in the Union Mills Lumber Company, of the debt which was sued on in the attachment proceedings, and in not taking into consideration improvements which it is asserted were put upon the property by the purchaser at the attachment sale. The first of these is placed in argument upon the ground that the cross petition of the Grigsbys admitted that the debt sued on in the attachment suit was, as between them and Temple, a partnership debt, for which they were jointly liable with Temple. But this statement, as made in argument, is rested solely upon a partial consideration of the Grigsby cross petition, and ignores the express allegation to the contrary which that petition contained. It suffices to say, however, as to both of these contentions, that there is nothing in the record disclosing that they were directly or indirectly presented to the trial court by way of pleading or otherwise before final judgment, and indeed were not made the subject of complaint in the motion for a new trial, and were evidently regarded by the supreme court of the territory as an afterthought, and not open under the state of the record.

Affirmed.

*EX PARTE: IN THE MATTER OF [144] EPHRAIM SIMON.

(See S. C. Reporter's ed. 144-149.)

Habeas corpus — to anticipate regular course of proceedings.

Habeas corpus, being an extraordinary remedy, will not issue on behalf of a person imprisoned in default of payment of a small fine for disobeying a preliminary injunction granted by a Federal circuit court, restraining the enforcement of a judgment of a state court, to inquire into the jurisdiction to grant the injunction, where the bill alleges facts which show a total want of jurisdiction in the state court, and implies, at least, that a fictitious service was made with deliberate fraud, and the writ is confessedly sought in order to obtain a summary disposition of the cause instead of awaiting the result of a trial in the regular way.

[No. 13, Original.]

Argued January 6, 7, 1908. Decided January 20, 1908.

PETITION for writs of habeas corpus and certiorari to inquire into the jurisdiction of a Federal circuit court to enjoin the enforcement of the judgment of a state court, on behalf of a person imprisoned in default of payment of a small fine for disobeying such injunction. Rule discharged and petition for habeas corpus denied.

For decision granting preliminary injunction, see 153 Fed. 234.

The facts are stated in the opinion.

Note.—As to when habeas corpus is sustainable, and what questions reviewable—see notes to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Tinsley v. Anderson, 43 L. ed. U. S. 92.

Messrs. **Louis Marshall** and **Henry L. Lazarus** argued the cause and filed a brief for petitioner:

The petitioner being restrained of his liberty by a United States marshal under a judgment of the United States circuit court which is claimed to be void, habeas corpus is the proper remedy to test the validity of the imprisonment.

Ex parte Fisk, 113 U. S. 713-718, 28 L. ed. 1117-1119, 5 Sup. Ct. Rep. 724; Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; Ex parte Wells, 18 How. 307, 15 L. ed. 421; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861; Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

The preliminary injunction issued out of the United States circuit court which restrained the proceedings of the petitioner in the civil district court of Louisiana, being in contravention of U. S. Rev. Stat. § 720, was a nullity, and its disregard by the petitioner does not constitute contempt.

Slaughter-house Cases, 10 Wall. 273, 19 L. ed. 915; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Leathe v. Thomas, 38 C. C. A. 75, 97 Fed. 136; Fenwick Hall Co. v. Old Saybrook, 66 Fed. 389; Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Sargent v. Helton, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78; Moran v. Sturges, 154 U. S. 267, 38 L. ed. 984, 14 Sup. Ct. Rep. 1019; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

There are two classes of cases which do not come within the purview of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581.

1. Cases where injunctions are authorized by a law relating to proceedings in bankruptcy.

2. Cases in which the issuance of an injunction has been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a Federal court of its lawful jurisdiction over particular persons or things.

3. To these may be added, as an additional class, those cases where a Federal court and a state court have concurrent jurisdiction, in which, as a rule of necessity and comity, it is held that the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved exhausted, in which case a Federal court, if it has first acquired jurisdiction, may protect it by injunction.

Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 365; Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; Re Chetwood, supra.

The rule applies to proceedings after judgment.

Central Nat. Bank v. Stevens, 169 U. S. 464, 42 L. ed. 819, 18 Sup. Ct. Rep. 403; United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 317, 320, 44 L. ed. 485, 486, 20 Sup. Ct. Rep. 423.

Mr. **Harry H. Hall** argued the cause and filed a brief for respondent:

The United States circuit court has jurisdiction of a suit between the parties in interest, citizens of different states, claiming that the judgment obtained by one against the other in a state court is null for want of citation.

Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. ed. 362; Williamson v. Berry, 8 How. 543, 12 L. ed. 1190; Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Payne v. Hook, 7 Wall. 429, 430, 19 L. ed. 261, 262; Galpin v. Page, 18 Wall. 364, 366, 367, 21 L. ed. 962, 963; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Arrowsmith v. Gleason, 129 U. S. 98, 32 L. ed. 634, 9 Sup. Ct. Rep. 237; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 15, 51 L. ed. 348, 27 Sup. Ct. Rep. 236.

The United States court has jurisdiction of a suit between the parties in interest, citizens of different states, claiming that the judgment obtained by one against the other is voidable for fraud practised in obtaining it.

Johnson v. Waters, 111 U. S. 667, 28 L. ed. 556, 4 Sup. Ct. Rep. 619; Cole v. Cunningham, 133 U. S. 112, 33 L. ed. 541, 10 Sup. Ct. Rep. 269; Marshall v. Holmes, 141 U. S. 596, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; Terre Haute & I. R. Co. v. Peoria & P. Union R. Co. 82 Fed. 945; National Surety Co. v. State Bank, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593.

The circuit court, having jurisdiction, may restrain by injunction all proceedings tending to impair that jurisdiction.

Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; Terre Haute & I. R. Co. v. Peoria & P. Union R. Co. 82 Fed. 943.

Mr. Justice **Holmes** delivered the opinion of the court:

The petitioner is in custody for contempt, he having violated a preliminary injunction issued by the circuit court of the United States. He brings this petition on the ground that the circuit court had no jurisdiction, and that therefore its decree might be disobeyed.

The jurisdiction of the circuit court over the cause depends on the allegations of the bill upon which the injunction was granted. That bill was brought by the Southern Railway Company against the petitioner. It al-
[147]leges that Simon brought *a suit against the railway in Louisiana surreptitiously and without its knowledge, and that, on the suggestion that the railway was a foreign corporation, doing business in the state without having named an agent to receive service, he served the citation upon the assistant secretary of state, whereas the railway was not a corporation doing business in the state, and the service was void. The suit proceeded to judgment for a fraudulently exaggerated sum, while the railway had no knowledge of the proceedings until after the judgment was rendered. As soon as it heard of it, it began this suit; in effect, to prevent the enforcement of the judgment, because unconscionable and fraudulently obtained, upon a cause of action to which it has a good defense if allowed to present the same.

The bill further alleges that Simon will attempt to collect the fraudulent judgment by fieri facias, and prays, as specific relief, an injunction against his further proceeding under the same, but the general scope and purpose of the bill is what we have stated. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. The contempt seems to have occurred in November. It consisted in obtaining a writ of fieri facias and directing a levy and the service of garnishment process to collect the judgment. It was admitted at the argument that this method was adopted in order to obtain a summary disposition of the cause by this court instead of awaiting the result of a trial in the regular way. The punishment was a small fine, and the imprisonment was ordered only until the fine was paid.

The facts stated seem to us enough to dispose of this case. The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a habeas corpus. United States
[148]v. Sing Tuck, *194 U. S. 161, 168, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Whitney v. Dick, 202 U. S. 132, 140, 50 L. ed. 963, 966, 26 Sup. Ct. Rep. 584; Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602. In the present instance the release of the petitioner is not the primary issue of the case, to be sure, but it is so closely wrapped up with that issue that when it is apparent that the imprisonment is only nominal and has been incurred after two years' acquiescence, merely in order to secure a speedier hearing in this court, the analogy of the decisions is very close. The petitioner is in no position to demand this summary relief.

This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, forbidding United States courts to stay by injunction proceedings in any state court. The circuit court had jurisdiction of the cause. That must be assumed at this stage, and finally, unless we overrule the strong intimations in Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, and the earlier cases cited in that case. Even if the decision could have been put on a narrower ground, the ground adopted was that the circuit court had original jurisdiction of such a suit. It would be going far to say that, although the circuit court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached, or that an injunction continued in force under the authority of the United States, but originally issued by a state court, stood on stronger grounds than one granted by the United States court in the first place. Even if the order was erroneous, it would be going far to say that it was made without jurisdiction and might be disregarded, although the court had jurisdiction of the cause. See United States v. Shipp, 203 U. S. 563, 573, 51 L. ed. 319, 323, 27 Sup. Ct. Rep. 165. But, without laying down a broader proposition than is required, we are of opinion that, in the particular circumstances of this case, habeas corpus is an extraordinary remedy, for which there has been shown no sufficient ground.

It is argued that the bill does not disclose facts that warrant going behind the judgment, but contains only vague allegations of fraud. But it alleges facts that show a total want of jurisdiction in the state court, and implies, at least, that the *fictitious service was made with deliberate[149] fraud. Its general nature and purpose are clear. Enough is alleged to amend by, if amendment is necessary, and to give jurisdiction to the circuit court. As we cannot pronounce the whole proceeding void, we have nothing to do with the sufficiency of the pleading or the question whether the bill would be good or bad on demurrer. There was at least color of right for the preliminary order, and it will be time enough to discuss the merits if the case comes here again after final decree.

Rule discharged.

Petition for habeas corpus denied.

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†HENRY O. HOUGHTON, Trustee; George H. Mifflin, J. Murray Kay, et al., Appts.,
v.
GEORGE B. CORTELYOU, Postmaster General.

(See S. C. Reporter's ed. 149–160.)

Injunction bonds — liability.

1. Liability on an undertaking required as a condition of granting the restraining order authorized by U. S. Rev. Stat. § 718, U. S. Comp. Stat. 1901, p. 580, pending decision upon a motion for a temporary injunction, ceases when a new and permanent injunction is granted without reference to the restraining order, which is by its terms to be in force "until further order, to be made, if at all, after a hearing."

Appeal — review of discretionary order — damages on injunction undertaking.

2. The refusal of the court of original jurisdiction to allow damages for the period during which the temporary restraining order, granted pursuant to U. S. Rev. Stat. § 718, U. S. Comp. Stat. 1901, p. 580, was in force, upon the undertaking given as a condition of granting such order, cannot be sustained as an appropriate exercise of discretion, where, by such order, the Postmaster General was restrained from refusing to transmit certain publications at second-class rates, as theretofore, and the result of the litigation was to establish not only the right of the government to receive additional postage pending the controversy, but also the fact that the publishers had received a very considerable service from the government in carrying the publications through the mails at a rate less than that which it was entitled to charge.

[No. 49.]

Argued November 12, 1907. Decided January 20, 1908.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, reversing a decree of the Supreme Court of the District, refusing to allow any damages on an undertaking given as a condition of granting a temporary restraining order, assessed damages on such undertaking for the entire time during which the action was pending. Modified so as to include only damages for the period covered by the restraining order, and, as modified, affirmed.

See same case below, 27 App. D. C. 188.

The facts are stated in the opinion.

Messrs. **William S. Hall** and **Holmes Conrad** argued the cause and filed a brief for appellants:

When an injunction bond has been given, it is within the power of the trial court to decide whether any damages at all ought to be recovered.

Russell v. Farley, 105 U. S. 433, 446, 26 L. ed. 1060, 1064.

The final decree ended the preliminary injunction or restraining order for which the only undertaking was ever given.

United States Electric Lighting Co. v. Ross, 9 App. D. C. 560.

An injunction which has been granted upon an interlocutory application is superseded by the decree made at the hearing of the cause. If, therefore, it is intended that it shall remain in force, it must be expressly continued.

Dan. Ch. Pl. & Pr. 6th Am. ed. 1680.

The preliminary injunction or restraining order was, by its terms, to continue only "until further order, to be made, if at all, after a hearing." It was never dissolved. It expired by its own limitation.

Sweeney v. Hanley, 61 C. C. A. 153, 126 Fed. 99.

Had the defendant desired security, the matter should have been brought to the attention of the court.

Cayuga Bridge Co. v. Magee, 2 Paige, 116.

The court cannot impose on the plaintiffs any undertaking which they have not given. The plaintiffs may decline the injunction by refusing to give the undertaking. The court only makes the undertaking a condition of granting the injunction. If the plaintiffs refuse to give it, the court can refuse the injunction, but it cannot compel the plaintiffs to give an undertaking.

Tucker v. New Brunswick Trading Co. L. R. 44 Ch. Div. 249.

An undertaking given by plaintiff on the issuing of a restraining order may be continued in effect after the hearing with the consent of the plaintiff, but not otherwise.

Novello v. James, 5 De G. M. & G. 876.

Mr. **Henry H. Glassie** argued the cause and filed a brief for appellee:

The vice in appellants' argument consists in ignoring the fact that the suit and the appeal are one proceeding.

Garrity v. Chicago & N. W. R. Co. 22 Ill. App. 404.

The objection made by appellants was urged in Dodge v. Cohen, 14 App. D. C. 582, and was overruled, and the contrary has since been the settled law and practice of the District.

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†This case is reported by the official Reporter under the title of "Houghton v. Meyer."

The security of a bond to act as a supersedeas and a continuance of the injunction is merely cumulative.

Hamilton v. State, 32 Md. 353.

Mr. Justice **Day** delivered the opinion of the court:

This case is here by appeal from the court of appeals of the District of Columbia. The case originated in an action brought against the then Postmaster General (Mr. Payne) to compel him to enter and transmit certain publications of the complainants, Houghton, Mifflin, & Company, as second-class matter instead of third class, as ruled by the Postmaster General; and the bill prayed an injunction restraining the Postmaster General from refusing to transmit them at second-class matter rates. A restraining order was issued upon the filing of the bill on May 31, 1902, in the following terms:

Upon the complainant filing undertaking, as required by equity rule 42, the defendant will be hereby restrained as prayed in the within-mentioned bill until further order, to [153]*be made, if at all, after a hearing, which is fixed for the 16th day of June, at 10 o'clock A. M., 1902, of which take notice.

By the court.

A. B. Hagner, Justice.

An undertaking was given in the following terms:

George H. Mifflin, one of the complainants, and the American Surety Company of New York, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

George H. Mifflin.
The American Surety Company, New York.

By Jno. S. Loud.
Approved 4 June, 1902. A. B. Hagner.

No further hearing was had upon the application for a temporary injunction, and on March 10, 1903, the case was heard on the merits and the following injunction awarded:

"This cause, coming on to be heard upon the bill and the exhibits filed therewith, and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered, and decreed—

"(1.) That the complainants are entitled to have their publications entitled 'Riverside Literature Series' received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879. [20 Stat. at L. 355, chap. 180.]

"(2.) That the Postmaster General be, and he is hereby, perpetually restrained from enforcing and continuing the cancelation *of the certificate of entry set forth in [154] paragraph six of said bill, and from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry, and transmission through the mails of their publication entitled 'Riverside Literature Series' as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879."

An appeal was taken to the court of appeals of the District of Columbia, and on June 5, 1903, the decree of the supreme court was reversed and the case remanded to the court below, with directions to dismiss the bill. 22 App. D. C. 234. From that decree an appeal was taken to this court, and the decree of the District court of appeals was affirmed on April 11, 1904. 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590.

Upon receipt of a mandate of this court the District court of appeals issued its mandate, ordering the court below to dismiss the bill. The Postmaster General moved the court to enter a decree upon the mandate of the District court of appeals, to dismiss the bill, dissolving the injunction, and ascertain the damages by reason of the violation thereof. The District supreme court entered a decree setting aside its original decree, and dismissed the bill, and dissolved the injunction theretofore granted, but being of opinion that, as matter of law, the complainants and sureties on the injunction bond given in the case were not liable to damages thereon, the motion for ascertainment of damages upon such undertaking was overruled and denied, and the injunction undertaking canceled and annulled.

From the part of the decree refusing to assess damages the Postmaster General, Mr. Cortelyou having succeeded Mr. Payne, appealed to the District court of appeals, where the order of the court below was reversed, and a decree directed against the appellant and the surety on the injunction bond for the sum of $6,880.86, the amount with in- [155] terest stipulated as the *difference between postage due at third-class rate and that paid as second-class rate "between the date of the filing of the injunction herein and June 16, 1904, when such mailing at the second-class rate was discontinued." 27 App. D. C. 188. Thereupon appeal was taken to this court.

It is the contention of the appellants that the original undertaking, being entered only for a temporary purpose, had spent its force, and that there is no liability thereon, notwithstanding the fact that the original decree granting a permanent injunction was reversed by the District court of appeals, which judgment was affirmed in this court.

The contention of the appellee is that the damages sustained by the Postmaster General during the time pending this action was secured by the bond, and recovery may be had for the damages sustained, or, if not for the full amount, at least for the time from the granting of the restraining order until the final decree in the court of original jurisdiction.

The determination of the question involved depends upon the nature and character of the undertaking given. The restraining order issued in the case was authorized by § 718 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 580), which is as follows:

"Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge." U. S. Rev. Stat. § 718.

Under this section, originally passed June 1, 1872 (§ 7, chapter 255, 17 Stat. at L. 196), a restraining order with features distinguishing it from an interlocutory injunction was introduced into the statutory law. In the prior act of Congress of March 2, 1793 (1 Stat. at L. 334, 335, chap. 22), it was provided in § 5: "Nor shall a writ of injunction be granted . . . in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

[156] *By force of § 718 a judge may grant a restraining order in case it appears to him there is danger of irreparable injury, to be in force "until the decision upon the motion" for temporary injunction. Thus, by its very terms, the section (718) does not deal with temporary injunctions, concerning which power is given in other sections of the statutes, but is intended to give power to preserve the *status quo* when there is danger of irreparable injury from delay in giving the notice required by equity rule 55, governing the issue of injunctions. While the statutory restraining order is a species of temporary injunction, it is only authorized, as § 718 imports by its terms, until the pending motion for a temporary injunction can be heard and decided. Yuengling v. Johnson, 1 Hughes, 607, Fed. Cas. No. 18,195; Barstow v. Becket, 110 Fed. 826, 827; North American Land & Timber Co. v. Watkins, 48 C. C. A. 254, 109 Fed. 101, 106; Worth Mfg. Co. v. Bingham, 54 C. C. A. 119, 116 Fed. 785, 789.

And the same view has been recognized in other jurisdictions having similar statutory provisions. "A temporary restraining order is distinguished from an interlocutory injunction, in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court; while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court." 1 High, Inj. 4th ed. § 3.

Turning from a consideration of the authority conferred to the terms of the order, it will be seen that the judge acted under the terms of § 718. For the order of restraint is "until further order, to be made, if at all, after a hearing, which is fixed for the 16th day of June, at 10 o'clock A. M., 1902, of which take notice." This is the order of which the defendant had notice and concerning which indemnity was required and given in the bond now in suit.

*As we have noticed, no further undertak- [157] ing was required of Houghton, Mifflin, & Company after the restraining order issued in its favor. The court of appeals for the District said:

"But we do not think the bond ceased to be in force after the decree was entered making the injunction perpetual. The parties by their actions treated it as though it continued to apply. The appellant would, had any question been raised, have asked for a new bond, in which event the appellees doubtless would have conceded that the bond remained in force. When the main case was before this court, and later was taken to the United States Supreme Court, it was considered that the original undertaking was in force or a new one would have been required,—one other than the supersedeas bond then given." 27 App. D. C. 195.

But we do not think the case can be decided upon conjecture as to what bonds might have been required. We must determine the case upon the liability of the principals and sureties on the bond which was actually given.

When the parties gave this undertaking, the court, exercising its discretion, had required that the restraining order should be upon condition that bond be given to secure the defendant against loss because of this temporary restraint.

It is true that the restraining order was, by its terms, to be in force until "further order," to be made, if at all, after hearing. Neither party brought on for hearing the pending motion for a temporary injunction. When the further order was made nothing was said of the restraining order. A new and permanent injunction in favor of the plaintiffs was granted. This decree necessarily superseded the restraining order, and it expired by the limitation contained in its terms, and there was no further liability on the bond, given only to secure that order.

It is further contended by the appellants that they should be relieved from all liability on this bond, upon the principles laid down in Russell v. Farley, 105 U. S. 433, 26 [158]L. ed. 1060. In that case the *equity practice in the courts of the United States concerning security for injunctions was elaborately discussed by Mr. Justice Bradley, speaking for the court. It was held that the exercise of discretion involved in the decision of the court of original jurisdiction, in awarding or withholding damages, should only be reversed in clear cases. And examining the procedure in the case then in hand, with a view to ascertaining whether injustice had been done, the fact is shown that the injunction secured by the obligation given in that case had never been entirely dissolved; that it had never been decided that the complainant was not entitled to it, at least, as to a portion of the property claimed by the parties suing out the injunction, and it turned out on the final hearing that, as to more than one half of the claim, the injunction was properly issued. In course of the discussion the learned Justice says:

"When the pledge [deposited by order of court] is no longer required for the purposes of justice, the court must have the power to release it and leave the parties to the ordinary remedies given by the law to litigants *inter sese.* Where the fund is security for a debt, or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not unfrequently occur that injustice would result from keeping property impounded in the court. On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice, *to[159] deny to the court the power to supersede the stipulation imposed."

In the present case the court of original jurisdiction, the supreme court of the District, refused to assess damages upon the injunction bond, for what reason the record does not disclose. The District court of appeals, as we have seen, assessed damages for the entire period during which it held the injunction to be in force. We do not think this case comes within the class outlined in Russell v. Farley, wherein the order of the trial court ought not to be disturbed upon principles of equity and in view of the superior knowledge of that court of the conduct of the parties in the course of the litigation.

In this case the government and the appellants were in controversy as to the rate of postage to be charged upon a certain class of publications sent through the mail by the appellants. It is true that the Department's rulings for some years had been in favor of the contention of the appellants as to the class to which this mailable matter belonged. When the Postmaster General ruled to the contrary, and correctly, as has now been held in the District court of appeals and in this court, the publishers applied to the court for an injunction to continue them in their original right to receive this lower rate of postage pending the litigation which they had begun, with a view to testing the right of the government to make this demand. The court entertained the suit and awarded a restraining order, but upon the condition that, if the publishers continue to receive the lower rate postage for which they contended, notwithstanding the ruling of the Postmaster General, the government was to be indemnified against loss should it turn out that its contention was right and that of the complainants wrong. The publishers accepted this condition, and gave the bond to secure their right to continue sending the mailable matter in controversy at the old rate, pending the further order of the court.

As a result of the final decision in this court, it turned out that the Postmaster General was right, and that the government [160]*was justly entitled to the additional rate of postage as ruled by the Postmaster General. The result of the decision established not only the right of the government to receive the additional postage, pending the controversy, but also established the fact that the publishers had received a very considerable amount of service from the government in carrying the publications through the mails at a rate less than it was entitled to charge.

We do not perceive, in this condition of affairs, any room for the application of the doctrine laid down in Russell v. Farley, which permits a court to relieve from liability on an injunction bond. The result of this litigation leaves no doubt as to the rights of the parties, and the government's right to avail itself of the security given to secure payment of the postage which it was legally entitled to charge.

It is not necessary for us to decide whether further and other security might not have been required under equity rule 93, or otherwise, as a condition of continuing the injunction after final judgment. What we determine is that this undertaking was authorized and given in pursuance of § 718, Revised Statutes, and should be construed accordingly. The District court of appeals should have sustained the order of the supreme court of the District, declining to assess any damages on the bond, except for the period from the time the bond was approved until March 10, 1903, the date of the decree in the court of original jurisdiction.

The judgment of the Court of Appeals, giving damages for the entire period of the litigation and until the legal rate of postage was paid by appellants, should be modified so as to include only damages for the period covered by the restraining order, as above stated, and, as so modified, affirmed, costs in this court to be equally divided.

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[161] *WILLIAM ADAIR, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 161-192.)

Constitutional law — due process of law — liberty — invalidity of statute forbidding discrimination against labor organization.

1. Personal liberty as well as the right of property is invaded without due process of law, in violation of U. S. Const., 5th Amend., by the provisions of the act of June 1, 1898 (30 Stat. at L. 424, chap. 370, U. S. Comp. Stat. 1901, p. 3205), § 10, making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of his membership in a labor organization.

Interstate commerce — congressional regulation — forbidding discrimination against labor organization.

2. There is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by the act of June 1, 1898, § 10, to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part.

[No. 293.]

NOTE.—Constitutionality of statutes forbidding employer from insisting that employees shall withdraw from or refrain from joining labor union as a condition of employment or continued employment.

That statutes of the kind in question are violative of the constitutional provision that no one shall be deprived of life, liberty, or property without due process of law, since the right not only to contract. but also to terminate contracts, is an essential attribute of the right of property, has been adjudicated in a number of cases. Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073; State v. Bateman, 7 Ohio N. P. 487; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098.

In some of the foregoing cases it is held that such statutes are also void because in violation of the constitutional provision against special legislation; and, in every case in which the contention has been raised, it has been declared that statutes of this kind cannot be upheld as a police regulation.

An analogous statute, requiring an employer to give a discharged workman a certificate stating the reasons of the discharge, has also been held unconstitutional, on the ground that the right of discharge may be exercised without any reason or explanation, in Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579.

The constitutionality of a statute of the kind under discussion has been upheld only in the case of Davis v. State, 11 Ohio Dec. Reprint, 894, the decision in which was rendered by an inferior court before the rendition of any of the decisions of the higher courts cited above, and was repudiated in the later Ohio case of State v. Bateman, supra.

Argued October 29, 30, 1907. Decided January 27, 1908.

IN ERROR to the District Court of the United States for the Eastern District of Kentucky to review a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of his membership in a labor organization. Reversed with directions to set aside the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the cause.

See same case below on demurrer, 152 Fed. 737.

The facts are stated in the opinion.

Messrs. **Benjamin D. Warfield** argued the cause, and, with Mr. Henry L. Stone, filed a brief for plaintiff in error:

To constitute a regulation of commerce within the meaning of the commerce clause of the Constitution the regulation must be direct and substantial, and not merely indirect, remote, incidental, and collateral.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 228, 44 L. ed. 136, 142, 20 Sup. Ct. Rep. 96; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Hooper v. California, 155 U. S. 648, 654, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Williams v. Fears, 179 U. S. 270, 278, 45 L. ed. 186, 190, 21 Sup. Ct. Rep. 128; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Swift & Co. v. United States, 196 U. S. 397, 49 L. ed. 524, 25 Sup. Ct. Rep. 276; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 687, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Veazie v. Moor, 14 How. 568, 14 L. ed. 545; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

We think it most significant that when state legislation has been attacked in this court as violative of the Constitution of the United States (a) because it required an express company to be licensed by the state in order that it might carry on an intrastate business (Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214), or (b) because it taxed the Pullman Company for carrying on an intrastate business (Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494), or (c) because it taxed a railroad company on its cab service (New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202), or (d) because it required separate coaches for the races (Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547), or (e) because it required trains to stop at certain stations (Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627), or (f) because it required engineers to be licensed (Smith v. Alabama, supra), or (g) because it required engineers to be examined for color blindness (Nashville, C. & St. L. R. Co. v. Alabama, supra), the argument of counsel and opinion of court have been at once directed to the consideration of the commerce clause of the Constitution.

On the other hand, when state legislation has been attacked in this court as invalid (a) because it altered the rule of fellow servant (Missouri P. R. Co. v. Mackey, 127 U. S. 206, 32 L. ed. 108, 8 Sup. Ct. Rep. 1161), or (b) because it rendered a railroad company liable for stock killed on account of failure to fence (Missouri P. R. Co. v. Humes, 115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110); or (c) because it rendered a railroad company liable for fire set without negligence (St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243),—in no one of the cases, although all these laws were general in their nature, and applicable to intrastate as well as interstate commerce, has the argument of counsel or opinion of court so much as hinted that these matters have any sort of relation to the commerce clause.

When cases have come to this court involving the question whether a particular state law is a regulation of interstate commerce, the question has been, Does the state law put a burden on interstate traffic?

Brown v. Maryland, 12 Wheat. 420, 6 L. ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Or the question has been, Does the state law place a burden on interstate transportation?

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

There is a difference between the power of Congress over land transportation and water transportation.

Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

Similar state statutes have been declared unconstitutional and void by the courts of last resort in those states, upon the ground that such statutes deprived the corporation or person against whom they were directed of liberty and property without due process of law.

State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073; Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579; New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; Shaver v. Pennsylvania Co. 71 Fed. 931. See also State v. Bateman, 7 Ohio N. P. 487.

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.

Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; Cooley, Torts, 278; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

Equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character.

Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

Attorney General **Bonaparte** and Mr. **William R. Harr** argued the cause and filed a brief for defendant in error:

In construing statutes, the whole statute and all of its parts are to be taken together.

Pennington v. Coxe, 2 Cranch, 34, 52, 2 L. ed. 199, 204.

The history of the act may be referred to in order to arrive at the intention of Congress.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

No better illustration of the power of Congress to regulate the subject of private contracts and private business in the interests of interstate commerce could be given than the Federal anti-trust act of July 2, 1890, which declares every contract in restraint of trade or commerce among the several states or with foreign nations illegal, and provides the penalty of fine or imprisonment for making or entering into any such contract.

This law has been adjudged constitutional and held to forbid, not only contracts which were in unreasonable restraint of interstate trade and commerce, but those which were reasonable in their nature.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

A common carrier is subject to peculiar control by the state or Congress, according as its business is local or interstate, because of the public nature of its business.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 393, 35 L. ed. 1051, 1054, 12 Sup. Ct. Rep. 255; Granger Cases (Munn v. Illinois) 94 U. S. 113, 24 L. ed. 77; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; United States v. Great Northern R. Co. 145 Fed. 438.

When the business of the carrier is interstate, the power of the state to control the conduct of its business in the interest of the public health, safety, or convenience is subject to the paramount right of Congress over the subject, which may displace all state regulations by legislation of its own.

Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Hennington v. Georgia, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep.

92; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914.

Prior to the construction of railroads, the plenary power of Congress over the navigable waters of the United States and the agencies and instrumentalities of interstate commerce thereon had been firmly established, and later cases confirm its power in that regard.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; Waring v. Clarke, 5 How. 441, 12 L. ed. 226; Sinnot v. Davenport, 22 How. 240, 16 L. ed. 246; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; United States v. Bellingham Bay Boom Co. 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 576, 577, 22 L. ed. 654, 662, 663; Sherlock v. Alling, 93 U. S. 99, 103, 104, 23 L. ed. 819–821; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 204, 29 L. ed. 158, 161, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The power of Congress over interstate commerce is not confined to the instrumentalities of such commerce known and in use when the Constitution was adopted, but extends to new means and agencies as they are developed.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The constitutionality of the statutes of the United States limiting the liability of owners of vessels navigating the waters of the United States for the embezzlement, loss, or destruction of property, goods, and merchandise shipped therein has been rested upon the commerce clause of the Constitution.

Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed 224; The Katie, 7 L.R.A. 55, 40 Fed. 480; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840.

Congress can prohibit an interstate carrier from engaging in any business that conflicts with its duties as a carrier.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

A similar state statute has been held constitutional.

Davis v. State, 11 Ohio Dec. Reprint, 894.

The Federal government may protect interstate commerce against all obstructions and disturbances, whether by capital or labor.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 319.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the constitutionality of certain provisions of the act of Congress of June 1st, 1898 (30 Stat. at L. 424, chap. 370, U. S. Comp. Stat. 1901, p. 3205), *concerning carriers engaged in interstate commerce and their employees. [**167**]

By the 1st section of the act it is provided: "That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3120), engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. The term 'employees,' as used in this act, shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: Provided, however, That this act shall not be held to apply to employees of street railroads, and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto, and shall not affect the obligations of said carrier either to the public or to the private parties concerned."

[168] *The 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th sections relate to the settlement, by means of arbitration, of controversies concerning wages, hours of labor, or conditions of employment, arising between a carrier subject to the provisions of the act and its employees, which seriously interrupt, or threaten to interrupt, the business of the carrier. Those sections prescribe the mode in which controversies may be brought under the cognizance of arbitrators, in what way the arbitrators may be designated, and the effect of their decisions. The first subdivision of § 3 contains a proviso "that no employee shall be compelled to render personal service without his consent."

The 11th section relates to the compensation and expenses of the arbitrators.

By the 12th section the act of Congress of October 1st, 1888 [25 Stat. at L. 501, chap. 1063], creating boards of arbitrators or commissioners for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of persons or property and their employees, was repealed.

The 10th section, upon which the present prosecution is based, is in these words:

"That any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; *or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization;* or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason [169] of any benefit received from *such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

It may be observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employee of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employee of the carrier because of his *not* being a member of such an organization.

The present indictment was in the district court of the United States for the eastern district of Kentucky against the defendant, Adair.

The first count alleged "that at and before the time hereinafter named the Louisville & Nashville Railroad Company is and was a railroad corporation, duly organized and existing by law, and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one state of the United States to another state of the United States of America; that is to say, from the state of Kentucky into the states of Ohio, Indiana, and Tennessee, and from the state of Ohio into the state of Kentucky, and was, at all times aforesaid, and at the time of the commission of the offense hereinafter named, a common carrier of interstate commerce, and an employer, subject to the provisions of a certain act of Congress of the United States of America, entitled, 'An Act Concerning Carriers Engaged in Interstate Commerce and Their Employees,' approved June 1st, 1898, and said corporation was not at any *time a [170] street railroad corporation. That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employee of said common carrier and employer, and was, at all said times, master mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated one O. B. Coppage was an employee of said common carrier and employer in the district aforesaid, and as such employee was, at all times hereinafter named, actually engaged in the capacity of locomotive fireman in train operation and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employee of said common carrier and employer actually engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named said

O. B. Coppage was a member of a certain labor organization, known as the Order of Locomotive Firemen, as he, the said William Adair, then and there well knew; a more particular description of said organization and the members thereof is to the grand jurors unknown."

The specific charge in that count was "that said William Adair, agent and employee of said common carrier and employer, as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against said O. B. Coppage, employee, as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, *because of his membership in said labor organization, and thereby did unjustly discriminate against an employee of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization,* contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second count repeated the general allegations of the first count as to the char-[171]acter of the business of the Louisville *& Nashville Railroad Company and the relations between that corporation and Adair and Coppage. It charged "that said William Adair, in the district aforesaid, and within the jurisdiction of this court, agent and employee of said common carrier and employer aforesaid, on and before the 15th day of October, 1906, did unlawfully *threaten said O. B. Coppage, employee as aforesaid, with loss of employment, because of his membership in said labor organization,* contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The accused, Adair, demurred to the indictment as insufficient in law, but the demurrer was overruled. After reviewing the authorities, in an elaborate opinion, the court held the 10th section of the act of Congress to be constitutional. 152 Fed. 737. The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of $100. We shall, therefore, say nothing as to the second count of the indictment.

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that, being an agent of a railroad company engaged in interstate commerce, and subject to the provisions of the above act of June 1st, 1898, he discharged one Coppage from its service *because of his membership in a labor organization,*—no other ground for such discharge being alleged.

May Congress make it a criminal offense against the United States—as, by the 10th section of the act of 1898, it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent *with both the words and spirit of [172] the Constitution, and is sustained as well by sound reason.

The first inquiry is whether the part of the 10th section of the act of 1898 upon which the first count of the indictment was based is repugnant to the 5th Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that "in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson v. Massachusetts, 197 U. S. 11, 29, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 362, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the 5th Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or [173]not, *as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

In Lochner v. New York, 198 U. S. 45, 53, 56, 49 L. ed. 937, 940, 941, 25 Sup. Ct. Rep. 539, 541, 543, which involved the validity of a state enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employee in such an establishment to work in excess of a given number of hours each day, the court said: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right. There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed 'police powers,' the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191. . . . In every [174]case that *comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the state's power to care for the health and safety of its people.

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, *for whatever reason, is the same as the right[175] of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin.† Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his [176] personal service any more than an employee *can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general employment on one side to accept the services of the employee and a general agreement on the other side to render services to the employer,—no term being fixed for the continuance of the employment,—Congress could not, consistently with the 5th Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization.

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employee from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the 5th Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is, within the meaning of the Constitution, a regulation of commerce among the states. If it be not, then clearly the government cannot invoke the commerce clause of the Constitution as sustaining the indictment against Adair.

Let us inquire what is commerce, the power to regulate which is given to Congress?

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could [177] *well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph,—indeed, every species of commercial intercourse among the several states,—but not that commerce "completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed.†

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†People v. Marcus, 185 N. Y. 257, 7 L.R.A. (N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A. (N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; Wallace v. Georgia, C. & N. R. Co. 94 Ga. 732, 22 S. E. 579; Hundley v. Louisville & N. R. Co. 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301; New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

†Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Passenger Cases, 7 How. 283, 12 L. ed. 702; Almy v. California, 24 How. 169, 16 L. ed. 644; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 9, 12, 24 L. ed. 708, 710, 711; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Howard v. Illinois C. R. Co. (present term) 207 U. S. 463, ante, 141, 28 Sup. Ct. Rep. 141.

Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, and authorities there cited. In this connection we may refer to Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, relied on in argument, which case arose under the act of Congress of March 2d, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174). That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes. But the act upon its face showed that its object was to promote the safety of employees and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce, and was calculated to subserve the interests of such commerce by affording protection to employees and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to Howard v. Illinois C. R.
[178]Co. *decided at the present term. 207 U. S. 463, ante, 297, 28 Sup. Ct. Rep. 141. In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the states, but not as to commerce completely internal to a state. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations, as labor organizations, have nothing to do with interstate commerce, as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot, in law or sound reason, depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because *of his not[179]
being a member of such an organization. It is the employee as a man, and not as a member of a labor organization, who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ, in the conduct of its interstate business, *only* members of labor organizations, or *only* those who are *not* members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to [**180**] which *we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Lottery Case (Champion v. Ames) 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321.

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant, Adair.

We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, is severable from its other parts, and as what has been said is sufficient to dispose of the present case, we are not called upon to consider other and independent provisions of the act, such, for instance, as the provisions relating to arbitration. This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employee from its service because of his being a member of a labor organization.

The judgment must be reversed, with directions to set aside the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the case.

It is so ordered.

Mr. Justice **Moody** did not participate in the decision of this case.

Mr. Justice **McKenna**, dissenting:

The opinion of the court proceeds upon [**181**] somewhat narrow *lines and either omits or does not give adequate prominence to the considerations which, I think, are determinative of the questions in the case. The principle upon which the opinion is grounded is, as I understand it, that a labor organization has no legal or logical connection with interstate commerce, and that the fitness of an employee has no dependence or relation with his membership in such organization. It is hence concluded that to restrain his discharge merely on account of such membership is an invasion of the liberty of the carrier guaranteed by the 5th Amendment of the Constitution of the United States. The conclusion is irresistible if the propositions from which it is deduced may be viewed as abstractly as the opinion views them. May they be so viewed?

A summary of the act is necessary to understand § 10. Detach that section from the other provisions of the act and it might be open to condemnation.

The 1st section of the act designates the carriers to whom it shall apply. The 2d section makes it the duty of the chairman of the Interstate Commerce Commission and the Commissioner of Labor, in case of a dispute between carriers and their employees which threatens to interrupt the business of the carriers, to put themselves in communication with the parties to the controversy and use efforts to "mediation and conciliation." If the efforts fail, then § 3 provides for the appointment of a board of arbitration,—one to be named by the carrier, one by the labor organization to which the employees belong, and the two thus chosen shall select a third.

There is a provision that if the employees belong to different organizations they shall concur in the selection of the arbitrator. The board is to give hearings; power is vested in the board to summon witnesses, and provision is made for filing the award in the clerk's office of the circuit court of the United States for the district where the controversy arose. Other sections complete the scheme of arbitration thus outlined, and make, as far as possible, the proceedings of the arbitrators *judicial, and, pending [**182**] them, put restrictions on the parties, and damages for violation of the restrictions.

Even from this meager outline may be perceived the justification and force of § 10. It prohibits discrimination by a carrier engaged in interstate commerce, in the employment under the circumstances hereafter mentioned, or the discharge from employment of members of labor organizations "*because of such membership.*" This the opinion condemns. The actions prohibited, it is asserted, are part of the liberty of a carrier, protected by the Constitution of the United States from limitation or regulation. I may observe that the declaration is clear and unembarrassed by any material benefit to the carrier from its exercise. It may be exercised with reason or without reason, though the business of the carrier is of public concern. This, then, is the contention, and I bring its elements into bold relief to submit against them what I deem to be stronger considerations, based on the statute and sustained by authority.

I take for granted that the expressions of the opinion of the court, which seems to indicate that the provisions of § 10 are illegal because their violation is made criminal, are used only for description and incidental emphasis, and not as the essential ground of the objections to those provisions.

I may assume at the outset that the liberty guaranteed by the 5th Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore, in judging of any legislation which imposes restraints or limitations, the inquiry must be, What is their purpose, and is the purpose within one of the powers of government? Applying this principle immediately to the present case, without beating about in the abstract, the inquiry must be whether § 10 of the act of Congress has relation to the purpose which induced the act, and which it was enacted to accomplish, and whether such purpose is in aid of interstate commerce, and not a mere restriction upon the liberty of carriers to employ whom they please, or to have business relations with whom they please.
[183]In the inquiry there *is necessarily involved a definition of interstate commerce and of what is a regulation of it. As to the first, I may concur with the opinion; as to the second, an immediate and guiding light is afforded by the case of Howard v. Illinois C. R. Co., recently decided. 207 U. S. 463, ante, 297, 28 Sup. Ct. Rep. 141. In that case there was a searching scrutiny of the powers of Congress, and it was held to be competent to establish a new rule of liability of the carrier to his employees; in a word, competent to regulate the relation of master and servant,—a relation apparently remote from commerce, and one which was earnestly urged by the railroad to be remote from commerce. To the contention the court said: "But we may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce." In other words, that the power is not confined to a regulation of the mere movement of goods or persons.

And there are other examples in our decisions—examples, too, of liberty of contract and liberty of forming business relations (made conspicuous as grounds of decision in the present case)—which were compelled to give way to the power of Congress. Northern Securities Co. v. United States, 193 U. S. 200, 48 L. ed. 679, 24 Sup. Ct. Rep. 436. In that case exactly the same definitions were made as made here and the same contentions were pressed as are pressed here. The Northern Securities Company was not a railroad company. Its corporate powers were limited to buying, selling, and holding stock, bonds, and other securities, and it was contended that, as such business was not commerce at all, it could not be within the power of Congress to regulate. The contention was not yielded to, though it had the support of members of this court. Asserting the application of the anti-trust *act of 1890 [26 Stat. at L. 209,[184]
chap. 647, U. S. Comp. Stat. 1901, p. 3200] to such business, and the power of Congress to regulate it, the court said "that a sound construction of the Constitution allows to Congress a large discretion 'with respect to the means by which the powers it [the commerce clause] confers are to be carried into execution, which enables that body to perform the high duties assigned to it, in the manner most beneficial to the people.'" It was in recognition of this principle that it was declared in United States v. Joint Traffic Asso. 171 U. S. 571, 43 L. ed. 288, 19 Sup. Ct. Rep. 25: "The prohibition of such contracts [contracts fixing rates] may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, and Congress is the *judge* of such necessity and propriety, unless, *in case of a possible gross perversion of the principle*, the courts might be applied to for relief." The contentions of the parties in the case invoked the declaration. There, as here, an opposition was asserted between the liberty of the railroads to contract with one another and the power of Congress to regulate commerce. That power was pronounced paramount, and it was not perceived, as it seems to be perceived now, that it was subordinate, and controlled by the provisions of the 5th Amendment. Nor was the relation of the power of Congress to that Amendment overlooked. It was commented upon and reconciled. And there is nothing whatever in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, or in Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, which is to the contrary.

From these considerations we may pass to an inspection of the statute of which

§ 10 is a part, and inquire as to its purpose, and if the means which it employs has relation to that purpose and to interstate commerce. The provisions of the act are explicit and present a well co-ordinated plan for the settlement of disputes between carriers and their employees, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the object of legislative action, and, it might be urged, [185]*to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end, as a "gross perversion of the principle" of regulation, the condition which, it was said in United States v. Joint Traffic Asso. supra, might justify an appeal to the courts.

We are told that labor associations are to be commended. May not, then, Congress recognize their existence? yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them,—maybe controls and impels them, whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed,—observed, I may say, not in speculation or uncertain prevision of evils, but in experience of evils,—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. at L. 501, chap. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employees of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employees in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid; but how could it be made an aid if, pending the efforts of "mediation and conciliation" *of the[186] dispute, as provided in § 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute) be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship, can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

There is no question here of the right of a carrier to mingle in his service "union" and "nonunion" men. If there were, broader considerations might exist. In such a right there would be no discrimination for the "union" and no discrimination against it. The efficiency of an employee would be its impulse and ground of exercise.

I need not stop to conjecture whether Congress could or would limit such right. It is certain that Congress has not done so by any provision of the act under consideration. Its letter, spirit, and purpose are decidedly the other way. It imposes, however, a restraint, which should be noticed. The carriers may not require an applicant for employment or an employee to agree not to become or remain a member of a labor organization. But this does not constrain the employment of anybody, be he what he may.

But it is said it cannot be supposed that labor organizations will, "by illegal or violent measures, interrupt or impair the freedom of commerce," and to so suppose would be disrespect to a co-ordinate branch of the government, and to impute to it a purpose "to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may *be, in the[187] same kind of labor and serving the same employer." Neither the supposition nor the disrespect is necessary, and, it may be urged, they are no more invidious than to impute to Congress a careless or deliberate or purposeless violation of the constitutional rights of the carriers. Besides, the legislation is to be accounted for. It, by its letter, makes a difference between members of labor organizations and other employees of carriers. If it did not, it would not be here for review. What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

I have said that it is not necessary to suppose that labor organizations will violate the law, and it is not. Their power may be effectively exercised without violence or illegality, and it cannot be disrespect to Congress to let a committee of the Senate speak for it and tell the reason and purposes of its legislation. The committee on education, in its report, said of the bill: "The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employees, with their helpless wives and children, are confronted with starvation." And, concluding the report, said: "It is our opinion that this bill, should it become a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage."

With the report was submitted a letter from the secretary of the Interstate Commerce Commission, which expressed the judgment of that body, formed, I may presume, from experience of the factors in the problem. The letter said: "With the corporations as employers, on one side, and [188] the organizations *of railway employees, on the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forbearance." And again: "It has been shown before the labor commission of England that, where the associations are strong enough to command the respect of their employers, the relations between employer and employee seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers."

It is urged by plaintiff in error that "there is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in such commerce;" and how can it be, it is asked, a regulation of commerce to prevent a carrier from selecting his employees or constraining him to keep in his service those whose loyalty to him is "seriously impaired, if not destroyed, by their prior allegiance to their labor unions?" That the power of regulation extends to the persons engaged in interstate commerce is settled by decision. Howard v. Illinois C. R. Co. 207 U. S. 463, ante, 297, 28 Sup. Ct. Rep. 141, and the cases cited in Mr. Justice Moody's dissenting opinion. The other proposition points to no evil or hazard of evil. Section 10 does not constrain the employment of incompetent workmen, and gives no encouragement or protection to the disloyalty of an employee or to deficiency in his work or duty. If guilty of either he may be instantly discharged without incurring any penalty under the statute.

Counsel also make a great deal of the difference between direct and indirect effect upon interstate commerce, and assert that § 10 is an indirect regulation at best, and not within the power of Congress to enact. Many cases are cited, which, it is insisted, sustain the contention. I cannot take time to review the cases. I have already alluded to the contention, and it is enough to say that it gives too much isolation to § 10. *The section is part of the means to secure [189] and make effective the scheme of arbitration set forth in the statute. The contention, besides, is completely answered by Howard v. Illinois C. R. Co. supra. In that case, as we have seen, the power of Congress was exercised to establish a rule of liability of a carrier to his employees for personal injuries received in his service. It is manifest that the kind or extent of such liability is neither traffic nor intercourse, the transit of persons nor the carrying of things. Indeed, such liability may have wider application than to carriers. It may exist in a factory; it may exist on a farm; and, in both places, or in commerce, its direct influence might be hard to find or describe. And yet this court did not hesitate to pronounce it to be within the power of Congress to establish "The primary object," it was said in Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, of the safety appliance act, "was to promote *the public welfare* by securing the safety of employees and travelers." The rule of liability for injuries is even more roundabout in its influence on commerce, and as much so as the prohibition of § 10. To contend otherwise seems to me to be an oversight of the proportion of things. A provision of law which will prevent, or tend to prevent, the stoppage of every wheel in every car of an entire railroad system, certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employee. It also seems to me to be an oversight of the proportions of things to contend that, in order to encourage a policy of arbitration between carriers and their employees which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employee, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. And mark the contrast of what is prohibited. In the one case the restraint, it may be, of a whim,—certainly of nothing that affects the ability of an em-[190]ployee to perform his *duties; nothing, therefore, which is of any material interest to the carrier,—in the other case, a restraint of a carefully-considered policy which had as its motive great material interests and benefits to the railroads, and, in the opinion of many, to the public. May such action be restricted, must it give way to the public welfare, while the other, moved, it may be, by prejudice and antagonism, is intrenched impregnably in the 5th Amendment of the Constitution against regulation in the public interest?

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a quasi public business, and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

Mr. Justice **Holmes**, dissenting:

I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment, and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is, at least, as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant, —matters which, it is admitted, Congress might regulate, so far as they concern commerce among the states. I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

*The ground on which this particular law[191] is held bad is not so much that it deals with matters remote from commerce among the states, as that it interferes with the paramount individual rights secured by the 5th Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word "liberty" in the Amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ; I think that laboring men sometimes attribute to them advantages, as *many attribute[192] to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

COUNTY COURT OF BRAXTON COUNTY, Jacob Huffman, President of Said Court, and John I. Bender and E. H. Cunningham, Commissioners of Said Court, Plffs. in Err.,

v.

STATE OF WEST VIRGINIA EX REL. C. W. DILLON, State Tax Commissioner, and Amos Bright, John M. Marple, Henry Bender, and W. C. Baxter.

(See S. C. Reporter's ed. 192–198.)

Error to state court — who may invoke appellate jurisdiction.

A West Virginia county court and its members have no personal interest in a controversy over the validity, under U. S. Const. art. 1, § 10, as affecting county bondholders, of a state statute limiting the amount which may be raised by taxation, so as to sustain a writ of error from the Supreme Court of the United States to review a judgment of the West Virginia supreme court of appeals, awarding a mandamus to compel the county court to change its assessment to conform to the requirements of the statute.

[No. 124.]

Submitted January 14, 1908. Decided January 27, 1908.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia to review a judgment awarding a writ of mandamus to compel the County Court of Braxton County, in that state, to change its assessment for taxation to conform to the requirements of a state statute. Dismissed for want of jurisdiction.

See same case below, 60 W. Va. 339, 55 S. E. 382.

Statement by Mr. Justice **Brewer**:

Sections 7 and 8, article 10, of the West Virginia Constitution of 1872, prohibit the county authorities, except in certain specified cases, from levying taxes in excess of 95 cents per $100 valuation. In 1904 the valuation of property in Braxton county was $2,799,604. The state legislature, at [193] *an extraordinary session in 1904 and the regular session of 1905, changed the statute law in respect to taxation, largely remodeling the entire tax system. One of the objects of such legislation was to secure a more correct valuation of property. In 1906, under this new legislation, the assessed value of the property in Braxton county was $10,195,301, nearly four times the amount of the assessment in 1904. In view of an expected increase in valuation the legislature enacted chapter 48 of the Acts of 1905 (Code of West Va., 1906, chap. 39, § 29), by which it was provided that no county court should, in the year 1906, assess or levy taxes which should exceed by more than 7 per cent the aggregate amount of taxes levied by it in the year 1904. The levy made in the county of Braxton in 1904 of 95 cents on the $100 valuation produced the sum of $26,596.23, subject, of course, to such minor reductions as might come from delinquencies and exonerations. Therefore, under the act of 1905, the amount which the county court could levy in 1906 was the $26,596.23 plus an addition of not to exceed 7 per cent, or $1,861.73, making a total of $28,457.96. To raise this amount a levy of not to exceed 28 cents on each $100 was sufficient. The county court, however, made a levy of 65 cents on every $100, and caused it to be entered upon the records of the court. Such levy of 65 cents would produce the sum of $66,269.45, more than double the amount which was authorized under the legislation of 1905. Thereupon the state tax commissioner and certain residents and taxpayers of Braxton county applied to the supreme court of the state for a mandamus to compel the county court to change that assessment to conform to the requirements of the act of 1905. The county court made answer and return to the alternative writ of mandamus, pleading that the amount necessary during the current fiscal year to pay the necessary expenses, discharge the county debts and liabilities payable during that year, was at least $57,146, not including an amount for interest and sinking fund of certain railroad bonds theretofore legally issued by the county. *In other [194] words, it may be said, in a general way, that the defense of the county court was that the sum authorized to be levied by the act of 1905 was insufficient to meet the ordinary expenses of the county, pay the interest, and provide a sinking fund for outstanding bonds. It was pleaded specifically that at the time these railroad bonds were issued there was not only no restriction upon the power of the county court to levy taxes for payment of the principal and interest thereof, but, on the contrary, that the general statutory law in force required the county to levy a tax in amount sufficient

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NOTE.—As to who may institute proceedings to transfer cause to Federal Supreme Court on writ of error or appeal to state court—see note to Wedding v. Meyler, 66 L.R.A. 854.

to pay the annual interest and provide a sinking fund. It was contended that these provisions entered into and became a part of the contract with the bondholders, and that the restrictions made by the act of 1905 worked an impairment of the obligation of the contract, and hence it was in conflict with § 10 of article 1 of the Federal Constitution.

The supreme court of appeals issued the mandamus as prayed for, whereupon the defendants brought the case here on error.

Mr. **George E. Price** submitted the cause for plaintiffs in error:

How can the people of Braxton county, in their collective capacity in which they made these contracts, test the validity of these statutes? They must do it, if at all, in the name and by means of the county court, their representative. They cannot be sued or defend an action.

Clark v. County Court, 55 W. Va. 285, 47 S. E. 162.

This very doctrine of the representation of the people by an artificial body which has the right, on their behalf, to raise the question of the constitutionality of a statute, is recognized and acted upon in Board of Liquidation v. Louisiana, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263.

The court, in a doubtful case, may follow the state court where it decides that the party has such an interest as will enable it to raise a Federal question, but it will not follow an erroneous decision of the state court which holds that a party has not such a right.

Ibid.

A ministerial officer can refuse to perform an act required by an unconstitutional statute, before it has been judicially declared invalid.

Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927; Van Horn v. State, 46 Neb. 62, 64 N. W. 365.

Mr. **W. Mollohan** submitted the cause for defendants in error. Messrs. W. L. Mathews and George W. McClintic were on the brief:

This court will simply follow the decision of the highest court of West Virginia as a matter of local and non-Federal concern.

Board of Liquidation v. Louisiana, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263.

Even if this court should be of opinion that it is not bound to accept the decision of the supreme court of appeals of West Virginia as to the powers of the county court to stand in judgment for its creditors, and present for decision the question of alleged impairment of creditors' contracts, yet, under the decisions of this court, the county court of Braxton county had no such interest as would enable it to prosecute a writ of error to this court.

Taylor, Jurisdiction, 461; Henderson v. Tennessee, 10 How. 311, 13 L. ed. 434; Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439.

*Mr. Justice **Brewer** delivered the opinion of the court: [**197**]

Speaking generally, the regulation of municipal corporations is a matter peculiarly within the domain of state control. The taxing body, the taxing district, and the limits of taxation are determinable by the legislature of the state. Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665, and cases cited in the opinion; Williams v. Eggleston, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; 1 Dill. Mun. Corp. 4th ed. p. 52, and following. True, the legislature may sometimes, by restrictive legislation in respect to taxes, seek to prevent the payment by a municipality of its contract obligations, and in such a case the courts will enforce the protective clauses of the Federal Constitution against any state legislation impairing the obligation of a contract. In other words, no state can, in respect to any matter, set at naught the paramount provisions of the national Constitution.

Again, that the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature. Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Lampasas v. Bell, 180 U. S. 276, 283, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; Smith v. Indiana, 191 U. S. 138, 148, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51. In the latter case suit was brought in the state court against a county auditor to test the constitutionality of the exemption law of Indiana, which was claimed to be in conflict with the Federal Constitution. The decision of the state court having been in favor of the act, the auditor brought the case here.

Mr. Justice Brown, delivering the opinion of the court, cited the following cases: Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup.
[198] Ct. Rep. 20; *Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623, and said:

"These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, *viz.*, the taxpayers; and in this particular the case is analogous to that of Caffrey v. Oklahoma, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

These decisions control this case and compel a dismissal of the writ of error, and it is so ordered.

UNITED STATES
v.
A. GRAF DISTILLING COMPANY.

(See S. C. Reporter's ed. 198–208.)

Internal revenue—forfeiture—grounds.

1. The sale of a barrel of whisky to which has been added, after such barrel has been properly stamped by a revenue officer, burnt sugar, or caramel, as coloring matter, does not authorize the seizure and forfeiture to the United States provided for by U. S. Rev. Stat. § 3455, U. S. Comp. Stat. 1901, p. 2279, when a barrel or other package contains anything else at the time of sale than the contents which were therein when lawfully stamped.

Internal revenue—forfeiture—grounds.

2. Substances which are not in themselves taxable under the laws of the United States are not embraced in the words "anything else," as used in U. S. Rev. Stat. § 3455, U. S. Comp. Stat. 1901, p. 2279, providing for a seizure, forfeiture, and penalty for selling packages which contain, at the time of sale, anything else than the contents when the same were lawfully stamped by a revenue officer, even where there is no intent to defraud, and for a much heavier penalty where there is such fraudulent intent.

[No. 24.]

(Argued December 16, 1907. Decided January 27, 1908).

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions as to whether the addition of burnt sugar, or caramel, before sale, to a barrel of whisky which has been stamped by a revenue officer, authorizes a seizure and forfeiture, and whether the phrase "anything else," as used in the statute providing for such seizure and forfeiture, includes substances that are not in themselves taxable. Both questions answered in the negative.

Statement by Mr. Justice **Peckham**:

This case comes here on a certificate from the United States circuit court of appeals for the eighth circuit. The proceeding was commenced in the district court of the United States for the eastern district of Missouri, January 4, 1905, by the United States district attorney for that district, who filed therein an amended information, praying for a decree of forfeiture, condemnation, and sale of three barrels of whisky, which had theretofore been seized by the collector of internal revenue and were still in his possession and custody.

The sole ground for the seizure and forfeiture averred in the information is contained in the following paragraph thereof, as certified by the circuit court of appeals:

"That prior to the times of said seizure of said barrels and packages, they, and each of them, had been purchased and received by A. Graf & Company, they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger. That afterwards, and before said seizure, said barrels and packages, and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sales last aforesaid containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, as aforesaid, to wit, burnt sugar, commonly called caramel, which had been added to and placed in said spirits before said last-mentioned sales thereof, in violation of § 3455 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2279), whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

[200] *The claimant, A. Graf Distilling Company, demurred to the information on the ground that it was insufficient in law to authorize a decree of forfeiture.

The demurrer was sustained by the district court, and, the United States declining to plead further, it was adjudged that the barrels of whisky be restored to the claimant.

The ground of the decision of the district court was that the purpose of § 3455 of the Revised Statutes is to prevent the disposition of packages stamped, branded, or marked, when empty, or when containing a taxable substance other than the contents which were therein when they were so lawfully stamped, branded, or marked by an officer of the revenue; and that burnt sugar, or caramel, not being taxable, is not within the meaning of the phrase "anything else," as contained in the section referred to.

The circuit court of appeals, in order to a correct determination of the cause, desired the instruction of this court upon the following questions:

"1. Does the sale of a barrel of whisky, stamped, branded, and marked so as to show that the contents have been duly inspected, and that the tax thereon has been paid, into which burnt sugar, or caramel, has been introduced after such stamping, branding, and marking by an officer of the revenue, authorize a seizure and forfeiture thereof to the United States under the provisions of § 3455 of the Revised Statutes of the United States?

"2. Does the phrase 'anything else,' as employed in § 3455 of the Revised Statutes, include substances that are not in themselves taxable under the laws of the United States?"

Section 3455 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2279), under which the seizure of the whisky was made, is set forth in the margin†

Assistant Attorney General **Cooley** argued the cause and filed a brief for the United States:

When the language of the statute is clear and unambiguous it admits of no construction.

Endlich, Interpretation of Statutes, § 4; United States v. Palmer, 3 Wheat. 610, 630, 4 L. ed. 471, 477; The Samuel E. Spring, 27 Fed. 764.

The statute, being a revenue law, should not be strictly construed.

United States v. Stowell, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244; 18 Ops. Atty. Gen. 246, 248; United States v. Hodson, 10 Wall. 395, 406, 19 L. ed. 937, 939; United States v. 100 Barrels Spirits, 1 Dill. 49, 57, Fed. Cas. No. 15,948.

The government's view accords with judicial construction of revenue laws.

United States v. 2 Bay Mules, 36 Fed. 84; United States v. Goodrich Transp. Co. 8 Biss. 224, Fed. Cas. No. 15,228; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594; Dobbins's Distillery v. United States, 96 U. S. 395, 401, 24 L. ed. 637, 638; United States v. Bayaud, 21 Blatchf. 287, 16 Fed. 384; United States v. Dobbs, Fed. Cas. No. 14,972; United States v. 50 Barrels of Whiskey, Fed. Cas. No. 15,091; United States ex rel. United States Attorney v. 9 Casks & Packages of Distilled Spirits, 51 Fed. 193.

Mr. **Warwick M. Hough** argued the cause and filed a brief for the A. Graf Distilling Company:

What is not specifically prohibited by the law is to be understood as being permitted or intended to be passed unnoticed.

United States v. Cask of Gin, 3 Fed. 20, Affirmed in 5 Fed. 438.

The addition of water to a package of distilled spirits which had been properly marked, stamped, and branded was not such a change in the contents as required any other or additional marks, stamps, or brands, or which subjected the person adding such water to any special tax therefor.

United States v. 32 Barrels of Distilled Spirits, 5 Fed. 188; 3 Packages of Distilled Spirits, 14 Fed. 569; United States v. Bardenheier, 49 Fed. 847; United States ex rel. United States Attorney v. 9 Casks & Packages of Distilled Spirits, 51 Fed. 193; United States v. 14 Packages of Whiskey, 14

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†Sec. 3455. Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeit, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envelope being empty, or containing anything else than the contents which

C. C. A. 220, 30 U. S. App. 240, 66 Fed. 984; United States v. 1 Package of Distilled Spirits, 88 Fed. 856.

The language of the statute should be given a reasonable construction, having in view the objects intended to be accomplished by Congress at the time of the enactment of the clause containing such language.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Felton v. United States, 96 U. S. 699, 24 L. ed. 875; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995; Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677; Potter v. Hall, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; United States v. 20 Boxes of Corn Whisky, 67 C. C. A. 214, 133 Fed. 910; The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499.

The purpose is evident to prevent persons from marking, dealing in, or even handling, a class of articles so branded or stamped that they can be used in fraud of the government as receptacles to disseminate articles on which the government levies a tax.

United States ex rel. United States Attorney v. 9 Casks & Packages of Distilled Spirits, supra.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

Other phases of this controversy have appeared in the courts below and are reported in 125 Fed. 52, and 63 C. C. A. 263, 129 Fed. 329. After the reversal of the judgment of forfeiture and the granting of a new trial by the circuit court of appeals, as disclosed by those reports, the information was amended by making the allegations contained in the foregoing statement, and the original averment as to placing other [204]*distilled spirits of a different quality in the barrels after being stamped is not before us.

We are here called upon to determine what is the proper construction of the language of the statute when it speaks of selling a barrel and its contents after it has been properly stamped, and which, at the time of sale, contained anything else than the contents which were therein when the barrel was stamped by the revenue officer. Does the addition, after such stamping, of burnt sugar, or caramel, placed in the barrel for the sole purpose of coloring the contents (in this case whisky), and without intent to defraud the revenue or any person, render the seller liable to the penalty provided by the statute, and the barrel and its contents liable to forfeiture? This coloring matter was not itself taxable. There is no charge that it is unhealthy, and it is plain that its use defrauds no one, within the legal meaning of that term. The statute is not a health law, nor is its purpose to prevent the coloring of whisky before its sale to the consumer. The matter which was added to the contents of the barrel, after it was stamped and branded, did not increase or decrease the amount of the tax otherwise payable on the spirits so colored.

The government, however, contends that it is wholly immaterial whether the coloring matter added is not itself taxable; it is, within the terms of the statute, something "else than the contents which were" in the barrel when it was lawfully stamped by the officer of the revenue; and, if the person who adds the coloring matter subsequently sells the barrel and contents, such act subjects them to forfeiture, and renders the person making the sale subject to the penalty named in the first part of the section. The counsel for the government insists that there is no room for construction other than such as the plain language of the statute calls for; and it is contended that to hold otherwise destroys the statute and opens the door to fraud which is not easy to detect, and which the statute was intended to prevent. In a very careful review of the various provisions of the internal revenue statute, counsel *for the government has[205] called attention to many acts which are forbidden and which would seem to be innocent, but which were, nevertheless, thought

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were therein when said articles had been so lawfully stamped, branded, or marked by an officer of the revenue, he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. And every person who makes, manufactures, or produces any box, barrel, bag, vessel, package, wrapper, cover, or envelope, stamped, branded, or marked, as above described, or stamps, brands, or marks the same, as hereinbefore recited, shall be liable to penalty as before provided in this section. And every person who violates the foregoing provisions of this section, with intent to defraud the revenue, or to defraud any person, shall be liable to a fine of not less than one thousand nor more than five thousand dollars, or to imprisonment for not less than six months nor more than five years, or to both, at the discretion of the court. And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section, and all their contents, shall be forfeited to the United States.

to be of such a character as to open the door for fraud upon the revenue, and hence it is argued that this addition of coloring matter was an act which, although it might seem to be innocent in itself, yet nevertheless comes within the plain prohibition of this section, and effect must be given to that prohibition, because it may tend to prevent some subsequent fraud, however harsh or unreasonable the provision might otherwise seem to be. We must first, however, be satisfied that this alleged total, absolute, and unconditional prohibition was the real intention of Congress, to be gathered from the language of the section when read in connection with the language of the whole statute. There is no doubt that many of its provisions are harsh beyond anything known heretofore in our history (United States v. Ulrici, 3 Dill. 532, 539, Fed. Cas. No. 16,594), and yet we cannot persuade ourselves that the act proved in this case comes within the law.

The section is one of many dealing with the subject of collecting a revenue from the taxation of the articles therein mentioned and in the manner therein provided. The aim of the whole statute is to make all of the taxable articles actually pay the tax, and to that end it prohibits those acts which might possibly lead to an evasion of the payment of the tax due upon any taxable article. When, therefore, in the course of the many provisions for collecting the tax and for preventing any evasion of its due payment the statute prohibits the putting of anything else in the barrel or package, etc., after it has been branded or stamped, it seems to us the natural meaning of the language limits the addition to anything of a taxable nature, and does not include an article which is not taxable, is wholly harmless, and added for a purpose not illegal or in itself improper.

We concur, of course, in the rule which has been upheld in this court, that a statute like this one, for the raising of a revenue, even when accompanied by provisions [206] of a very *highly penal nature, is still to be construed as a whole and in a fair and reasonable manner, and not strictly in favor of a defendant. United States v. Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244. Construed under this rule, we are unable to conclude that the section applies to this case. The language used, when considered in connection with the whole statute, is not so plain as to preclude the application of those general rules of construction of statutes which frequently interpret language in accordance with what seems to be the real meaning of the legislature, although not in exact and literal obedience to the wording of the law.

We do not think that the opportunities for perpetrating a fraud upon the revenue are in any way extended by reason of the addition in question. A liquor dealer having a properly stamped barrel in his possession might violate the law and empty the contents of the barrel without destroying the stamps, and might then dispose of the barrel, so stamped, to an illicit distiller, who might then endeavor to perpetrate a fraud upon the revenue by filling the barrel with nontax-paid spirits, but we do not see that the prior addition, as mentioned, of coloring matter to the contents of the barrel, would aid him in his attempt, nor would the absence of such matter tend in any degree to its prevention or detection. It is not the coloring matter which was added to the contents of the barrel before they were emptied that would, in such case, aid the attempted fraud, for such coloring matter would probably have been emptied with the other contents of the barrel. The opportunities for fraud commenced at the time the liquor dealer emptied the contents of the barrel without destroying the stamp, and that opportunity was not in the slightest degree affected by the addition. and the attempted fraud of the distiller is not made more easy of accomplishment because of such addition. We cannot see, therefore, that any reasonable purpose could be attributed to Congress in prohibiting an addition, such as is charged in this case, and we cannot construe the section on the mistaken theory that, though the act was *real- [207] ly innocent, yet it might aid in the evasion of payment of some portion of a tax, and hence must be regarded as prohibited.

The statute in question, although there has been no intent to defraud, makes a person violating it liable to the lighter penalty, while, if the intent to defraud be alleged, the article is still liable to forfeiture and the person may be fined a much larger sum and also imprisoned. On this ground it is contended the statute is intended to meet just such a case as the one before us, where there was no intent to defraud and where there was no addition of anything which was itself taxable, but where, nevertheless, something else had been added after the stamping and branding, which was not a part of the contents of the barrel when it was so stamped. It is therefore urged that, as the section provides for a forfeiture of the article and a fine upon the person guilty of the addition, even when no intent to defraud is alleged or proved, it emasculates the section to hold that the addition must be something which is itself taxable. We do not think so. When there has been an addition of anything that was taxable, the statute applies, although there was no intention to defraud; while, if there were such intention, a much heavier penalty is imposed. The two portions of the section are distinct, and each may be enforced, however harsh the first may appear to be, when imposed in a case where the action was really without any intention to defraud the revenue or any person.

It has been held under other sections of this act, somewhat similar, that the addition of water to the contents of a barrel or package is no ground of forfeiture. We do not say that the language is exactly the same, but only that it is somewhat similar. United States v. 32 Barrels of Distilled Spirits, 5 Fed. 188; 3 Packages of Distilled Spirits, 14 Fed. 569; United States v. Bardenheier, 49 Fed. 846, 848; United States ex rel. United States Attorney v. 9 Casks & Packages of Distilled Spirits, 51 Fed. 191. Reference is made to them in the opinion in this case in 125 Fed. supra.

[208] *We think the reasonable construction of this statute requires that the questions submitted should be answered in the negative. It will be so certified.

PENN REFINING COMPANY, Limited, Plff. in Err.,
v.
WESTERN NEW YORK & PENNSYLVANIA RAILROAD COMPANY and Samuel G. De Coursey, Receiver thereof, Western New York & Pennsylvania Railway Company, and Lehigh Valley Railroad Company.

(See S. C. Reporter's ed. 208-225.)

Carriers — discriminating rates.

1. Carriers cannot be charged with discriminating against shippers of oil in barrels from the Pennsylvania oil fields to Perth Amboy, New Jersey, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them, the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than the transportation by barrels, and the barrel shippers have made no demand for tank cars, and cannot use them economically for shipments to Perth Amboy, on account of the lack of facilities for unloading at that point.

Connecting carriers — discriminating rates.

2. A connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels which may be practised by the initial carrier, merely because such connecting carrier has participated in the adoption of a joint through rate for barrel shipments which is, in itself, reasonable, although, by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3159), § 8, a carrier which "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful," shall be liable to the full amount of the damages sustained by one injured thereby.

[No. 27.]

Argued October 18, 21, 1907. Decided January 27, 1908.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment reversing a judgment of the Circuit Court for the Western District of Pennsylvania, in favor of plaintiff, in an action against interstate carriers to recover the amount of money reparation directed by the Interstate Commerce Commission. Affirmed.

See same case below, 70 C. C. A. 23, 137 Fed. 343.

Statement by Mr. Justice **Peckham**:

The plaintiff in error, who was plaintiff below, seeks to review a judgment of the circuit court of appeals for the third circuit (70 C. C. A. 23, 137 Fed. 343), reversing absolutely and without allowing a writ of venire facias de novo, the judgment of the circuit court of the United States for the western district *of Pennsylvania in [209] favor of the plaintiff company for $8,579, with interest from May 15, 1894; in all, $12,706.92. This sum was made up of the charge of 14 cents for the weight of the barrel in which oil was transported to Perth Amboy from the Pennsylvania oil fields, from September 3, 1888, the time when such charge commenced, to May 15, 1894, the time when the hearing on the claims was had before the Interstate Commerce Commission.

The proceeding resulting in the petition herein to the circuit court was originally commenced before the Interstate Commerce Commission, and thereafter conducted pursuant to §§ 13 to 16 of the act creating the Commission (24 Stat. at L. 379, 384, chap. 104), as amended by the act of 1889 (25 Stat. at L. 855, 859, chap. 382, U. S. Comp. Stat. 1901, p. 3165), to obtain relief from certain alleged illegal practices of the railroad companies in the way of overcharges for the transportation of oil for the complainants in the petition, and to obtain reparation therefor.

Three substantially contemporaneous, yet also separate, petitions, were filed with the Commission, two on the 4th of December, 1888, and one on the 30th of January, 1889, by the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, against several railroad companies. The petitioners were associations of some sixteen separate refining companies, operating distinct and separate works in the oil regions of Pennsylvania, near the city of Titusville or Oil City.

The petitions were filed for the purpose of obtaining relief from certain charges made by the defendant companies against the petitioners for the transportation of their oil from those oil fields to tidewater in New Jersey, and specially to Perth Amboy, in that state, and described as a point in New York harbor, and also to Boston and points in that vicinity. Their petition relating to the charges for transportation to Perth Amboy is alone involved here.

[210] *The ground of complaint in that petition was that the railroads who were therein made defendants, *viz.*, the Western New York & Pennsylvania and the Lehigh Valley, charged 66 cents per barrel of oil, which was alleged to be an excessive, unjust, and unreasonably high rate for the transportation of oil to Perth Amboy.

There was no complaint in the petition of the failure of defendants to furnish tank cars for the petitioners for the transportation of their oil to Perth Amboy. There was no averment of unfairness of the rates as between barrel and tank oil. Nor was there any averment that the defendants, by their custom of charging for the gross weight of the oil and barrels, were giving a preferential rate to the tank shippers as against the barrel shipments made by plaintiffs. It was only alleged that the rate for the transportation of oil to Perth Amboy was unreasonably high at 66 cents per barrel, the weight of the barrel being included and charged for therein. The averments in the petition, that plaintiffs were subjected to undue prejudice and that an undue advantage was given their competitors in business, among others the Standard Oil Trust, had no relation to discrimination arising from a charge for the weight of the barrel, but was connected with the averment that the charge of 66 cents for the carriage of the oil was excessive, and hence worked a disadvantage to the plaintiffs and gave an unreasonable preference to the competitors in plaintiffs' business.

The prayer of the petition was that the Commission direct the defendants to cease their unlawful acts, etc.

The evidence was taken before the Commission in the three cases, with the understanding it should be applied to each or all the cases, so far as applicable therein.

It appears by the evidence before the Commission that the charge of 14 cents per barrel (in addition to 52 cents for its contents) for the transportation thereof to Perth Amboy commenced about September, 1888, and prior to that the charge had been 52 cents for the oil and the barrel. *There had been [211] some reasons alleged on account of which the charge had been limited to the total of 52 cents before September, 1888. Perth Amboy was the station to which all the petitioners in the proceedings before the Commission, applicable to that port, had consigned their oil for export, and that station had no conveniences for unloading in bulk the oil which was brought there in tank cars. Not one car in a hundred was a tank car. The trade demand at that point was for oil in barrels, and the ocean shipments therefrom by the petitioners were also made in barrels, as there were no vessels from that port carrying oil in bulk. Some of the petitioners in the proceedings before the Commission owned tank cars, but did not use them for the Perth Amboy port for the above reasons. Oil which came to Perth Amboy, intended for export, if it arrived in tank cars, had to be there unloaded and filled in barrels before it could be loaded on ships. The petitioners, including the plaintiffs, therefore, had no use for tank cars to that point. The Lehigh Valley road did not own tank cars, nor did any of the other railroad companies to any material extent, except the Pennsylvania Railroad, which is not a party to this proceeding. The charges for transportation of oil in tank cars did not include any charge except for the oil. In the transportation of the oil to Perth Amboy *via* Buffalo the initial carrier was the Western New York & Pennsylvania Railroad Company, the Lehigh Valley Railroad Company taking the oil as delivered to them in barrels in cars at Buffalo, New York, and transporting it to Perth Amboy, the plaintiffs paying therefor a joint through rate, amounting to 66 cents per barrel, including the barrel. The defendants had established this joint through rate. The tank cars that were used by others for transportation to other places than Perth Amboy were rented from the owners, who were also shippers of the oil, to the railroad companies, who paid the owners for the use of such tank cars a certain sum, determined by the miles run. Those cars were used exclusively for the transportation of the oil of the owners of the cars.

[212] *The Commission ordered the defendants to cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce. It was also ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads, should be the same, and the said rate from said oil regions to New York points should not exceed 16½ cents per hundred pounds. The defendants were also required "to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package, on shipments of oil in barrels, *when the use of tank cars had not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use.*"

In its opinion, covering, so far as applicable, the three cases, the Commission said that the unlawful discrimination regarding the charge of 14 cents for the barrel package, in addition to the 52 cents for the carriage of the oil per barrel, as against 52 cents per barrel by tank cars, without any charge for the package, lay in the fact that the choice was not open generally to shippers, and that the case was one where both modes of transportation are employed by the carrier, and the use of one, the tank cars, is not open to shippers impartially, but is practically limited to one class of shippers, and that the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulted in a greater [213] cost of transportation to the *shipper in barrels on like quantities of oil, between like points of shipment and destination, than to the tank shipper, and that it was an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage, and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

The order of the Commission was filed November 14, 1892, and the proceedings were kept open for the purpose of ascertaining the amounts which were due the parties plaintiff on the theory adopted by the Commission.

The defendants did not comply with the order, but continued to charge the 14 cents for the barrel, and the parties seeking reparation—that is, the recovery of the damage which they alleged they had sustained—applied for a hearing before the Commission to ascertain the amount thereof. The Commission proceeded thereafter, on proper notice, to determine the amounts due each of the claimants from September 3, 1888, the time of the commencement of the charge for the barrel transportation, to May 15, 1894, the time of the hearing before the Commission, and found (October 22, 1895) the amount due the plaintiff, the Penn Refining Company, Limited (among many other claimants), to be the amount already stated, arising, as found, from the transportation of barrels containing petroleum oil, shipped and carried by the railroads from Oil City and Titusville to Perth Amboy at 14 cents per barrel in addition to 52 cents for its contents.

The Commission, in its reparation opinion, stated that the carriers had failed to notify the public, by publication in their tariffs of rates and charges, that they would, on reasonable notice, supply shippers who might apply therefor with tank cars for transportation to New York harbor points. The original order, directing the publication of these notices by defendants in their tariffs of rates, was entered November 14 *1892, [214] while the period covered by the reparation order of October, 1895, giving damages, included four years, namely, from September, 1888, to November, 1892, before the making of such order. The Commission, in its opinion, also stated that tank cars had not been open to the use of shippers generally on the carriers' roads, but there was no statement or finding that plaintiffs had ever applied for such cars or desired them, or had been refused. The companies did not comply with the order of reparation, and the Commission then commenced (some time in 1896) a proceeding in its own name in the circuit court of the United States, in equity, to enforce all the directions contained in the orders, including the provision for the payment of the money damages found due the various claimants. Upon demurrer that court held that the latter provision could not be enforced in equity, as the railroads were entitled to a jury trial on the issue as to the amount of the money recovery, and that the order in regard to the amount due ought to be enforced by each plaintiff in his own name. Interstate

Commerce Commission v. Western New York & P. R. Co. 82 Fed. 192–195.

Thereupon, and in April, 1901, this proceeding by petition was commenced in the United States circuit court for the western district of Pennsylvania by the Penn Refining Company, Limited, to recover the amount of the money reparation directed by the Commission. The Lehigh Valley Company demurred to the petition, which was overruled, and issue was then joined by all the defendants upon the material allegations of the petition, and the case was tried in March, 1902, and a verdict found for the plaintiff against all the defendants.

Messrs. **James W. Lee** and **Samuel S. Mehard** argued the cause, and, with Messrs. M. J. Heyward and Eugene Mackey, filed a brief for plaintiff in error:

It being the duty of the railroad companies transporting oil between the oil regions of Pennsylvania and the seaboard to furnish cars for the transportation of refined oil, it was likewise their duty, as public servants, to do so impartially.

Dawson v. Chicago, & A. R. Co. 79 Mo. 296; Ayres v. Chicago & N. W. R. Co. 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; Smith v. New Haven & N. R. Co. 12 Allen, 531, 90 Am. Dec. 166; St. Louis & S. E. R. Co. v. Dorman, 72 Ill. 506; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827; State ex rel. Kohler v. Cincinnati, N. O. & T. P. R. Co. 47 Ohio St. 130, 7 L.R.A. 319, 23 N. E. 928; Rice v. Louisville & N. R. Co. 1 Inters. Com. Rep. 722.

The railroads failed to furnish the vehicles of transportation to all shippers of freight, but rented those of the Standard Oil Company upon the express stipulation that the tank cars should be used only by the lessor, and then charged the lessor only for the naked weight of the oil, and not for the iron package in which it was transported, while they not only failed and refused to furnish tank cars to the Independent Refiners, but charged them for the weight of the wooden barrel package in which their oil was transported. This was unjust, undue, and unreasonable.

State ex rel. Kohler v. Cincinnati, N. O. & T. P. R. Co. supra.

Mr. **John G. Johnson** argued the cause, and, with Mr. Francis I. Gowen, filed a brief for defendants in error:

In determining whether a preference accorded to an individual or locality is undue or unreasonable, those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 197, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 282, 36 L. ed. 705, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

Carriers, parties to joint through rates, do not, because of this fact, become responsible for the default or negligence of the other companies, parties to such rate, in respect to the transportation of the traffic moving under such joint rate.

St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co. 104 U. S. 146, 26 L. ed. 679.

Upon what possible theory, therefore, can it be claimed that they become responsible for any overcharge made by such connecting carrier, or for the failure or refusal of such carrier to furnish equipment of the character desired by a shipper?

Mr. John G. Johnson, with Messrs. Patterson, Sterrett, & Acheson, also filed a brief for defendants in error.

*Mr. Justice **Peckham**, after making the [215] foregoing statement, delivered the opinion of the court:

The questions arising on this writ of error are, in some respects, different in regard to the different railroads who are defendants in error, but, as to the matters now to be discussed, all occupy the same position.

In their petition to the Commission, the petitioners in that proceeding complained of the rate of transportation of oil to Perth Amboy, fixed by the carriers at 66 cents per barrel, the weight of the barrel being included and charged for in that amount, which rate, it was asserted, was unreasonable and excessive.

In the opinion of the Commission, filed with its order, in referring to a former charge of 52 cents per barrel of oil without charging for the weight of the barrel, from the oil fields to Perth Amboy, it is said: "While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it, and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do not feel authorized, under all the facts and circumstances disclosed by the record and evidence in these cases, to order a reduction in addition to the exclusion of the charge for the barrel package" (14 cents); "and our conclusion is that the rate to New York points should be not more than 16½ cents per hundred pounds, both in tank and barrel shipments, to be charged, in both cases, only for the weight or quantity of oil carried, exclusive of any charge for the package." Again, the Commission, in its opinion, said: "In order to guard against misapprehension the Commission wishes to say that these cases are decided purely upon the facts as set forth in the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier, in hauling packages, is not entitled to pay according to the weight [216] thereof. It is simply held that, *on account of the peculiar circumstances in these cases, to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned." Upon referring to the order actually made by the Commission, its language is "that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of western Pennsylvania, to New York and other points in New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of western Pennsylvania to New York harbor and Boston points such rates should not exceed 16½ cents and 23½ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipment in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines."

The defendants were also, by the order of the Commission, "required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipment of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for *the purpose of loading [217] and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the 9th of January, 1893, said defendants notify the public accordingly, by publication in their tariffs of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days," etc., as set forth in the order.

By reference to the foregoing extracts from the opinion of the Commission it appears that they did not hold that the carrier, in hauling barrels of oil, was not entitled to pay for the weight thereof, including the package, but only that the peculiar circumstances of the case before it made it improper to charge for the weight of the barrel, because, by such charge, the shippers of oil in barrels were placed at a disadvantage as against shippers by tank cars, and although in one portion of the opinion it is stated that the charge of 52 cents per barrel, excluding the weight of the barrel package, was as high as it should be in view of the nature of the traffic and the conditions surrounding it, nevertheless the Commission gave the above-quoted precise directions contained in its formal order. It made use of language by which the defendants were required to cease from charging for the transportation of the barrel package, or, on reasonable notice promptly furnish tank cars to complainant and other shippers who might apply therefor for the purpose of loading and shipping oil to New York harbor or Boston points, as the shippers might direct. This, of course, amounted and was equivalent to a holding that the charge for the weight of the barrel package of oil was not excessive. If the charge for the carriage of the barrel itself, taken in connection with the charge for the weight of the oil contained therein, made a total charge which was, in and of itself, excessive or unreasonably high (as was the complaint of the petitioners), of course the Commission would not *have permitted the [218] charge, even if the petitioners had not applied for the use of tank cars. East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 23, 45 L. ed. 719, 727, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 283, 47 L. ed. 1047, 1055, 23 Sup. Ct. Rep. 687. This limits the case against the defendants, upon the finding of the Commission, to that of discrimination, which was decided to exist under the peculiar circumstances of the case, by reason of the charge for the barrel in which the oil was contained, while in tank cars the charge was limited to the oil carried.

We will therefore inquire what were the peculiar circumstances, as shown by the evidence, which led the Commission to make its order as to discrimination?

They were these:

1. That the railroads owned no tank cars.
2. That they transported oil in tank cars only for those shippers of oil who owned and furnished such cars. That, in the case of oil intended for export by such owners, it was sent to ports in New York harbor near Perth Amboy; the seaboard, and not Perth Amboy alone, being the place of competition between the plaintiffs and the Standard Oil Trust and others.
3. That the carrier hired tank cars from the shippers of the oil and paid for them a certain sum, measured by the miles run to and from the place of consignment.
4. That the tank cars, thus hired, were used exclusively to carry the oil of the owners of such cars. Other shippers of oil had their oil carried in barrels, in box cars, and a charge was made for the weight of the barrel containing the oil, while the charge for the oil in tank cars was limited to the amount of oil actually carried.

These facts, in the opinion of the Commission, rendered the case an exception to the usual rule as to the right to charge for the weight of package as well as its contents. In the view of the Commission, although it admitted that the transportation in tank cars was more profitable to the carrier in yielding a larger revenue above the [219] cost of service than that in barrels, *yet the case was not presented "of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rated and, as claimed by the defendants, the better, mode of transportation, was open practically to only a particular class of shippers." When, therefore, as was stated, "the carrier accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars, in which barrels must be used for oil, the carrier is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage."

These facts also appeared before the circuit court, and that court left it to the jury to find from them whether there was "undue discrimination" in favor of the shipper by tank cars and against the shipper by barrels, although the petition made no such allegation, but only alleged that the rates and charges for the service (66 cents per barrel) were excessive, unjust, and unreasonable. Discrimination was not alleged between the tank and the barrel car, for what would seem to be the obvious reason that the plaintiffs could make no use of the tank cars, as they had no facilities for unloading them at Perth Amboy, and no vessels to export the oil in bulk, and the trade demand there was for oil in barrels. But, although, without such facilities, and not being in position, therefore, to use such cars, the plaintiffs nevertheless demanded that no charge for transportation should be made for the barrel package, although the charge made was a reasonable one, unless a charge for the tank packages was made against those who used tank cars for the carriage of their oil to points adjacent to Perth Amboy, and although the transportation by tank cars was more remunerative to the companies than the transportation by barrels.

The whole theory of this discrimination rests upon the alleged failure to furnish tank cars to shippers demanding *them, while [220] at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively, and yet in this case there has been no such failure, because there has been no demand for such cars by the plaintiffs, who, for the reasons stated, had no use for them.

Although, in the opinion of the Commission in the reparation proceeding, it was stated that the defendants had not notified the public as to supplying shippers with tank cars, as required by the order of November 14, 1892, while at the same time they denied to plaintiffs the use of such cars, yet there is no statement or finding that the plaintiffs had ever asked for such cars for the Perth Amboy station, and the proof is they did not want them for that point. In the course of the opinion some general observations were made in regard to the failure to supply tank cars, and the consequent necessity for the shippers to ship their oil in barrels and pay transportation on the total weight of the oil and the barrels. The opinion was delivered in two different proceedings, in which all the facts were not identical, one regarding Perth Amboy and the other Boston and adjacent points, and we cannot suppose that the Commission meant to include Perth Amboy in the opinion on this point, because the facts already adverted to furnish ample reasons for not demanding or using tank cars.

It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy during the time of investigation by the Commission.

If it be assumed that it was the duty of the railroads to furnish tank cars to those [221] who demanded them while the *railroads continued to hire that kind of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless, it was stated that the facts already adverted to made out a case of unjust discrimination between the tank and barrel shipper, and it was so adjudged in this case, where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.

If the carrier must take off such charge for the weight of the barrel, although tank cars are not demanded, the result is to make the defendants carry the barrels free from freight charges, even while the shippers were unable to use, and did not demand, tank cars.

It is not incumbent, therefore, upon this court to now decide what would be the duty of the carrier as to furnishing tank cars to those who desired and demanded, but did not own, them, where the railroads accepted tank cars owned by other shippers of oil, for the purpose of carrying their oil alone, and to different points than Perth Amboy. We are dealing with a case where such question does not arise.

There are other reasons in addition to the foregoing why the Lehigh Valley should [222] not be held for any discrimination *in this case. That company was but a connecting carrier, and took the cars as they were delivered to it by the initial carrier at Buffalo for transportation to Perth Amboy. It was the duty of the connecting carrier to do so, and it was not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy, which was in itself reasonable. Nor did the 8th section of the commerce act render it liable for any such alleged wrongful act asserted against the initial carrier.

These views render it unnecessary to consider the objection to the recovery, taken by the defendants in error, based upon the fact that the petition to the Commission asked for relief on the ground that the charges were unreasonably high, while the relief granted was based upon discrimination,—a charge not contained in the pleading. For the reasons already stated, the judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice **Moody**, dissenting:

In my opinion there was evidence which tends to support the plaintiff's cause of action, and I think that it should have been, as it was, submitted to the jury. It appeared that the plaintiff was engaged in shipping oil, destined for export, from the oil regions in Pennsylvania to Perth Amboy. Up to September, 1888, the transportation rate was 52 cents per barrel, and that rate applied, whether the oil was carried in barrels or in tank cars. At that rate the plaintiff was able to ship oil in competition with other producers. In September, 1888, the rate for shipment in barrels was changed to 66 cents per barrel, while the rate was left unchanged where the oil was carried in tank cars. The evidence tended to show that, in view of the number, ownership, and management of all the tank cars in existence, the new rate was practically prohibitory of barrel shipments from the Pennsylvania oil *regions to the seaboard, that it [223] was designed by a competitor, who influenced the defendants to impose it, to have this effect, and that this was the only method of shipment practically open to the plaintiff. Under these circumstances the plaintiff joined with others in a complaint to the Interstate Commerce Commission. Section 3 of the interstate commerce act makes it "unlawful . . . to subject . . . any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155], as well as to give any person or kind of traffic an undue preference or advantage. The plaintiff might have brought an action for damages under §§ 8 and 9 of the act, but it chose to make complaint to the Commission, thereby electing that as the exclusive remedy. The Commission, after a hearing, adjudged that the 66-cent rate worked unjust discrimination against barrel shipments, and ordered the defendants to make reparation to the plaintiff and others. The amount of the reparation was afterward ascertained. An order prescribing the tariff in the future was made, but its terms do not seem to be material, as the claims for reparation were for the time between the establishment of the discriminating rate and the making of the Commission's order. The order for the future may or may not be a valid and enforceable one. The plaintiff's right under that order, in the absence of a demand for tank cars, may be uncertain. We need not pursue those inquiries. Here the only question is of the right of the plaintiff to recover damages for the alleged discriminatory rate collected from it before, and not after, the order of the Commission. The defendants declined to make the reparation ordered by the Commission, and the plaintiff sought to recover it by an action, brought under § 17 of the act, in which the defendants were entitled to a trial by jury. On the trial the statute makes "the findings of fact prima facie evidence of the matters therein stated." They, with other evidence, were submitted to the jury. The jury was instructed that whether the plaintiff had [224] been subjected to *undue prejudice was a question of fact. The jury was further instructed as follows:

"In arriving at that conclusion, it is proper to call your attention to this point: that the mere fact that there is or may be a preference or advantage given where refined oil is shipped in some other way,—for example, in tank cars,—and that a more favorable rate is given to tank-car shippers, does not, in and of itself, show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to these facts and matters which railroad men, apart from any question arising under the statute, would treat as calling for a preference or advantage to be given; for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment, whether such preference or advantage is undue or unreasonable. In the complexity of human affairs, and especially in commercial affairs, absolute uniformity is well-nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable that the act makes it unlawful.

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly, and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established between these two companies (if you find that to be the fact), did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you *so [225] find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount. You will understand that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged."

These instructions seem to me full and appropriate. The jury found a verdict for the plaintiff, thereby affirming that "the particular description of traffic" in which the plaintiff was engaged was subjected to "undue or unreasonable prejudice or disadvantage." I am not persuaded that we can say, as matter of law, that there was not sufficient evidence to be submitted to the jury and to warrant the verdict. Nor do I see any reason why the Lehigh Valley Railroad should not be held responsible. It had, with the other defendant, established a joint tariff for a continuous shipment between the states. That tariff has been found to be discriminatory and unlawful. It has received its share of the unlawful exaction. The 8th section of the act provides that a carrier who "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful" shall be liable to the full amount of the damages sustained by one injured thereby. I see no escape for this defendant from this provision.

There may have been error committed during the trial which would require that the verdict should be set aside and a new trial granted. It is not necessary for me to consider this question. I go no further than to dissent from the judgment of the court, which in effect denies the right of the plaintiff to recover upon the evidence against any of the defendants.

I am authorized to say that Mr. Justice **Harlan** concurs in this dissent.

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[226]*GEORGE R. ELDER, Successor in Interest to Samuel McMillen, Deceased; Alice J. McCombe, Administratrix of John McCombe, Deceased; and Rowena E. McCombe, by Alice J. McCombe, Her Next Friend, Plffs. in Err.,

v.

TINGLEY S. WOOD, Impleaded with Mary M. Bullard, Anna L. Finnerty, and Cecelia L. Wahrer, Defts. in Err.

(See S. C. Reporter's ed. 226–233.)

Taxes — state taxation of right of possession of mining claim.

1. Lands of the United States are not taxed in violation of the act of March 3, 1875 (18 Stat. at L. 474, chap. 139), § 4, by the imposition, under the authority of Colo. Laws 1887, pp. 340, 341, of a tax upon the right of possession, for mining purposes, of a lode mining claim, and the enforcement of the collection of such tax by a sale of such right of possession.

Error to state court — questions reviewable — effect of decision on non-Federal ground.

2. The question of the validity, under the due-process-of-law clause of U. S. Const., 14th Amend., of a tax sale made upon a notice published only in a Sunday newspaper, is not open on a writ of error from the Supreme Court of the United States to the highest court of a state, whose decision upholding the tax title was based upon the grounds that a state statute made the tax deed, which, upon its face, was a valid instrument, prima facie evidence of the sufficiency of the notice, and that possession under such deed for the prescribed period met the requirements of the state statute of limitations.

[No. 95.]

Argued January 9, 1908. Decided January 27, 1908.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which reversed a judgment of the District Court of Lake County, in that state, in favor of plaintiffs in an action to recover possession of an interest in a lode mining claim, and ordered judgment for the defendants. Affirmed.

See same case below, 37 Colo. 174, 119 Am. St. Rep. 269, 86 Pac. 319.

The facts are stated in the opinion.

Mr. **George R. Elder** for plaintiffs in error:

While the title remains in the government, public lands are not subject to state taxation, and tax sales and tax deeds thereof are void; and one subsequently acquiring title thereto can test their validity.

Stearns v. Minnesota, 179 U. S. 223, 251, 45 L. ed. 162, 176, 21 Sup. Ct. Rep. 73; Hussman v. Durham, 165 U. S. 145, 41 L. ed. 664, 17 Sup. Ct. Rep. 253, 88 Iowa. 29, 55 N. W. 11; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Northern P. R. Co. v. Traill County (Northern P. R. Co. v. Rockne) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; Central Colorado Improv. Co. v. Pueblo County, 95 U. S. 259, 24 L. ed. 495; Cooley, Taxn. 3d ed. 1903, p. 136; Pitts v. Clay, 27 Fed. 635; Coulter v. Stafford, 6 C. C. A. 18, 15 U. S. App. 118, 56 Fed. 564; Bronson v. Kukuk, 3 Dill. 490, Fed. Cas. No. 1.929; Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126; Duncan v. Newcomer, 9 S. D. 375, 69 N. W. 580; Scott v. Chickasaw County, 46 Iowa, 253; Reynolds v. Plymouth County, 55 Iowa, 90, 7 N. W. 468; Moriarty v. Boone County, 39 Iowa, 634; Kohn v. Barr, 52 Kan. 269, 34 Pac. 880; Calder v. Keegan, 30 Wis. 126; Davis v. Magoun, 109 Iowa, 308, 80 N. W. 423.

Tax deeds and tax sales made of United States lands during the period of suspended entry and cancelation are void, and the statute of limitations does not run until issue of patent.

Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; Pitts v. Clay; Coulter v. Stafford; Bronson v. Kukuk; Campbell v. Spears; Duncan v. Newcomer; Scott v. Chickasaw County; Reynolds v. Plymouth County; Moriarty v. Boone County; Kohn v. Barr; Calder v. Keegan; and Davis v. Magoun,—supra; Steele v. Boley, 7 Utah, 67, 24 Pac. 755; South End Min. Co. v. Tinney, 22 Nev. 228, 38 Pac. 401.

Subsequent to the order of cancelation, May 2, 1887, up to order of cancelation, August 7, 1894, and until the commencement of this suit, the title of the Comstock lode was part of the public domain of the United States, under the following decisions:

Gibson v. Chouteau, 13 Wall. 99, 20 L. ed. 536; Henshaw v. Bissell, 18 Wall. 269, 21

NOTE.—As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

L. ed. 840; **Hagar v. Spect**, 48 Cal. 408; Gardiner v. Miller, 47 Cal. 570; Manly v. Howlett, 55 Cal. 95; King v. Thomas, 6 Mont. 409, 12 Pac. 865.

Messrs. **A. B. Browne,** Charles Cavender, and Alexander Britton for defendants in error:

The Federal question, if there be one, not having been raised in proper time, this court will not now consider the question, even if it be in the case.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

The decision is based on a local statute and the construction thereof, and no Federal question was involved therein or necessarily decided.

New York, C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375, 63 L.R.A. 33, and note; Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L. R.A. 513, 52 Pac. 573, 54 Pac. 367, 882; Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

A mining location is real estate, and belongs to, and the title is in, the locator, although the paramount title might not have passed from the government, and is capable of conveyance, inheritance, and, of course, protection at law and in equity, and subject to tax levy and sale.

Forbes v. Gracey, 94 U. S. 767, 24 L. ed. 314; Belk v. Meagher, 104 U. S. 283, 26 L. ed. 737; Manuel v. Wulff, 152 U. S. 505, 511, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 655, 43 L. ed. 322, 19 Sup. Ct. Rep. 61; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Roseville Alta Min. Co. v. Iowa Gulch Min. Co. 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920; Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; Bakersfield & F. Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892.

A possessory mining claim could be sold for state taxes, under state law, on default in payment thereof.

Forbes v. Gracey, supra; Manuel v. Wulff, 152 U. S. 505, 510, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651; Maish v. Arizona, 164 U. S. 599, 609, 41 L. ed. 567, 571, 17 Sup. Ct. Rep. 193.

Mr. Justice **Moody** delivered the opinion of the court:

The plaintiffs in error brought this action in a district court of the state of Colorado to recover from the defendants in error the possession of an undivided interest in the Comstock lode mining claim, situated in that state. Both parties claimed title under Wilhelmina Gude, who was agreed to have been the owner of the interest in dispute; the defendants under a sale for taxes assessed upon her interest, made August 5, 1889, and a deed in pursuance of the sale, made August 8, 1892, and recorded August 11, 1892; the plaintiffs under a quitclaim deed of her interest, made April 5, 1894, and duly recorded. The tax title was the earlier, and possession of the interest in dispute was held by those claiming under that title for more than five years, which is the period of the statute of limitations of Colorado applicable to such a case. The plaintiffs, however, insisted that the tax title was void, and the judge of the trial court so found, and entered judgment for the plaintiffs, which was reversed by the supreme court of the state and judgment for the defendants ordered. The case is here upon writ of error to the latter court.

The plaintiffs' contention is that the tax title was void for two reasons: First, because the property was not subject to *state [231] taxation, as the title to the land was in the United States, and therefore the levy of the tax was a nullity; second, because the notice of the sale for taxes was published only in a Sunday newspaper, and therefore the sale was a nullity. The further contention is then made that the tax deed, for these reasons, was void, and did not afford color of title sufficient for the purpose of the statute of limitations.

The judgment under review, however, determined that the interest of Wilhelmina Gude was liable to taxation under the laws of the state, although the land on which it was located had not been patented to her or entered for patent by her; that the possession was the subject of the assessment, and that the right of possession passed by the tax sale; that a tax deed was, by a state statute, prima facie evidence *inter alia* "that the property was duly and lawfully advertised for sale;" that the tax deed was not void upon its face, and that it constituted a sufficient color of title to satisfy the statute of limitations; and, finally, that, as this action was not brought within five years after the delivery of the tax deed, it was barred by that statute, which provided that "no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer."

The question for decision here is only whether this judgment denied to the plaintiffs any Federal rights duly claimed by them in the state court, and we have no right to inquire further.

1. The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the territory of Colorado were enabled to form a state (§ 4 of act approved March 3, 1875, 18 Stat. at L. 474, chap. 139) provided that no taxes [232] *should ever be imposed upon lands or property of the United States. The claim of a Federal right was based upon this statute. But, assuming that under this statute a Federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: "In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado." Laws 1887, pp. 340, 341, Mills's Anno. Stat. §§ 3222–3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the supreme court of the state, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself; that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock lode was a "valid subsisting mining location," and, at the time of the assessment of the tax, Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable, and taxable. Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313; Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 737; Manuel v. Wulff, 152 U. S. 505, 510, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61; 1 Lindley, Mines, §§ 535 to 542, inclusive. The state, therefore, had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States.

2. The tax deed under which the defendant in error Wood claims title was executed in pursuance of a sale made upon *a notice [233] published only in a Sunday newspaper. This fact does not appear from the deed itself, as an analogous infirmity appeared in the tax deed before the court in Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83. The deed upon its face was a valid instrument, and could be impeached only by evidence *aliunde*. The state court did not deem it necessary to consider whether such a notice was sufficient, because it held that a state statute made such a deed prima facie evidence of the sufficiency of the notice, and that possession under such a deed for the prescribed period met the requirements of the state statute of limitations. The decision therefore did not reach the only Federal question which can be imagined with respect to this part of the case, namely, that a sale upon such a notice was wanting in due process of law, but rested upon entirely adequate grounds of a non-Federal nature. Whether the decision of the question of state law was right or wrong, we may not consider. It is enough that the judgment proceeded solely upon the state law, and that the state law was adequate to dispose of the case without reaching any Federal question. Leathe v. Thomas (November 11, 1907), 207 U. S. 93, ante, 118, 28 Sup. Ct. Rep. 30. We need not, therefore, consider whether this Federal question was properly raised in the court below, or whether a sale upon such a notice would be a denial of due process of law, in violation of the 14th Amendment of the Constitution.

The plaintiffs in error have shown no violation of Federal right, and the judgment of the Supreme Court of Colorado is affirmed.

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*MISSOURI VALLEY LAND COMPANY [234] and Iowa Railroad Land Company, Plffs. in Err.,

v.

ASMUS WIESE.

(See S. C. Reporter's ed. 234–250.)

Error to state court — signature to writ of error.

1. A writ of error from the Federal Supreme Court to the supreme court of the state of Nebraska sufficiently conforms to the requirement of U. S. Rev. Stat. § 999, U. S. Comp. Stat. 1901, p. 712, respecting

allowance by the chief justice of the state court, where it is signed "John B. Barnes, Presiding Judge of Supreme Court of Nebraska, in absence of Sedgwick, Ch. J., from this state," and the truth of this recital is not challenged.

Error to state court — frivolousness of Federal question.

2. The Federal question presented by a claim of right and title under a patent from the United States to land within the place limits of the grant made by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120), and the amendatory act of July 2, 1864 (13 Stat. at L. 356, chap. 216), in aid of branch railroads, which rests upon the theory that such grant was not one *in præsenti*, and that therefore the title did not pass upon completion of the railroads and compliance with the terms and conditions of the grant, but the land remained in the jurisdiction of the Land Department, which, up to a short time before the execution of the patent, had assumed and exercised jurisdiction over controversies respecting the land,—is not so frivolous as to require the dismissal of a writ of error from the Federal Supreme Court to review a decision of a state court against the right or title claimed.

Adverse possession — land within congressional grant.

3. The grant of lands within place limits, made by the act of July 1, 1862, § 14, as amended by the act of July 2, 1864, § 17, in aid of a branch railroad, to be constructed on the same terms and conditions as the main line, is not taken out of the general rule that the grant is one *in præsenti*, and that, on filing the map of definite location, the title passes to the railway company so that it can be held adversely, even as against such company, because the road which might build the branch was not, or may not have been, in existence at the time of the passage of the amendatory act, nor because of its provision that said company shall be "entitled to receive" alternate sections of land for 10 miles in width on each side of the way, along the whole length of the branch, nor because of the supposed limited character of the forfeiture provided for failure to complete the branch.

Adverse possession — land within congressional grant — interruption.

4. An attempt to acquire title from the United States under the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), enacted in behalf of bona fide purchasers of land excepted from the operation of a railroad land grant, with the view of removing a cloud upon the title, is not an act of recognition or acknowledgment of a superior title, either in the United States or in the railroad company, which can operate to interrupt the continuity of an adverse possession, and much less can it be held to have destroyed a title which had already become perfect by the expiration of the statutory period for acquiring legal title by adverse possession.

[No. 101.]

Argued January 10, 1908. Decided February 3, 1908.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Washington County, in that state, in favor of plaintiff in an action to quiet title. Affirmed.

See same case below (Neb.) 108 N. W. 175.

The facts are stated in the opinion.

Mr. **Charles A. Clark** argued the cause and filed a brief for plaintiffs in error:

In cases where it has been held that the grant of the full legal title was *in præsenti*, the language was "that there be and is hereby granted."

NOTE.—As to necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

Who may properly act as chief judicial officer of state court in allowing writ of error or signing citation.

The proper judge of the state court to allow a writ of error is the chief justice or chancellor, unless the court is composed of a single judge or chancellor, when the writ may be allowed by him; and therefore an associate justice of a court composed of a chief justice and three associates has no authority to allow the writ. Bartemeyer v. Iowa, 14 Wall. 26, 20 L. ed. 792.

A writ of error allowed and a citation signed by an associate judge of the New York court of appeals, who does not purport to act as chief judge or chief judge *pro tem.*, is not sufficient, although there is an affidavit by counsel that the chief judge of the court is abroad in Europe, and will be for some time to come. Havnor v. New York, 170 U. S. 408, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631.

But it will be presumed that a judge who signs an allowance of a writ of error and a citation as the presiding judge of the supreme court of the state was such presiding judge at the time of the signing. Butler v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.

A citation signed by a district judge on a writ of error to a state court is without authority of law and therefore without effect. Palmer v. Donner, 7 Wall. 541, 19 L. ed. 99.

For exhaustive note on practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal, see Wedding v. Meyler, 66 L.R.A. 833.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769.

Where the language of the grant is "shall be granted," it is uniformly held that this is not a grant *in præsenti* of the legal title.

Minnesota v. Hitchcock, 185 U. S. 392, 46 L. ed. 964, 22 Sup. Ct. Rep. 650; United States v. Thomas, 151 U. S. 583, 38 L. ed. 278, 14 Sup. Ct. Rep. 426; Beecher v. Wetherby, 95 U. S. 523, 24 L. ed. 440; Cooper v. Roberts, 18 How. 179, 15 L. ed. 340.

There may be a grant *in præsenti* of an inchoate right or title where the legal title does not pass until patent is issued for the land.

Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188; Michigan Land & Lumber Co. v. Rust, 168 U. S. 592, 42 L. ed. 592, 18 Sup. Ct. Rep. 208.

The government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

Wisconsin C. R. Co. v. Price County, 133 U. S. 511, 33 L. ed. 694, 10 Sup. Ct. Rep. 341.

Nothing passes but what is conveyed in clear and explicit language.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733–740, 23 L. ed. 634–637; United States v. Oregon & C. R. Co. 164 U. S. 539, 41 L. ed. 544, 17 Sup. Ct. Rep. 165.

An action for the possession of the land could not have been maintained by the Sioux City & Pacific Railroad Company or its grantee in advance of patent, and hence the statute of limitations could not run or toll the right of that company or its grantee under patent for the land when finally issued.

Howard v. Perrin, 200 U. S. 74, 75, 50 L. ed. 377, 26 Sup. Ct. Rep. 195; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Iowa R. Land Co. v. Blumer, 206 U. S. 495, 496, 51 L. ed. 1154, 1155, 27 Sup. Ct. Rep. 769.

It is only in the interest of justice that the fiction of relation is applied, by which a legal title is held to relate back to the initiatory step for the acquisition of the land.

United States v. Anderson, 194 U. S. 399, 48 L. ed. 1038, 24 Sup. Ct. Rep. 716.

Where, as in the case at bar, the application of that rule would, under a state statute of limitations giving title by prescription, toll the legal title before it passes from the United States, this is not in the interest of justice, and the fiction of relation cannot obtain.

Gibson v. Chouteau, 13 Wall. 100, 20 L. ed. 536; Howard v. Perrin, supra.

The writ of error was properly signed.

Butler v. Gage, 138 U. S. 56, 34 L. ed. 871, 11 Sup. Ct. Rep. 235; Havnor v. New York, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631.

Federal questions are involved.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Redfield v. Parks, 132 U. S. 246, 33 L. ed. 330, 10 Sup. Ct. Rep. 83; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769.

The questions involved are not frivolous.

Union P. R. Co. v. United States, 17 Land Dec. 43; Iowa R. Land Co. v. Blumer, supra; Gertgens v. O'Connor, 191 U. S. 240, 48 L. ed. 164, 24 Sup. Ct. Rep. 94.

Mr. **James H. Van Dusen** argued the cause, and, with Messrs. Irving F. Baxter and Edward F. Colladay, filed a brief for defendant in error:

The acts of Congress of July 1, 1862, and July 2, 1864, were grants *in præsenti,* and, under the admission in the pleadings of the completion of the railroads and the compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the government on or prior to that date.

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769.

If the title passed from the government, as contended by us, then the state statute of limitations operated, and proceedings before the Land Department could not toll it.

Deseret Salt Co. v. Tarpey and Toltec Ranch Co. v. Cook, supra; Southern P. R. Co. v. Whitaker, 109 Cal. 268, 41 Pac. 1083; Sage v. Rudnick, 91 Minn. 330, 98 N. W. 89, 100 N. W. 106; Iowa R. Land Co. v. Blumer, supra.

Messrs. James H. Van Dusen and Edward F. Colladay also filed a brief in support of motion to dismiss or affirm:

The writ was not properly allowed.

Havnor v. New York, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631.

There is no Federal question involved in this case.

Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 113, 26 Sup. Ct. Rep. 41; Dibble v. Bellingham Bay Land Co. 163 U. S. 74, 41 L. ed. 75, 16 Sup. Ct. Rep. 939.

The plaintiff in error in this case contends, in effect, that although the terms of the grants from the United States were complied with prior to January 1, 1870, the title remained in the United States until the issuance of the patent, July 24, 1903; and that contention, we respectfully insist, is frivolous. A patent is merely evidence of a grant; it adds nothing to the grantee's rights, but only furnishes him with convenient proof thereof.

Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Simien v. Perrodin, 35 La. Ann. 931; Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063; Stark v. Starr, 6 Wall. 402, 18 L. ed. 925; Moran v. Horsky, 178 U. S. 212, 44 L. ed. 1040, 20 Sup. Ct. Rep. 856; Joplin v. Chachere, 192 U. S. 94, 98, 48 L. ed. 359, 361, 24 Sup. Ct. Rep. 214; Dibble v. Bellingham Bay Land Co. supra; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166.

Mr. Justice **White** delivered the opinion of the court:

Within the grants of land made to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company by the act of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120), and the amendatory act of July 2, 1864 (13 Stat. at L. 356, chap. 216), some of the land within place limits overlapped. This controversy concerns the title to a 40-acre tract within an overlap.

We state the salient facts established by [239] the pleadings and *the proofs in order to make clear the contentions which are required to be decided.

The land involved is the northeast ¼ of the northeast ¼ of section 21, township 17, range 11 east, Washington county, Nebraska. At the time of the passage of the granting acts referred to the records of the General Land Office showed a school indemnity selection of the tract now in controversy, made on July 1, 1858. The railroads named, each having complied with all the conditions of the acts of Congress, had become fully entitled to the granted lands prior to January 1, 1870. A joint patent was issued in 1873 to the two roads named for a large quantity of the lands within the common territory. This action of the Land Department was upheld by the circuit court for the district of Nebraska in 1876, and the two railroad companies were adjudged to be tenants in common of such lands. Sioux City & P. R. Co. v. Union P. R. Co. 4 Dill. 307, Fed. Cas. No. 12,909. As remarked in a footnote to a report of the case, "This decree was acquiesced in by the parties, who subsequently effected an amicable partition of the land." Apparently, however, in consequence of the school indemnity selection referred to, the 40-acre tract now in controversy was not included in such patents. On July 3, 1880, the school indemnity selection was canceled by the General Land Office because not authorized by statute. See Union P. R. Co. v. United States, 17 Land Dec. 43. This cancelation, so far as the record discloses, left the tract free from claims antagonistic to the rights of the railroad companies under the grants of 1862 and 1864. On June 12, 1881, the Union Pacific Railroad Company "listed the land in question, per list No. 4, but the Sioux City & Pacific Railroad Company never listed the same." On December 1, 1882, the Union Pacific Railroad Company sold, and in 1887, after completion of the payment for the same, conveyed, the land to John Japp by a warranty deed, purporting to transfer the entire title, and this deed was soon afterwards recorded. Japp went into and remained in open, continuous, and adverse possession of the land, farming *the same, until February [240] 28, 1891, when he sold it to Asmus Wiese, the defendant in error. The latter at once recorded his deed, inclosed the land with a wire fence, and maintained an exclusive possession of the land, claiming to be the owner.

Upon the ground that the school indemnity selection referred to, although invalid, was uncanceled when the railroad grants of 1862 and 1864 were made, and that such invalid selection operated to except the tract in question from said grants, the General Land Office on May 19, 1892, canceled the listing of the tract which had been made by the Union Pacific Railroad Company and rejected a claim "as to this land" made by the Sioux City & Pacific Railroad Company. When such claim was made and its precise character is not shown by the record.

By § 5 of the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), providing for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, etc., it was made lawful for a bona fide purchaser of lands forming part of a railroad land grant, but which, for any reason, had been excepted from the operation of the grant, to make payment to the United States for said lands and obtain patents therefor. Because of the ruling made by the General Land Office, to the effect that the Union Pacific Railroad Company was without title to the land which it had conveyed to Japp, as before stated, Asmus Wiese, on August 10, 1893, began proceedings under the 5th section of the act of 1887 to obtain a patent to the land from the United States, made the required publication and proof, and on September 25, 1893, paid to the register of the proper local land office the sum of $50,—the price of the land. A certificate was delivered to Wiese, reciting that he was entitled, on presentation thereof, to receive a patent. On October 17, 1894, presumably while an application of Wiese for patent was pending before the Commissioner, the Sioux City & Pacific Railroad Company filed a protest against the issue of the patent, on the ground that the land affected lay within [241] the *limits of the grant to said company under the act of 1864, that the indemnity school selection then apparently existing was void, and did not cause the land to be excepted from the grant on the definite location of the road, and, in consequence, that there was no authority of law for the purchase by Wiese. It was further claimed that, as the land was within the grant to the Sioux City road, it was a condition precedent to acquiring title under the act of 1887, that it had been purchased from that company, whereas the proof by Wiese was that it had been purchased from the Union Pacific Railroad Company. The protest was dismissed by the Commissioner on the ground that the Sioux City Company was debarred from making the protest, because a claim previously made by that road to the land had been rejected. Thereafter, upon application of the attorneys for the Sioux City Company, this decision of the Commissioner was reviewed by the Secretary of the Interior. On April 28, 1896, applying a prior decision in Union P. R. Co. v. United States, 17 Land Dec. 43, that official held that the school indemnity selection referred to having been made without statutory authority therefor, did not reserve the land so selected from the operation of subsequent grants to the railroads on the definite location of their line or lines, and that the entry made by Wiese in supposed conformity to the act of 1887 was unauthorized. In August following, the entry of Wiese was formally canceled. In September, 1897, a patent from the United States for the tract was issued to the Missouri Valley Land Company as the successor in interest to the Sioux City & Pacific Railroad Company. Following a notification from the Land Office by letter, dated May 17, 1898, that the land had been erroneously patented, as it was within the limits of the grant to the Union Pacific Railroad Company, and a patent should have issued to the companies jointly, the Missouri Valley Land Company, by quit-claim deed, reconveyed the land to the United States. Finally, on July 24, 1903, a patent for the land was issued by the United States to the Union Pacific Railway Company, successor in interest to the Union Pacific *Railroad Company and to the Mis- [242] souri Valley Land Company, successor in interest of the Sioux City & Pacific Railroad Company, jointly.

Prior, however, to the issue of the patent last referred to, and on November 12, 1902, Wiese commenced, in the district court of Washington county, Nebraska, this action to quiet his title to the tract, making defendants to the petition the Union Pacific Railway Company, the Sioux City & Pacific Railroad Company, and the Missouri Valley Land Company. On February 7, 1903, the Union Pacific Railway Company filed a disclaimer of "any and all interest of every kind or nature in and to the subject-matter of this action." The issues, however, upon which the case was tried, were made by a second amended petition, filed on February 20, 1904, and an answer and cross petition thereto and a reply to the cross petition. The only defendants named in this second amended petition were the Missouri Valley Land Company and the Iowa Railroad Land Company. Averments were made in the petition as to the making of the overlapping grants by Congress, the completion of the two railroads prior to January 1, 1870, the sale to Japp in 1882 and by Japp to the plaintiff, the adverse possession of the land by the plaintiff and his grantor, commencing in 1882, absolute ownership of the land by the plaintiff, the issue in 1903 of the joint patent for the land to the successors in interest of the original beneficiaries of the grants made by the acts of 1862 and 1864, and the assertion of conflicting claims to the land by the defendants as successors in interest to the Sioux City & Pacific Railroad Company. The prayer was that the title of plaintiff might be quieted, etc.

We excerpt from the brief of counsel for plaintiffs in error a synopsis of the contents of the claims made by its answer and cross petition:

"Plaintiff in error set up and claimed by its answer and cross bill that the title to its interest remained in the United States until the issuance of the patent in 1903; in other words, that the grant for the Sioux City branch was not a grant of *the legal [243] title *in praesenti*. It also specially set up and claimed that the Land Department had jurisdiction to determine whether the land was subject to the grant under acts of 1862 and 1864, and to determine all disputes as to who was entitled to a patent therefor; that it was not adjudged until July 24, 1903, that each company under the grant was entitled to a moiety of the lands. That while the Land Department was holding, as above stated (because of the indemnity school selection), the land in controversy to have been excepted from the grants under the acts of 1862 and 1864, defendant in error was permitted by the local land officers of Nebraska to enter the land under the act of Congress of March 3, 1887, and that this entry was not canceled until August 25, 1896; that, under these rulings and contests, and while the title remained in the United States, up to the issue of the joint patent, the possession of defendant in error was in no sense adverse, but was in subserviency to the title of the United States."

The plaintiff, by his reply, in substance alleged that the grants were *in præsenti*, and that the effect of the completion of the railroads and compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the government on or prior to that date, and that the General Land Office had not thereafter jurisdiction in respect to such lands, and that the adverse possession of the plaintiff was not affected by the proceedings had in the Land Department concerning such land.

The cause was submitted to the court on the pleadings and evidence, and a decree was entered adjudging that Wiese had a perfect title to the tract. The supreme court of Nebraska affirmed the decree (108 N. W. 175), holding, in substance, that the grant to the two companies of the tract in controversy was *in præsenti*, that the title of the companies attached upon the definite location of their lines of road, and that the adverse possession of Wiese and his grantor, commencing in 1882, had completely barred [244] any claims of the *companies to the property. The case was then brought to this court.

A motion has been filed to dismiss the writ of error because it "was not allowed by the chief justice of the supreme court of Nebraska, and it does not appear in the record by what authority the judge who allowed the writ styles himself 'Presiding Judge of the Supreme Court of Nebraska,' and because there is no Federal question involved in said cause."

Looking at the record we find that originally the writ of error was signed by "Charles B. Letton, Justice of the Supreme Court of the State of Nebraska," and that subsequently an additional signature was added, *viz.*, "John B. Barnes, Presiding Judge of Supreme Court of Nebraska, in absence of Sedgwick, C. J., from this State." Obviously, in procuring the signature of Justice Letton, counsel overlooked the fact that by § 999, Rev. Stat., U. S. Comp. Stat. 1901, p. 712, it was necessary that the writ of error should be allowed by the chief justice of the court. The recital made by Justice Barnes following his signature is, however, prima facie evidence of the correctness of the statements therein contained, *viz.*, the absence of the chief justice from the state and the fact that Justice Barnes was, in his absence, the presiding judge of the supreme court of Nebraska, and counsel have not assailed the accuracy of the representations. We are of opinion that the statute was complied with. Havnor v. New York, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631.

The contention of the absence of a Federal question is also without merit. In effect, the plaintiffs in error pleaded their right and title to a moiety of the tract in controversy under the joint patent of July 24, 1903, and urged in support thereof the claim that the legal title had not, before the date named, passed out of the United States, that the land was within the jurisdiction of the General Land Office, and that, up to a short time before the execution of the joint deed, the Department had assumed and exercised jurisdiction over controversies respecting the land. Such a contention cannot be said to be frivolous, and as the state court necessarily decided against *the right [245] or title so specially set up under the United States, we possess jurisdiction.

That the decision of the court below was right, s applied to the land within the place limits of the main line grant made to the Union Pacific Railroad Company by the act of 1862 and the amendatory act of 1864, is not an open question. This is so, since it has been expressly held that the main line grant was one *in præsenti*, that the grantee company had a right to bring ejectment for such land after the definite location of its road, and that consequently, from the time of such definite location, a possession might be acquired by a third party to land embraced within the grant, which would be adverse, even as to the railroad company, and bar its title if possession was continued for the statutory length of time. Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 166; Iowa R. Land Co. v. Blumer, 206 U. S. 482, 51 L. ed. 1148, 27 Sup. Ct. Rep. 769. In the last-mentioned case, summing up the doctrine, it was said:

"But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title. Deseret Salt Co. v. Tarpey, and Toltec Ranch Co. v. Cook, supra."

The conclusive effect of these rulings, if applicable, is not denied, but it is insisted that they are not pertinent, because the land in question was not a part of the main line grant, but was embraced within a grant for the construction of a branch road, which is so different from the grant for the construction of the main line, that the branch line grant cannot be held to have been a grant *in præsenti* within the principle of the previous cases. We proceed to consider this contention.

[246] *The grants to aid in the construction of branch lines embraced by the act of 1862 are found in §§ 9, 13, and 14 of the act. The grant to the particular branch line with which we are concerned is contained in § 14. By that section the Union Pacific Railroad Company was authorized and required to construct two branch lines of road and telegraph from a point on the western boundary of the state of Iowa and from Sioux City, in the state of Iowa, so as to connect with the line which was to start from the western boundary. The two branch lines referred to in § 14, as also the branch lines referred to in other sections of the act of 1862, were authorized to be constructed "on the same terms and conditions as provided" or "as contained in the act for the construction of the Union Pacific Railroad Company," etc. Section 17 of the act of 1864 amended § 14 of the act of 1862, so that the section read as follows:

"Sec. 17. And be it further enacted, That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the states of Iowa or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union & Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year; Provided, That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said company *constructing [247] said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: And provided, further, That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: Provided, however, That if the said company so designated by the President, as aforesaid, shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all of the railroad which shall have been constructed by said company shall be forfeited to, and become the property of, the United States."

It will be observed that there was employed in the act of 1864 similar language to that used in the act of 1862 in regard to the consideration moving from the United States for the construction of the branch in question, *viz.*, that the work should be done "on the same terms and conditions as are provided in this act, and the act to which this is an amendment, for the construction of the said Union & Pacific Railroad and telegraph line and branches." That consideration, among other things, was a grant of lands and also an issue of bonds by the United States. As we must refer to the terms of the main grant to the Union Pacific Railroad Company to determine the nature of like grants of land made in the acts of 1862 and 1864 to aid in the construction of the branch lines, we see no escape from the conclusion that the construction given to the grant of lands within place limits, made in aid of the main line, must be adopted as to the grants of place lands made in aid of branch roads; and, as we have seen, the settled construction *is that [248] title to lands within the place limits passed by the main grant on the filing by the road of its map of definite location in the General Land Office. Nor is there merit in the contention that a different construction is rendered necessary by the circumstance that the road which might build up the branch from Sioux City was not or may not have been in existence at the time of the passage of the act of 1864. As well argue that because § 7 of the act of 1862 required the Union Pacific Railroad to file its assent to the act, under the seal of the company, in the Department of the Interior, within one year after the passage of the act, that there was uncertainty as to whether the Union Pacific Company might accept and that the grant therefore could not be said to be one *in præsenti.*

Stress is also laid upon the fact that, by § 17 of the act of 1864, it was provided that "said company shall be *entitled to receive* alternate sections of land for ten miles in width on each side of the same along the whole length of said branch;" and, in effect, we are asked to treat this as the granting clause of the act. But it is clear that the clause deals only with the quantity of lands to be granted, and that reference must be made elsewhere to ascertain the precise character of the grant. Further, it is urged that the provision of § 17 concerning forfeiture for failure to complete the branch as required embraces "all of the railroad which shall have been constructed by said company," but did not include the granted lands, as in the case of the main line and other branches under § 17 of the act of July 1, 1862. From this it is argued that it was not the intention of Congress that the lands should pass under the grant for the Sioux City branch except as they were earned and duly patented. But whether or not the forfeiture was of the limited character referred to, we think the clause cannot be allowed to impair the force and effect of the operative words of present transfer made in the statutory grant of lands contained in § 3 of the act of 1862, as amended, in reliance upon which, as one of the terms and condi-
[249]tions of the contract with *the government, the Sioux City & Pacific Railroad Company entered upon the construction of its road.

It results from the foregoing that the grant of the tract of land in controversy made by the act of 1862, and the amendatory act of 1864, to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company, being a grant *in præsenti,* and third parties, on the definite location of the road, not having acquired rights in the land, the legal title attached in favor of the two companies on the filing of their maps of definite location as of the date of the grant. Such title attached long prior to the purchase of the land by Japp. When the sale was made to him no contest was pending in respect to the land, and the statutory period of ten years, necessary in Nebraska to sustain a claim of title by adverse possession, ended prior to the various proceedings had in the General Land Office, to which we have heretofore referred, growing out of the invalid school selection and the conflicting adjudications of the Office in respect to it.

That the entry and holding of the land by Japp, the grantor of Wiese, under the purchase by Japp in 1882, and the continued possession by Wiese after he acquired the land from Japp, should be deemed to have been adverse to the title and possession of the Sioux City Company, if the possession by Japp was not that of a cotenant, and such possession was unaffected by the proceedings had in the Land Office subsequent to 1882, is not questioned. We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and, in any event, cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession.

*The foregoing considerations, we think,[250] dispose of the various contentions presented to our notice, and, finding no error in the judgment of the Supreme Court of Nebraska, it is, for the reasons stated, affirmed.

MISSOURI VALLEY LAND COMPANY
and Iowa Railroad Land Company, Plffs. in Err.,

v.

CARSTEN WRICH.

(See S. C. Reporter's ed. 250, 251.)

This case is governed by the decision in Missouri Valley Land Co. v. Wiese, ante, 466.

[No. 102.]

Argued January 10, 1908. Decided February 3, 1908.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Washington County, in that state, in favor of plaintiff in an action to quiet title. Affirmed.

See same case below (Neb.) 108 N. W. 178.

Mr. **Charles A. Clark** argued the cause and filed a brief for plaintiffs in error.

Mr. **James H. Van Dusen** argued the cause, and, with Mr. Irving F. Baxter and Edward F. Colladay, filed a brief for defendant in error.

For contentions of counsel, see their brief as reported in Missouri Valley Land Co. v. Weise, ante, 466.

Mr. Justice **White** delivered the opinion of the court:

This case was argued with Missouri Valley Land Co. v. Wiese, No. 101 [208 U. S. 234, ante, 466, 28 Sup. Ct. Rep. 294], of this term, just decided, and in all essential particulars the two cases are alike. Wrich purchased his land in 1881 from the Union Pacific Railroad Company, and received his deed in 1890. The land lay within overlap grants to the Union Pacific Company and the Sioux City & Pacific Railroad Company. Wrich took possession immediately after his purchase, and ever afterwards held and claimed the land as his own. In September, 1893, [251]he undertook *to make a cash entry of the land under the act of 1887 [24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595], as did his neighbor, Wiese. All the questions involved in the Wiese Case are present in this, and, for the reasons given in the opinion in the former, the judgment of the Supreme Court of Nebraska in this case must be affirmed.

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Plff. in Err.,

v.

THOMAS DOUGHTY.

(See S. C. Reporter's ed. 251-259.)

Railroad land grants — when grant attaches — filing profile map.

No rights under the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), granting rights of way to railroads, can be initiated before a profile map of the road has been filed in the local office and approved by the Secretary of the Interior,—unless actual construction is sooner begun,—in view of the provisions of § 4 of that act, that any railroad company desiring to secure the benefit of the statute shall, within a definite time after location, file such profile map with the register of the local land office, that upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in such office, and that "thereafter" all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

[No. 81.]

Argued December 17, 1907. Decided February 3, 1908.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which affirmed a judgment of the District Court of Foster County, in that state, in favor of plaintiff in an action to recover compensation for an injury to land caused by the construction and operation of a railroad. Affirmed.

See same case below (N. D.) 107 N. W. 971.

The facts are stated in the opinion.

Mr. **Alfred H. Bright** argued the cause and filed a brief for plaintiff in error:

The first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right.

Shepley v. Cowan, 91 U. S. 338, 23 L. ed. 427; Sturr v. Beck, 133 U. S. 550, 33 L. ed. 765, 10 Sup. Ct. Rep. 350.

The map follows the location, of necessity. It is therefore more than idle to assert, contrary to the law of Congress, that the line is only located, or definitely located, as said by some, by the map. The map is simply the evidence of the location, made as all locations are made, and may be built upon before the map is approved, or even filed.

Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568.

It therefore follows, as a certain conclusion, that, when the company locates its line, it has begun proceedings to acquire the title, which, if regularly followed up, make it the first in right as to any unoccupied government land.

Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 25 L. ed. 438.

It is perfectly legitimate to consider that the term "thereafter" applies to the first thing which the railroad company was required to do, to-wit: the location of its road. That it refers to the whole group of acts for securing the title, and that, by the doctrine of relation, when the map is approved, the title vests in the railway company as of the date of the location of its road. This is doubtless the rule which was always applied to pre-emptors when they proved up and received their patent. It is the rule also applied by the Supreme Court of the United States in some of the railway land grants.

Note.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790. See also Denver & R. G. R. Co. v. Alling, supra; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 334, 50 L. ed. 499, 504, 26 Sup. Ct. Rep. 282.

The construction of this statute, for which I contend, invokes the doctrine of relation from the approval of the map to the inception of the equitable title of the railway company, at least as early as the 17th day of June. This construction is supported by several cases.

Kinion v. Kansas City, Ft. S. & M. R. Co. 118 Mo. 577, 24 S. W. 636; Denver & R. G. R. Co. v. Handun, 19 Colo. 162, 34 Pac. 838; Lewis v. Rio Grande Western R. Co. 17 Utah, 504, 54 Pac. 981.

The decision of this court in Jamestown & N. R. Co. v. Jones, supra, has overthrown some of the decisions to the contrary, and gone a long way toward destroying them all as authority as to the proper construction of this statute.

There is a radical difference between the right of way and the land-grant acts.

Jamestown & N. R. Co. v. Jones, supra.

Congress, in the right-of-way act, saw fit to recognize that location as of enough importance to serve as the initiation of the right of the railway company under the right-of-way grant. And surely, there is no sound reason why it should be considered of less importance than the ordinary settlement of a homesteader or a pre-emptor upon the vacant government land. Equal importance, and much greater, has been attached to such a location in other respects by the law.

3 Elliott, Railroads, § 927; Denver & R. G. R. Co. v. Alling, supra; Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. 27 Fed. 770; 1 Elliott, Railroad, § 121; Miller v. Pittsburg & C. R. Co. 40 Pa. 237, 8 Am. Dec. 570; Warner v. Callender, 20 Ohio St. 190; Swartwout v. Michigan Air Line R. Co. 24 Mich. 405.

While it is strongly intimated in the Jones Case that a more liberal rule would apply to the consideration of the grant of right of way, and as it was more distinctly said by the court in the case of St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426–430, 26 L. ed. 578–580, the construction adoped by the supreme court of North Dakota makes the right-of-way act more stringent and the securing of the benefits much more difficult and uncertain, because, as decided by this court in Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336, the title of the railway company became perfect upon filing the map with the Secretary of the Interior, without any further act on the part of the railway company, and this could not be defeated nor in any way impaired by failure or delay on the part of the Land Department in further proceedings, whereas, by the construction from which we are appealing, the title of a railway company to any benefit under the right-of-way act is postponed until the last clerical act required to be done,—namely, the entrance upon the plats in the local land office of the right of way designated by the approved map.

Mr. S. E. **Ellsworth** argued the cause, and, with Mr. George W. Soliday, filed a brief for defendant in error:

The approval of the profile of line of route by the Secretary of the Interior is an absolute condition precedent to definite location of its road, and acquisition of title by the railroad company dates from that act.

Lilienthal v. Southern California R. Co. 56 Fed. 701; Dakota C. R. Co. v. Downey, 8 Land Dec. 115; Commissioner's Circular, 2 Copp's Pub. Land Laws, 816; Commissioner's Circular, 12 Land Dec. 423; Denver & R. G. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843; Hamilton v. Spokane Falls & P. R. Co. 3 Idaho, 164, 28 Pac. 408; Chicago, K. & N. R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. 472; Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23 Pac. 974; Enoch v. Spokane Falls & N. R. Co. 6 Wash. 393, 33 Pac. 966; Reidt v. Spokane Falls & N. R. Co. 6 Wash. 623, 34 Pac. 150.

Unless the railroad company can point to actual evidence and notice of its appropriation of a right of way as unmistakable as that afforded by complete construction of its road, as against the claim of a settler it can secure the grant only by showing full and technical compliance with § 4 of the act of March 3d, 1875.

Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568.

*Mr. Justice **McKenna** delivered the opinion of the court: [254]

This action was brought by the defendant in error against plaintiff in error in the district court of Foster county, state of North Dakota, to recover compensation for injury to his land by the construction and operation of the railroad of the plaintiff in error.

Defendant in error has a patent to the land, and the question is whether, before his settlement under the homestead laws, plaintiff in error acquired a right of way over the land for its railroad under the act of March 3, 1875. 18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568.

The trial court held: (1) That defendant in error was "the owner in absolute fee simple of the land" and that his title related back to July 1, 1892,—the date of his settlement. (2) That the railroad "having attempted to acquire a right of way across said land before and in anticipation of the construction of its railroad, in compliance with the provisions of § 4 of the act of Congress approved March 3, 1875, the filing with the register of the district land office, and approval by the Secretary of the Interior, of the plat or profile of the section of its railroad extending across said land, was a condition precedent to the acquisition or claim on its part to right of way, and any title, estate, or interest acquired by it in or to said land dates from said filing and approval." Judgment was entered for the sum of $1,000 damages and costs, and it was adjudged, upon paying the sum, the title to the right of way should vest in the railroad company.

The facts, as recited by the supreme court in its opinion, are as follows:

"On June 25, 1892, the plaintiff's application to enter the quarter section in question was presented to and accepted by the register and receiver of the United States land office at Fargo. On July 1, 1892, the plaintiff took up his residence on the land under his homestead entry and in all things complied with the Federal homestead laws. [255]On November 4, *1899, a patent conveying the title to him was issued. That instrument makes no mention of any easement in favor of the railroad.

"The defendant railway company was organized in 1891. Its articles were filed with the Secretary of the Interior on March 26, 1891, and approved by him on April 15, 1891; and it thereby became entitled to the benefit of the act of March 3, 1875.

"In October, 1891, the company made a preliminary survey of its proposed line of railway across the land; and on May 13, 1892, completed its final survey, definitely fixing the line of its proposed road over the quarter section. The line as surveyed was marked by stakes driven into the ground 100 feet apart, indicating the center of the roadway to be constructed. The definite location of the route as fixed by this survey was approved and adopted by the company's board of directors on June 17, 1892, being eight days before the plaintiff made his homestead filing.

"The map or profile of its road as thus definitely located was filed in the local land office at Fargo on July 20, 1892, and received the approval of the Secretary of the Interior on October 14, 1892. In the latter part of July, 1892, the company constructed its road across the land, on the line as surveyed, and ever since has operated its railway over the roadway so constructed, using and appropriating for that purpose a strip 200 feet wide, 100 feet on each side of the center of the track." 107 N. W. 971.

On these facts the court affirmed the judgment of the trial court, basing its decision on Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568. The court said that it was a necessary inference from that case "that actual construction is the only sufficient act, other than compliance with § 4, to constitute a definite location, and the right of way does not exist before actual construction unless the company's profile map has been approved by the Secretary before the settler's rights attached."

*It will be necessary, therefore, to con-[256] sider § 4 of the act and its interpretation in that case.

Section 1 of the act reads: "That the right of way through the public lands of the United States is hereby granted to any railroad company . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization, . . . to the extent of one hundred feet on each side of the central line of said road."

Section 4 reads as follows:

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of, subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Did the district court and the supreme court construe this section correctly? The railroad contends against an affirmative answer, and urges that it is the location of its road which initiates a railroad company's right, and which, "if regularly followed up, makes it the first in right as to any unoccupied government land." And this, it is contended, is a necessary conclusion from other provisions which make the location the first act, the act from which "everything is reckoned,"—the time within which the map must be filed and the time within which the road must be built. And it is further urged that an entry upon the land to locate the road is as necessary as an entry on the [257]land to build the road, and, being there, *the railroad "could not become a trespasser, either as to the government or as to the plaintiff." In further support of the contention it is pointed out that Congress gave the company twelve months after the location within which to make its filing, and, therefore, in analogy to pre-emption and homestead laws, Congress intended to protect the location during the time allowed for the filing of the profile or plat. But § 4 gives little play to construction or the analogies which the company invoke. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) Location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. "And thereafter," are the words of the statute, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense nor lead to an unnatural consequence. Unless rights under the act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible conflict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one time to mean another would be a pretty free exercise of construction. We admit that the letter of a statute is not always adhered to and words may be transposed, but the necessity for it must be indicated to accomplish the purpose of the legislation. There is always a presumption that the words were intended as written and in the order as written; certainly, when they express a definite sense which would be changed to another with different and opposing legal consequences. The railroad company, however, [258]*contends for that result. We have stated its contentions, and, it is urged, if there is difficulty in accepting them, it arises "from a too rigid and literal or verbal construction" of § 4; "that the word 'thereafter' means only after the last act recited has been done. Whereas it is perfectly legitimate to consider that the term 'thereafter' applied to the first thing which the railroad company was required to do, to wit, the location of its road. That it refers to the whole group of acts for securing the title, and that, by the doctrine of relation, when the map is approved the title vests in the railway company as of the date of the location of its road." And this, it is further urged, is the rule applied to pre-emptors on the public lands and which this court has applied to some railway land grants. The contention is supported by Kinion v. Kansas City, Ft. S. & M. R. Co. 118 Mo. 577, 24 S. W. 636; Lewis v. Rio Grande Western R. Co. 17 Utah, 504, 54 Pac. 981; and, it is urged, by Denver & R. G. R. Co. v. Hanoum, 19 Colo. 162, 34 Pac. 838. It is opposed by Lilienthal v. Southern California R. Co. 56 Fed. 701; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23 Pac. 974; Hamilton v. Spokane & P. R. Co. 3 Idaho, 164, 28 Pac. 408; Enoch v. Spokane Falls & N. R. Co. 6 Wash. 393, 33 Pac. 966; Denver & R. G. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843. The simple weight of opinion is against the contention of the railroad, and its counsel meets the fact squarely, and says that those cases "are, in their broad scope, in clear and unmistakable conflict with the fundamental principle on which" Jamestown & N. R. Co. v. Jones was decided, "and rest upon the hard and fixed proposition that no railroad company under this act [act of 1875] could get any right in the land until its map was approved." But counsel, while invoking the "fundamental principle" of Jamestown & N. R. Co. v. Jones, attacks the construction of the statute there made and the reasoning which led us to the principle.

That case decided three propositions: (1) That a railroad company becomes specifically a grantee under the act of 1875 by filing its articles of incorporation and due proof of its organization under the same with the Secretary of the Interior. (2) *That the[259] lands granted were identified by a definite location of the right of way, and, sustaining the contention of the railroad that definite location could be made by actual construction of the road, against the decision of the lower courts that such location could only be made by a profile map of the road, we said that the contention gives practical operation to the statute and enables the railroad company to secure the grant by an actual construction of the road, or, in advance of construction, by filing a map as provided in § 4. (3) Actual construction of the road is certainly unmistakable evidence and notice of appropriation.

This, it is now contended or intimated, reads something into the statute which is not there, and that the Jamestown & Northern Railway Company "could only maintain its claim to right of way upon the same construction of the statute as that for which the plaintiff in error contends." In other words, location initiated the company's right, and any other view will put Jamestown & N. R. Co. v. Jones in opposition to the decisions in railway land grant cases. The latter proposition was disposed of in the case. The answer to the other is contained in the words of the statute, and the essential difference between a mere location, movable at the will of the company, and the actual construction of the road, necessarily fixing its position and consummating the purpose for which the grant of a right of way was given.

Judgment affirmed.

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[260]*UNITED DICTIONARY COMPANY, Appt.,
v.
G. & C. MERRIAM COMPANY.

(See S. C. Reporter's ed. 260–266.)

Copyright—notice—publication abroad. An American copyright is not lost by publishing a work abroad and selling it for use there without inserting the notice of copyright which, under the act of June 18, 1874 (18 Stat. at L. 78, chap. 301, Rev. Stat. § 4962, U. S. Comp. 1901, p. 3411), § 1, must be inserted in the several copies of every edition published.

[No. 129.]

Argued and submitted January 23, 1908. Decided February 3, 1908.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the Circuit Court for the Northern District of Illinois, dismissing the bill in a suit to restrain the infringement of a copyright. Affirmed.

See same case below, 76 C. C. A. 470, 146 Fed. 354.

The facts are stated in the opinion.

Messrs. **James H. Peirce, George P. Fisher, Jr.,** and **William Henry Dennis** submitted the cause for appellant:

The English edition of appellee's copyrighted book contains no copyright notice, as required by U. S. Rev. Stat. § 4962, U. S. Comp. Stat. 1901, p. 3411, and this suit cannot therefore be maintained.

Callaghan v. Myers, 128 U. S. 617, 652, 32 L. ed. 547, 557, 9 Sup. Ct. Rep. 177; Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; Mifflin v. Dutton, 190 U. S. 265, 47 L. ed. 1043, 23 Sup. Ct. Rep. 771.

Appellee, by copyrighting a Webster's dictionary under the title "Webster's High School Dictionary," and, thereafter, publishing or consenting to the publication of a Webster's dictionary differing materially therefrom, and under the radically different title of "Webster's Brief International Dictionary," has set a trap for the American publisher, and should not be heard to complain if the latter book is imported into and republished in this country.

Mifflin v. R. H. White Co. 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769.

U. S. Rev. Stat. § 4962 is not a penal statute nor a quasi-penal statute.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94.

The agreement between appellee and George Bell & Sons as to the importation of the English edition into this country was one with which the public had no concern and which might at any time have been modified by the parties to it.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Henry Bill Pub. Co. v. Smythe, 27 Fed. 914; Harrison v. Maynard, M. & Co. 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 689; Bobbs-Merrill Co. v. Straus, 77 C. C. A. 607, 147 Fed. 15.

The fact that appellant was aware of the existence of the American copyright on the book in question cannot prevent appellant from availing itself of appellee's failure to comply with the requirement of the statute with respect to the insertion of the copyright notice in the several copies of every edition published.

Thompson v. Hubbard, supra.

The fact that appellee did not intend that the edition of his book should be imported into or sold in this country is of no moment, as the plain provisions of a statute cannot be evaded by any design or intention that may exist in the mind of the owner of the copyright, with respect to the use to be made of his book.

Holmes v. Hurst, 174 U. S. 82, 89, 43 L. ed. 904, 907, 19 Sup. Ct. Rep. 606; Mifflin v. R. H. White Co. 190 U. S. 260, 264, 47 L. ed. 1040, 1042, 23 Sup. Ct. Rep. 769.

Mr. George W. Ogilvie, by special permission, also filed a brief for appellant.

Mr. Stephen H. Olin, as *amicus curiæ*, filed a brief on behalf of the American Publishers' Copyright League:

The omission of the notice of a United States copyright from a book published in a foreign country, although with the consent of the proprietor of the United States copyright in the same book, does not of itself forfeit that copyright.

Werckmeister v. American Lithographic Co. 126 Fed. 246; Werckmeister v. Pierce & B. Mfg. Co. 63 Fed. 447.

Even if the statute allowed two books to be imported for use, and not for sale, this importation, for misuse and as a means of sale, would be piratical, and could not lay the foundation of any rights.

Turner v. Robinson, 10 Ir. Ch. Rep. 517.

Mr. **William B. Hale** argued the cause, and, with Messrs. Charles N. Judson, Frank F. Reed, and Edward S. Rogers, filed a brief for appellee:

Appellee's copyright is not invalidated by the failure to insert the notice of the American copyright in the books published in England, but not imported by or with the consent of appellee into the United States, because the statute has no extraterritorial operation, and therefore does not require such notice to be inserted in such foreign books.

Dwight v. Appleton, 1 N. Y. Legal Obs. 195, Fed. Cas. No. 4,215; Haggard v. Waverly Pub. Co. 144 Fed. 490; Harper & Bros. v. M. A. Donohue & Co. 144 Fed. 491; Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54; American Tobacco Co. v. Werckmeister, 76 C. C. A. 647, 146 Fed. 375, 207 U. S. 284, ante, 208, 28 Sup. Ct. Rep. 72; Boucicault v. Wood, 2 Biss. 34 Fed. Cas. No. 1,693.

Statutes of a state or nation have no extraterritorial operation, and this rule has been applied to the patent act, which is *in pari materia* with the copyright act.

The Apollon, 9 Wheat. 370, 6 L. ed. 111; Bond v. Jay, 7 Cranch, 350, 3 L. ed. 367; Brown v. Duchesne, 19 How. 183, 15 L. ed. 595; Gandy v. Main Belting Co. 143 U. S. 592, 36 L. ed. 275, 12 Sup. Ct. Rep. 598; Chase v. Fillebrown, 58 Fed. 377; American Sulphite Pulp Co. v. Howland Falls Pulp Co. 70 Fed. 992; Tabor v. Commercial Nat. Bank, 10 C. C. A. 429, 27 U. S. App. 111, 62 Fed. 383; The State of Maine, 22 Fed. 734; Colquhoun v. Heddon, L. R. 25 Q. B. Div. 134; Warren v. First Nat. Bank, 149 Ill. 25, 25 L.R.A. 746, 38 N. E. 122; Johnson v. Mutual L. Ins. Co. 180 Mass. 407, 63 L.R.A. 833, 62 N. E. 733; Atty. Gen. v. Netherlands F. Ins. Co. 181 Mass. 522, 63 N. E. 950; Carnahan v. Western U. Teleg. Co. 89 Ind. 526, 46 Am. Rep. 175; Charles v. People, 1 N. Y. 180; Sims v. Sims, 75 N. Y. 466; National Trust Co. v. Gleason, 77 N. Y. 401, 33 Am. Rep. 632; People v. Mosher, 2 Park. Crim. Rep. 195; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; Clark v. Clark, 8 Cush. 386; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; Leonard v. Leonard, 151 Mass. 151, 6 L.R.A. 632, 21 Am. St. Rep. 437, 23 N. E. 732; Martin v. Martin, 47 N. H. 52; Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553; Ponsford v. Johnson, 2 Blatchf. 51, Fed. Cas. No. 11,266; Phillips v. Madrid, 83 Me. 205, 12 L.R.A. 862, 23 Am. St. Rep. 770, 22 Atl. 114; Sutton v. Warren, 10 Met. 451; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Com. v. Green, 17 Mass. 515; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583; Western Transp. & Coal Co. v. Kilderhouse, 87 N. Y. 430; State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81.

Other sections of the copyright act do not apply to books published abroad. Construction should be given which makes the whole act stand consistently together.

Covington v. McNickle, 18 B. Mon. 286; Blackwood v. Queen, L. R. 8 App. Cas. 94; King v. Poor Law Comrs. 6 Ad. & El. 1; Gandy v. Main Belting Co. supra; Pennington v. Coxe, 2 Cranch, 52, 2 L. ed. 204; Brinsfield v. Carter, 2 Ga. 143; Burke v. Monroe County, 77 Ill. 610; McLoughlin v. Raphael Tuck & Sons Co. 53 C. C. A. 508, 115 Fed. 85, 191 U. S. 267, 48 L. ed. 178, 24 Sup. Ct. Rep. 105.

The object of requiring notice is not subserved by insertion in foreign books.

Sarony v. Burrow-Giles Lithographic Co. 17 Fed. 591, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; Snow v. Mast, 65 Fed. 995; American Press Asso. v. Daily Story Pub. Co. 66 L.R.A. 444, 57 C. C. A. 70, 120 Fed. 766.

The owner of the copyright cannot control the foreign publication, and should not be penalized for consenting to what he cannot prevent. No statute will be construed to work hardship, injustice, or inequality.

Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; American Press Asso. v. Daily Story Pub. Co. supra; Harper & Bros. v. M. A. Donohue & Co. supra; Hepburn v. Griswold, 8 Wall. 607, 19 L. ed. 521; Lionberger v. Rouse, 9 Wall. 475, 19 L. ed. 724; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 328; United States ex rel. McIntosh v. Crawford, 47 Fed. 561.

The copyright statute is a system of local regulations applicable only to publications within the jurisdiction, and the general language used in various sections is either expressly or impliedly so limited.

Graves v. Gorrie, 2 C. L. R. Can. 186; Routledge v. Low, 18 L. T. N. S. 874, L. R. 3 H. L. 100; Jefferys v. Boosey, 4 H. L. Cas. 815.

The copyright statute must be liberally construed with a view to support the copyright.

Ford v. Charles E. Blaney Amusement Co. 148 Fed. 642; Werckmeister v. American Lithographic Co. 142 Fed. 827; Boucicault v. Fox, 5 Blatchf. 87, Fed. Cas. No. 1,691; Mifflin v. R. H. White Co. 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441.

The importation of the book by appellant did not constitute, in legal effect, a publication by the appellee in this country.

Harper & Bros. v. M. A. Donohue & Co. 144 Fed. 491, Affirmed in 76 C. C. A. 678, 146 Fed. 1023; American Press Asso. v. Daily Story Pub. Co. supra.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the appellee to restrain the infringement of copyright in a book entitled "Webster's High School Dictionary." The appellee, a Massachusetts corporation, took out copyrights at the same time in England and here. It published and sold the book in this country with the statutory notice of copyright, and made a contract with English publishers, under which it furnished them with electrotype plates of the work, and they published it in England, omitting notice of the American copyright. The English work has a different title—"Webster's Brief International Dictionary"—and has some other differences on the first three and last thirty-four pages, but otherwise is the same. The appellant, an Illinois corporation, sent for the English book with the intent to reprint it, and was about to publish it when restrained. The English publishers agreed not to import any copies of their work into this country, and also to use all reasonable means to prevent an importation by others, so that the appellee cannot be said to have assented to the appellant's act. So far as appears, the only copies that have been brought over are the one above mentioned and another, purchased for use, but not for sale, by the president and manager of the appellant. The question is whether the omission of notice of the American copyright from the English publication, with the assent of the appellee, destroyed its rights; or, in other words, whether the requirement of the act of June 18, 1874, chap. 301, § 1, 18 Stat. at L. 78 (Rev. Stat. § 4962, U. S. Comp. Stat. 1901, p. 3411), that notice shall be inserted *"in the [264] several copies of every edition published," extends to publications abroad. The circuit court sustained the defendant's contention and dismissed the bill. 140 Fed. 768. The circuit court of appeals reversed this decision (76 C. C. A. 470, 146 Fed. 354) and the case is brought to this court by appeal.

Notwithstanding the elaborateness of the arguments addressed to us and the difference of opinion in the courts below, there is not a great deal to be said, and the answer seems to us plain. Of course, Congress could attach what conditions it saw fit to its grant, but it is unlikely that it would make requirements of personal action beyond the sphere of its control. Especially is it unlikely that it would require a warning to the public against the infraction of a law beyond the jurisdiction where that law was in force. The reasons for doing so have not grown less, yet, in the late statute giving copyright for foreign publications, the notice is necessary only in "all copies of such books sold or distributed in the United States." Act of March 3, 1905, chap. 1432, 33 Stat. at L. 1000, amending Rev. Stat. § 4952, U. S. Comp. Stat. Supp. 1907, p. 1021. So it is decided that the section punishing a false notice, which naturally would be coextensive with the requirement of notice, did not extend to false statements affixed abroad. McLoughlin v. Raphael Tuck & Sons Co. 191 U. S. 267, 48 L. ed. 178, 24 Sup. Ct. Rep. 105. The same conclusion would follow from the form prescribed for the notice, which would be inapt in foreign lands.

It is said that the act of 1905 cannot affect the construction of the law under which the parties' rights were fixed, and it cannot, beyond illustrating a policy that has not changed. But the age of the condition affords another reason for confining it as the later condition is confined. When it first was attached, in 1802, there was little ground to anticipate the publication of American works abroad. As late as 1820 Sydney Smith, in the Edinburgh Review, made his famous exclamation, "In the four quarters of the globe, who reads an American book?" If, however, there was a publication abroad, importation without the consent of the owner was *forbidden in general [265] terms,—a fact giving another reason for the narrower construction of § 4962. If that was the true construction once, it is the construction still. Again, when the present act was passed, there was no foreign copyright for an American author, and Congress knew and he knew, as he knows now, if he contents himself with home protection, that his work might be reprinted without notice of any sort. Such reprints rather inconsistently are called piracies in argument. But whatever the moral aspects may be, the piracy is a legal right, and as such its exercise must be contemplated by the author. It does not matter whether he does so with regret at the loss of money or with joy at the prospect of fame, and it is difficult to see any greater difference between giving consent to the foreign publication and intentionally creating the opportunity, the inducement, and the right. But it hardly would be argued that, because no copyright had been taken out in England, and therefore the reprint there was lawful, an American copyright could be defeated by importing the English book and reprinting from that. Thompson v. Hubbard, 131 U. S. 123, 150, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710. It would be even bolder to say that the American author would have stood worse if, in the days before he could get a copyright in England, he had made an arrangement with English publishers to secure some payment from them. Yet that is the logic of the appellant's case.

If a publication without notice of an American copyright did not affect the copyright before the days when it was possible to get an English copyright also, it is not to be supposed that Congress, by arranging with England for that possibility, gave a new meaning to the old § 4962, increasing the burden of American authors, and attempted to intrude its requirements into any notice that might be provided by the English law. The words of the section remained unchanged, notwithstanding the grant of a limited liberty of importation, while other sections were amended where there was reason for a change.

It may be that in most cases the importation of a pirated English copy of an Ameri-[266]can book would be unlawful, whereas *it is argued that the importation was lawful in the case at bar. The appellee makes a strong argument that the appellant's importation was wrong. But it is hard to see how the right to copy a book, whether lawfully or unlawfully imported, can be affected by the mode in which it got here. The analogies of the law are the other way. A person is subject to the jurisdiction, even if he was brought there by wrong. Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111. A document is admissible in evidence, although it was improperly obtained. Com. v. Tucker, 189 Mass. 457, 470, 7 L.R.A.(N.S.) 1056, 76 N. E. 127; 3 Wigmore, Ev. § 2183. The argument for the appellant dwells somewhat fancifully on the possibilities of innocence being led astray. All those possibilities might exist if a pirated volume should be smuggled into the United States. Moreover the appellant argues, with the support of the opinion of an Attorney General and a Solicitor General, that under § 4956 (U. S. Comp. Stat. 1901, p. 3407) and its amendments two copies of an unauthorized edition lawfully might be imported for use. 21 Ops. Atty. Gen. 159, 162. The statutes cannot be expected to do more than to secure the author and the public so far as is reasonably practicable. The obvious plan is not to be distorted by the chance that ingenuity may find some way to slip through the law uncaught.

As we are satisfied that the statute does not require notice of the American copyright on books published abroad and sold only for use there, we agree with the parties that it is unnecessary to discuss nice questions as to when a foreign reprint may or may not be imported into the United States under the present provisions of our law.

Decree affirmed.

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*JAMES W. DONNELL, Petitioner, [267]
v.
HERRING-HALL-MARVIN SAFE COMPANY and Hall Safe & Lock Company.

(See S. C. Reporter's ed. 267–274.)

Unfair competition — in use of one's own name — extent of relief.

The successor to the business and good will of a safe and lock company, with the right to use the surname of the founder, which has a commercial value, while entitled to protection against the use, in the sale of safes made by the sons of such founder, who were members of the original corporation, of any name, mark, or advertisement indicating that the seller is the successor of the original company, or that its goods are the product of that company or its successors, and against any interference with the good will, cannot have an injunction totally restraining the use of such surname, and thus interfering with the right of the founder's sons to continue in the safe business and use their own name in so doing, after being released from their contract obligation not to engage in any competing business east of the Mississippi river for a limited time.

[No. 106.]

Argued January 14, 15, 1908. Decided February 3, 1908.

NOTE.—Limitation of right to use one's own name as trade name.

The principle covering cases of unfair trade, briefly stated, is that nobody has the right to represent his goods as the goods of somebody else; and, as applied to the particular case of a proper name, it is that, although everyone may have the absolute

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Illinois in a suit removed to that court from the Superior Court of Cook County, in that state, enjoining the use of the word "Hall" in carrying on the business of selling safes. Reversed.

See same case below, 74 C. C. A. 361, 143 Fed. 231.

The facts are stated in the opinion.

Messrs. **George Peck Merrick** and **S. S. Gregory** argued the cause and filed a brief for petitioner:

The following propositions are established:

1. A family surname is incapable of exclusive appropriation by anyone as against others of the same name, who are using it legitimately in their own business.

2. In the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or part of a corporate name.

3. One corporation is not entitled to restrain another from using in its corporate title the name to which others have a common right.

4. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of

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right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice, or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 53 L.R.A. 384, 82 Am. St. Rep. 346, 63 Pac. 480; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; Allegretti v. Allegretti Chocolate Cream Co. 177 Ill. 129, 52 N. E. 487; Frazier v. Dowling (Ky.) 39 S. W. 45; Gordon Hollow Blast Grate Co. v. Gordon, 142 Mich. 488, 105 N. W. 1118; International Silver Co. v. William H. Rogers Corp. 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187; International Silver Co. v. Rogers (N. J.) 67 Atl. 105; Meyer v. Dr. B. L. Bull Vegetable Medicine Co. 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

The principle is the same where the name of a person has already become associated with his goods as where a fanciful name or particular words have, by long use, become associated with such goods. Valentine Meat Juice Co. v. Valentine Extract Co. 83 L. T. N. S. 259.

A person entering upon a business under his own name must, therefore, use every means reasonably possible to distinguish his business from that of the party of the same name whose reputation is already established, and his goods from those made by the other. Walter Baker & Co. v. Baker, 77 Fed. 181; Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; Walter Baker & Co. v. Baker, 87 Fed. 209; Chickering v. Chickering & Sons, 56 C. C. A. 475, 120 Fed. 69; Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Valentine Meat Juice Co. v. Valentine Extract Co. supra.

It is not necessary that the person using his name in connection with his business or goods should have an actual fraudulent intent to trade upon the reputation of another. Dodge Stationery Co. v. Dodge, supra; Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Tarrant & Co. v. Johann Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; Jameson v. Dublin Distillers' Co. [1900] Ir. Ch. 43.

Nor does the fact that the two names are spelled differently constitute a defense if they are *idem sonans*, as in case of the names "Stuart" and "Stewart" (Stuart v. F. G. Stewart Co. 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243), "Rogers" and "RoDgers" (International Silver Co. v. Rodgers Bros. Cutlery Co. 136 Fed. 1019), or "McLane" and "McLean" (McLean v. Fleming, 96 U. S. 248, 24 L. ed. 829.)

An entire dissimilarity of the packages will not suffice to distinguish the second maker's goods, where the name of the first maker has, for so many years, been associated with his goods, that it has come to have a secondary meaning as designating his goods. Valentine Meat Juice Co. v. Valentine Extract Co. supra.

Clearly, a person may not use his name, either in a trademark or upon labels, in such a way as to simulate the trademark or labels of another. El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 6 L.R.A. 823, 23 Am. St. Rep. 537, 7 So. 23; Shaver v. Shaver, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; Rock Springs Distillery Co. v. Monarch, 15 Ky. L. Rep. 866, 22 S. W. 1028; Stonebraker v. Stonebraker, 33 Md. 252; Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N. E. 722; Robinson v. Storm, 103 Tenn. 40, 52 S. W. 880; McLean v. Fleming, 96 U. S. 258, 24 L. ed. 833; Meyer v. Dr. B. L. Bull Vegetable Medicine Co. 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209.

And positive proof of fraudulent intent is not required if the simulation is clearly shown. McLean v. Fleming and Drake Medicine Co. v. Glessner, supra.

another. And if competition is so conducted as not to mislead the public, nor palm off the goods of one as those of another, no wrong exists.

5. The right of the individual to use his own name, reputation, and experience in that business or occupation for which he is best fitted is important to the public as well as to the individual; and to deprive him of that right is in restraint of trade and against public policy.

6. The stockholders of a corporation which has sold its property, business, and good will, and has been dissolved, in the absence of individual contracts not to engage in competition, or after the expiration of such contracts by limitation, may engage in competition, to the same extent as anyone else.

Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151;

The question under discussion is presented in another form in connection with the right of a person to use his name in forming a corporation organized to compete with another person or corporation using the same surname; and, while a distinction has been made by some courts, upon the ground that a person comes naturally by his name from his parents, and it is a thing personal to himself, which, in truth and in justice, he has the right to use, provided he does not resort to artifice calculated to produce deception or confusion in the public mind between him and some other person, to the injury of the latter, while the name given to a corporation is an artificial and impersonal thing, selected arbitrarily by the corporators themselves, and which can be selected from an entire vocabulary of names (Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; International Silver Co. v. William H. Rogers Corp. 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187; J. & P. Coats v. John Coates Thread Co. 135 Fed. 177; International Silver Co. v. Rodgers Bros. Cutlery Co. supra),—a more reasonable rule is that laid down by the Supreme Court in Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name, the court saying: "If every man has the right to use his name reasonably and honestly in every way, we cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself."

See also, as following the last-cited case, Bates Mfg. Co. v. Bates Mach. Co. 141 Fed. 213, in which it is held that the fact that a person assisted in forming a corporation, in the name of which his own name was used, did not, in the absence of proof that he transferred to such corporation the exclusive right to use his name in its business, preclude the use of his name as part of that of another corporation organized by him to engage in a competing business.

While the general principles applicable to the question under discussion are well settled, it is not always easy to determine the precise extent to which the newcomer should be permitted to use his name, but it may be generally stated that while the courts will not enjoin a person from any use whatever of his own name because it is already used as a trade name by another, they will forbid its use in such a way as will be likely to deceive the public.

Thus, in Morton v. Morton, 148 Cal. 142, 1 L.R.A.(N.S.) 660, 82 Pac. 664, an injunction was issued, restraining a person who had engaged in the baggage and transfer business in competition with another of the same name, whose business was previously established, from using such name as a hat label; in Allegretti v. Allegretti Chocolate Cream Co. 177 Ill. 129, 52 N. E. 487, against the use by defendants of the name of one of their firm in the sale of chocolate creams and confections, "except when such use is coupled with words clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel, and Giacomo Allegretti, and not by Ignazio Allegretti, or the Allegretti Chocolate Cream Co.;" in Gordon Hollow Blast Grate Co. v. Gordon, 142 Mich. 488, 105 N. W. 1118, against the use of the defendant's name as the manufacturer of grates in competition with a corporation in which his individual name occurred, but his firm was permitted to state that they manufacture a grate under letters patent granted to him, in connection with another statement, made equally prominent, that the firm is distinct from, and has no connection with, the complainant company; in International Silver Co. v. Rogers (N. J.) 67 Atl. 105, Reversing (N. J. Ch.) 63 Atl. 977, against the manufacture and sale of goods stamped with the words "W. H. Rogers of Plainfield, New Jersey," unless also stamped with the words "not the original Rogers," or "not connected with the original Rogers," and this although the boxes, packages, and wrappers in which such silverware was put up

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Bates Mfg. Co. v. Bates Mach. Co. 141 Fed. 213; Von Faber—Castell v. Faber, 71 C. C. A. 383, 139 Fed. 257.

The right of an individual to use his name as the whole or a part of a corporate title is just as full and complete as the right to employ his name in a business carried on by him as an individual.

American Cereal Co. v. Eli Pettijohn Cereal Co. 72 Fed. 903; Monarch v. Rosenfeld, 19 Ky. L. Rep. 14, 39 S. W. 236; Baker v. Baker, 53 C. C. A. 157, 115 Fed. 297; Fite v. Dorman (Tenn.) 57 S. W. 129.

Messrs. **Charles H. Aldrich** and **Lawrence Maxwell, Jr.**, argued the cause, and, with Mr. Henry S. McAuley, filed a brief for respondents:

The corporation is a distinct entity, separate from its stockholders. But the theory of corporate entity is not allowed to protect fraudulent conduct, hide the truth, or defeat the ends of public or private justice.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Anthony v. American Glucose Co. 146 N. Y. 407, 41 N. E. 23; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 177, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; McKinley v. Wheeler, 130 U. S. 630, 636, 32 L. ed. 1048, 1050, 9 Sup. Ct. Rep. 638; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; 1 Purdy's Beach, Priv. Corp. 6.

Stockholders are bound by those acts of their corporation which can only be taken with their assent, and to which they give assent by affirmative vote or acquiescence, *e. g.:*

Sale of the entire assets of a solvent, going concern.

Cook, Corp. § 670.

Increase of capital stock.

Sewell's Case, L. R. 3 Ch. 131; Lane's Case, 1 De G. J. & S. 504; Payson v. Stoever, 2 Dill. 427, Fed. Cas. No. 10,863.

Execution of a mortgage.

Dimpfel v. Ohio & M. R. Co. 9 Biss. 127, Fed. Cas. No. 3,918; Thomas v. Citizens' Horse R. Co. 104 Ill. 462.

Acceptance of charter.

Demarest v. Flack (Demarest v. Grant) 128 N. Y. 205, 13 L.R.A. 854, 28 N. E. 645; Com. v. Bakeman, 105 Mass. 53.

Acceptance of amendment to charter for user.

Atlanta v. Gate City Gaslight Co. 71 Ga. 106; State v. Sibley, 25 Minn. 387; Sumrall v. Sun Mut. Ins. Co. 40 Mo. 27.

Lease of railroad.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 404, 36 L. ed. 748, 753, 12 Sup. Ct. Rep. 953.

Use of individual names in corporate name.

Holmes, Booth, & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 294, 9 Am. Rep.

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were marked "not connected with any other Rogers;" in Andrew Jurgens Co. v. Woodbury, 106 N. Y. Supp. 571, against the manufacture and sale of soap known as "Woodbury's New Skin Soap" in competition with the purchasers of the formula of "Woodbury's Facial Soap;" in Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941, against the use of the name "Le Page" in connection with glue, even to state the fact that it is manufactured by Le Page or the Le Page Company, where said Le Page had previously transferred all his interest in and the good will of the original business to another corporation, which still manufactures Le Page glue; in Tarrant & Co. v. Johann Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959, against the sale of malt extract manufactured by Leopold Hoff as "Hoff's Malt Extract" unless preceded by the name Leopold, although the bottles had an inconspicuous side label, having printed thereon, "manufactured by Leopold Hoff;" in Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889, against the use by W. H. Baker of his surname, whether his given name or its initials are prefixed or not, so as to announce upon label or advertisement that the goods he sells are "Baker's Chocolate," although he was permitted to use it in connection with his chocolate goods to set forth that the chocolate is "made by" or "for" or "prepared by" or "for" or "sold by" W. H. Baker, or that it is made or prepared at W. H. Baker's factory, with the alternative that he might affix upon every package sold, in type as prominent as the title, a statement that "W. H. Baker is distinct from, and has no connection with, the old chocolate manufactory of Walter Baker & Co.;" in Walter Baker & Co. v. Baker, 87 Fed. 209, against the presentation of defendant's article as "W. P. Baker's Chocolate," and from using in connection with the business of making or selling chocolate the word "Baker," "Baker's," or "Bakers" alone, or the word "Baker," "Baker's," or "Bakers" whether or not coupled with other names or initials, in such a collocation with the word "chocolate" as to indicate that the chocolate so made or sold is a variety of "Baker's Chocolate," or from using the initial "W." in connection with the word "chocolate;" but defendant

324; Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 40 L. ed. 155, 16 Sup. Ct. Rep. 30; Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304: Penberthy Injector Co. v. Lee, 120 Mich. 174, 78 N. W. 1074.

The name "Hall" having been so long identified with the safe business as to acquire a secondary meaning, the sale of that business as a going concern, including the trade rights and good will, passed to the purchaser the exclusive right to use the name in that business as against all parties participating in the sale.

Le Page Co. v. Russia Cement Co. supra; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Brown Chemical Co. v. Meyer, 139 U. S. 548, 35 L. ed. 250, 11 Sup. Ct. Rep. 625; Dr. S. A. Richmond Nervine Co. v. Richmond, supra; Hopkins. Unfair Trade, 109, 110; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879: Myers v. Kalamazoo Buggy Co. supra.

The Hall's Safe Company, composed of the Halls, who sold the original Hall's Safe & Lock Company to the respondent's predecessor, should be enjoined from the use of the word Hall in the safe business because:

(1) They have been paid for the name.

(2) They are estopped to assert a right to it.

(3) Their use of the name "Hall" constitutes a fraud upon respondent.

Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Peck Bros. & Co. v. Peck Bros. Co. 62 L.R.A. 81, 51 C. C. A. 251, 113 Fed. 291; Chickering v. Chickering & Sons, 56 C. C. A. 475, 120 Fed. 69; Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Singer Mfg. Co. v. Bent, 163 U. S. 205, 41 L. ed. 131, 16 Sup. Ct. Rep. 1016; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Le Page Co. v. Russia Cement Co. supra; Hoxie v. Chaney, supra; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Frazer v. Frazer Lubricator Co. 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639; Chas. S. Higgins Co. v. Higgins Soap Co. supra; Levy v. Walker, L. R. 10 Ch. Div. 436; Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; Myers v. Kalamazoo Buggy Co. supra.

Mr. Justice **Holmes** delivered the opinion of the court:

This suit was brought in the Superior court of Cook county, Illinois, by the Hall Safe & Lock Company against the Herring-Hall-Marvin Safe Company, and was removed by the latter to the United States circuit court. The bill sought to enjoin the defendant from representing itself to be the successor of the Hall Safe & Lock Company and otherwise, as need not be stated in detail. The defendant answered, denying

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was permitted to indicate that the chocolate is made, or prepared for, or sold by, Wm. P. Baker or Wm. Phillips Baker; in Lever Bros. Boston Works v. Smith, 112 Fed. 998, against the use by Welcome A. Smith of the word "Welcome" segregated from the surname or in larger type or letters than the surname, or so placed above the surname, or otherwise so located, as to admit the inference that the soap is "Welcome" soap, manufactured by A. Smith; in Chickering v. Chickering & Sons, 56 C. C. A. 475, 120 Fed. 69, against the marking of pianos with the name "Chickering Bros., Chicago" in letters similar to those used on pianos marked "Chickering, Boston, U. S. A.;" in Royal Baking Powder Co. v. Royal, 58 C. C. A. 499, 122 Fed. 337, against the displaying of the manufacturer's surname, although accompanied by his initials, on the front label of his cans of baking powder; in J. & P. Coats v. John Coates Thread Co. 135 Fed. 177, against the use of the name "Coates" by a corporation engaged in the manufacturing of thread in competition with J. & P. Coats; in Ball v. Best, 135 Fed. 434, against using the name "Best & Co.," with or without prefixes, by a Chicago firm competing with Best & Co., New York, in the mail order business; in International Silver Co. v. Rodgers Bros. Cutlery Co. 136 Fed. 1019, against the use of the name "RoDgers or Rogers on tableware stamped "RoDgers Bros. Cutlery Co. 1751—Cronstedt—1751—Muskegon, Mich." where the defendants did not manufacture their goods and had no established business therein; in Von Faber-Castell Co. v. Faber, 76 C. C. A. 538, 145 Fed. 626, against the use of defendant's surname on pencils without prefix, in competition with A. W. Faber; and in J. F. Rowley Co. v. Rowley, 154 Fed. 744, against the use of the name "Rowley" in connection with the manufacture and sale of artificial limbs, where the Rowley name had become firmly associated in the public mind with complainant's product.

An injunction, however, should not go so far as to restrain the use of the name in some other line of business. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

In White v. Trowbridge, 216 Pa. 11, 64 Atl. 862, it was held that a retiring partner was not deprived of the right to use his own name in connection with a competing the plaintiff's rights and setting up its own. At the same time it filed a cross bill to which it made the petitioner, Donnell, the president of the plaintiff company, a party, and by which it sought to enjoin the plaintiff and Donnell from carrying on the safe business under any name of which the word "Hall" is a part, or marking or advertising their safes with any such name, etc., unless made by the defendant or its named predecessors in business. The bill was dismissed by the circuit court, no appeal was taken, and it is not in question here. On the cross bill an injunction was issued as prayed and an account of profits ordered. This decree was affirmed by the circuit court of appeals. 74 C. C. A. 361, 143 Fed. 231. Subsequently an injunction was granted by the circuit court of appeals for the sixth circuit, but in much more limited form, after a consideration of the present case. 76 C. C. A. 495, 146 Fed. 37. Later still a certiorari was issued by this court.

The facts are as follows: About sixty years ago Joseph L. Hall started a business of constructing safes, and in time attached [271]*a reputation to his name. In 1867 he and his partners organized an Ohio corporation by the name of Hall's Safe & Lock Company, which went on with the business. (This was not the plaintiff, which is an Illinois corporation of much later date.) Hall was the president, a part or the whole of the time, until he died, in 1889. He owned the greater part of the stock and his children the rest. In 1892 the Ohio company sold all its property, including trademarks, trade rights, and good will, and its business as a going concern, to parties who conveyed on the same day to the Herring-Hall-Marvin Company. Subsequently this company's property was sold to the Herring-Hall-Marvin Safe Company, the party to this suit. In its conveyance the Ohio company agreed to go out of business and get wound up, which it did, with the assent, it may be assumed, of all the stockholders. The stock belonged to the Hall family and connections, and they, of course, ultimately received the consideration of the sale. A part consisted of stock in the new company, which was distributed to them at once, and a part was money paid to the selling company about to be dissolved. By election, and under a contract made on the day of the sale, Edward C. Hall, a son of the founder, became president of the purchasing corporation, the contract reciting that it was made as part of the inducement to the purchase, and he agreeing in it to hold the office until May 2, 1897, to devote all his time to the interests of the corporation, and, so long as it might desire to retain his services as stipulated, not to engage in any competing business east of the Mississippi river. Another son became treasurer under a nearly similar contract, and a son-in-law secretary.

Both sons resigned and left the service of the corporation August 1, 1896, and both were released, in writing, from their obligations under their contract. The next month the sons organized an Ohio corporation, under the name of Hall's Safe Company, which is party to the litigation in the sixth cir-

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business simply from the fact that his surname is a portion of the trademark used by the copartnership, whose business had been continued by the other partners.

In Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 545, it was held that the words "Fish Bros. & Co." and the picture of a fish may be applied by brothers named Fish to vehicles manufactured by them, although such words and picture were previously used by them in a business which had passed, with its good will and trademarks, to a corporation, provided their use is not such as to induce persons to buy their vehicles as and for those manufactured by the corporation.

In Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625, it is held that one is not liable for selling a medicine having for its label the words "Brown's Iron Tonic," originally put up by one Brown, of whom the present manufacturers are successors in business, in the absence of testimony showing an intention to palm off the medicine as that of the plaintiff, who has sued and uses the words "Brown's Iron Bitters" on his medicine.

There is no unfair competition with the maufacturers of Remington typewriters in the adoption by persons bearing respectively the surnames Remington and Sholes of the name "Remington-Sholes" for their typewriter, and the giving of that name to the corporation formed for its manufacture and sale. Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; nor in the stamping of cheap silverware with the name of Wm. A. Rogers, who was a dealer, as against a concern manufacturing a high class of goods. Rogers v. Wm. Rogers Mfg. Co. 17 C. C. A. 575, 35 U. S. App. 848, 70 Fed. 1019; nor in selling starch in packages marked "Prepared by Duryea & Co.," as against a concern manufacturing "Duryea's Starch." Duryea v. National Starch Mfg. Co. 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651, 41 C. C. A. 244, 101 Fed. 117; nor in the use of a person's name in the manufacture and sale of a muffler, as against a concern also entitled to use the name in such manufacture and sale, provided that such words are used in connection with others clearly indicating the manufacturer of the particular article. Hygienic Fleeced Underwear Co. v. Way, 70 C. C. A. 553, 137 Fed. 592.

cuit, but is not a party here. The petitioner, Donnell, had been a selling agent of the original company, and afterwards of the [272]*company that bought it out, having a place in Chicago, with a large sign, "Hall's Safes," on the front. In 1898 he, with others, organized the plaintiff, Hall Safe & Lock Company, the name differing from that of the original corporation only by not using the possessive case. This company does business in the petitioner's old place, with the old sign, and sells the safes of the present Ohio corporation as Hall's safes. It has accepted a decree forbidding it to go on under the above name. The question before us is upon the scope of the injunction finally issued, as we have stated, upon the cross bill. That, the petitioner contends, is too broad, while the Herring-Hall-Marvin Safe Company contends that, as against the Hall family and anyone selling their safes or standing in their shoes, it has the sole right to the very valuable name "Hall" upon or for the sale of safes.

It no longer is disputed that the Herring-Hall-Marvin Safe Company is the successor of the original Hall's Safe & Lock Company, or that it has the right to use the word "Hall." But it is denied that it has the exclusive right. The name does not designate a specific kind of safe, and yet may be assumed to have commercial value as an advertisement even when divorced from the notion of succession in business,—a sort of general good will, owing to its long association with superior work. So far as it may be used to convey the fact of succession it belongs, of course, to the Herring-Hall-Marvin Safe Company, and the narrower decree, made in the sixth circuit, was intended to prevent the present Ohio company from using any name or mark indicating that it is the successor of the original company, or that its goods are the product of that company or its successor, or interfering with the good will bought from it. But, as we have said, we presume that the word may have value, even when that idea is excluded, and when there is no interference with the good will or the trade name sold.

The good will sold was that of Hall's Safe & Lock Company. There is nothing to show that while that company was [273]*going the sons of Joseph L. Hall could not have set up in business as safe makers under their own name, and could not have called their safes by their own name, subject only to the duty not to mislead the public into supposing, when it bought from them, that it was buying their father's safes. Therefore it could not be contended that, merely by a sale, the father's company could confer greater rights than it had. But it was said that, if a partnership had sold out by a conveyance in like terms, the members would have given up the right to use their own names if they appeared in the firm name; that in this case the Halls received the consideration for the good will they had attached to their name; that they ratified the sale and necessarily assented to it, since otherwise the corporation could not have sold its property or have carried out its agreement to dissolve; and that, under such circumstances, a court ought to look through the corporation to the men behind it.

Philosophy may have gained by the attempts in recent years to look through the fiction to the fact and to generalize corporations, partnerships, and other groups into a single conception. But to generalize is to omit, and, in this instance, to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a nonconductor, through which, in matters of contract, it is impossible to see the men behind. However it might be with a partnership (Russia Cement Co. v. Le Page, 147 Mass. 206, 211, 9 Am. St. Rep. 685, 17 N. E. 304), when this corporation sold its rights everybody had notice and knew in fact that it was not selling the rights personal to its members, even if, as always, they really received the consideration, or, as usual, they all assented to its act. That it contracted for such assent, if it did, by its undertaking to dissolve, does not make the contract theirs. But the case does not stop there. The purchasing company had the possibility of competition from the Halls before its mind and gave [274]*the measure of its expectations and demands by the personal contracts that it required. Those contracts were limited in time and scope and have been discharged.

A further argument was based on the confusion produced by the petitioner through his use of signs and advertisements calculated to make the public think that his concern was the successor of the first corporation, and otherwise to mislead. This confusion must be stopped, so far as it has not been by the decree in force, and it will be. But it is no sufficient reason for taking from the Halls the right to continue the business to which they were bred and to use their own name in doing so. An injunction against using any name, mark, or advertisement indicating that the plaintiff is the successor of the original company, or that its goods are the product of that company or its successors, or interfering with the good will bought from it, will protect the right of the Herring-Hall-Marvin Safe Company, and is all that it is entitled to

demand. See Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

Decree reversed.

DIETRICH LOEWE ET AL.
v.
MARTIN LAWLOR ET AL.

(See S. C. Reporter's ed. 274–309.)

Combinations in restraint of commerce.

1. Any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business, is within the inhibition of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations "in restraint of trade or commerce among the several states."

Boycott as combination in restraint of commerce.

2. A combination by members of labor organizations to destroy an existing interstate traffic in hats by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the state, and to prevent their vendees in other states from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transportation of such hats

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NOTE.—As to monoplies—see notes to Fowle v. Park, 33 L. ed. U. S. 67; and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

What relation must a contract or combination bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act.

Since the Federal anti-trust act is operative only as to contracts or combinations in restraint of trade which affect commerce among the several states or with foreign nations (Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247), and has no reference to the mere manufacture or production of articles or commodities within the limits of the several states (Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436), in pursuing the inquiry which forms the subject of this note it becomes necessary first to determine whether the commerce to which any combination or contract relates is interstate commerce, before going on to determine whether interstate commerce is thereby affected in such a manner as to bring the combination or trade within the inhibition of the statute. Practically, however, the two questions are very intimately related, the complexity of modern business leaving little room for contracts which cannot be said in some degree to affect interstate commerce.

Interstate commerce is not affected by a contract, although of the class at which the Federal anti-trust act is aimed, which is to be wholly performed within a state (Moore v. United States, 29 C. C. A. 269, 56 U. S. App. 471, 85 Fed. 465); as, a purchase of wheat by parties who have cornered the market (C. H. Albers Commission Co. v. Spencer, 205 Mo. 105, 11 L.R.A. (N.S.) 1003, 103 S. W. 523); a sale of goods within the state, both parties to which were corporations organized under state laws and existing in the state (National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864); a combination of producers within the state, consisting in the organization of a corporation to act as general sales agent, which is to be given the exclusive right to sell the entire output at uniform prices, where it does not appear that the contract contemplated interstate or international commerce in dealing with such product, and is capable of being fully performed within the state (Slaughter v. Thacker Coal & Coke Co. supra; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264); or an agreement to withdraw from competition for a limited time with a line of boats plying along a boundary river between points within the state (Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208).

But an agreement between railroad companies engaged in the transportation of persons and freight from one state to another, for the purpose of establishing and maintaining rates, is, by its necessary effect, an agreement to restrain interstate trade or commerce, within the meaning of the Federal anti-trust act. United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

And a combination of railroad employees to prevent the operation of railroads engaged in interstate traffic is within the provision of § 1 of the Federal anti-trust act. United States v. Elliott, 5 Inters. Com. Rep. 148, 64 Fed. 27.

A combination relating to interstate trade or commerce is effected by an agreement by the members of a publishers' association controlling 90 per cent of the book business of the country, under which all agreed not to sell to anyone who would cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices (Mines v. Scribner, 147 Fed. 927); and by an agreement between coal producers in one state and coal dealers in another, to regulate the prices of from the place of manufacture to the various places of destination, is a combination "in restraint of trade or commerce among the several states," within the meaning of the anti-trust act of July 2, 1890, the members of which are liable for the threefold damages which, under § 7 of that act, may be recovered by those injured in business or property by violations of the act, although a negligible amount of intrastate business may be affected in carrying out the combination, and although the members of the combination are not themselves engaged in interstate commerce.

[No. 389.]

Argued December 4, 5, 1907. Decided February 3, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of the Circuit Court for the District of Connecticut, sustaining a demurrer to and dismissing the complaint in an action to recover threefold damages for injuries sustained by reason of a combination alleged to violate the anti-trust act. Reversed and remanded.

See same case below, in circuit court, 148 Fed. 924.

The facts are stated in the opinion.

Messrs. **James M. Beck** and **Daniel Davenport** argued the cause and filed a brief for Loewe et al.:

As with all conspiracies, the plaintiff can-

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coal in a certain city, and to divide any advances in price in excess of the advances in freight, and tending to monopolize the coal trade of the city among members of the combination (United States v. Jellico Mountain Coke & Coal Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432).

The question whether the commerce affected is of an interstate character is also involved in many of the following cases, especially those in which the sales or acts in question were wholly consummated within the limits of one state, the main point of decision, however, being the manner in which such commerce is affected.

While any given business scheme need not amount to a total suppression of trade, nor a complete monopoly, in order to fall within the statute, if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition (United States v. MacAndrews & F. Co. 149 Fed. 823), it is not enough that interstate commerce be indirectly affected, but there must be some direct and immediate effect (United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 525, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784).

So, where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but properly and fairly to regulate the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that its character and terms are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is, in any event, but indirect and incidental, and not its purpose or object. Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

Although where a combination, the ultimate object of which is not the restraint of interstate trade as such, tends directly and appreciably to restrain interstate commerce, it is not material to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination (Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182), yet, where such interference is insignificant and incidental, it will not fall within the act (Cincinnati, P B. S. & P. Packet Co. v. Bay, supra).

Interstate commerce has been held to be only indirectly affected by contracts relating exclusively to the acquisition of sugar refineries and the business of sugar refining in a state, the object of which is private gain in the manufacture, but not through the control of interstate or foreign commerce, although the manufactured product is principally bought and used in other states (United States v. E. C. Knight Co. supra); by a combination between the owners of brick manufactories, whereby they all agreed to sell and convey their plants to a corporation, to be organized under the laws of the state, which would have its principal place of business at a place within the state, and whereby they mutually agreed not thereafter to engage in the brick-making business in such a way as to come into competition with the said corporation within a territory which may be described as within a radius of 50 miles of the principal place of business of the corporation, within a period of ten years,—as it related entirely to the business of manufacturing within the state (Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804); by a combination of commission merchants at stock yards, by which they refused to do business with nonmembers, though most of the purchases and sales at such stock yards are of livestock sent from other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance not set forth all the defendants' secret operations with definiteness and particularity.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The anti-trust law declares illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states. The act is not limited to restraints of interstate trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce.

Northern Securities Co. v. United States, 193 U. S. 331, 48 L. ed. 697, 24 Sup. Ct. Rep. 436.

Liability under the anti-trust law does not depend upon any physical obstruction of interstate transportation.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 65; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Since the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, it cannot be denied that commerce is something more than mere transportation. It also consists in traffic and in that even larger field of interstate communication to which Marshall gave the all-embracing term of commercial "intercourse."

That the field of interstate commerce includes all essential acts antecedent to physical transportation and subsequent thereto,

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money to the cattle owners, and pay their drafts, and aid them in making the cattle ready for market (Hopkins v. United States, supra); by an agreement among persons engaged in a common business as yard traders of buying at a city stock yard cattle which come from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, or buy cattle from those who also sell to yard traders who are not members of the association (Anderson v. United States, supra); by a contract for the sale of certain river craft, which permits a suspension of payment of instalments of the purchase price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and requires the vendors to withdraw from such competition for five years (Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208); by a restriction in a contract of sale by a manufacturer to jobbers, of some of its product, to be shipped across state lines to the latter, against its resale or reshipment outside of a certain state (Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593); by an agreement by the stockholders of a company, which was ancillary to the sale of their plant, not to engage directly or indirectly in the same business for ten years within the territory in which the corporation operated, although the purchaser also purchased other plants, to an extent that tended to create a power to monopolize the market (Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31); by a contract not to compete in the manufacture of machinery under patterns the right to use which is sold to the other contracting party (Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97); by an agreement on the part of a purchaser, in consideration of a reduction in the price, not to resell the goods or the similar goods of any other manufacturer at less than a stipulated price (Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91); by the restriction by a manufacturer of the sale of its product to those who refrain from dealing with its competitors, by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the price to those who declined to deal in the wares of its competitors, so that the purchase of the goods was profitable to them (Whitwell v. Continental Tobacco Co. supra); or by the specification by a municipal council in its resolution and ordinances for street improvements, that Trinidad lake asphalt, the product of a foreign country, shall be the material used, though there are deposits in several of the United States from which suitable asphalt can be had (Field v. Barber Asphalt Paving Co. supra). See also Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637, in which it was held by one of the judges that the agreement and conduct of the combined defendants, who mutually agreed not to sell any of their goods to anyone who thereafter should buy or sell any goods manufactured by the plaintiff, in pursuance of which agreement the defendants refused to sell their goods to purchasers of and dealers in plaintiff's goods, did not constitute such a direct restraint of interstate commerce as to fall within the prohibition of the Federal act.

And in Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 575, it was held that a covenant upon the sale of the good will of the business of soliciting trade for Port Au Prince, Hayti, not to solicit freights for such point in or from any place in the United States east of the Mississippi river for a certain term, did not so directly contemplate the restraint of foreign commerce as to contravene the Federal anti-trust act.

On the other hand, interstate commerce has been held to be directly and materially affected by the following contracts and combinations: An agreement or combination where necessary to preserve the free flow of such commerce, can no longer be doubted.

Swift & Co. v. United States, supra.

The Federal power does not end with the mere physical delivery of the article transported in the state of destination.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The obvious ground of these decisions, and the many others which support the original-package theory, must be that the act of purchasing commodities for interstate transportation, the act of transporting them across the boundaries of a state, and the act of reselling them in the state of destination, are each essential incidents of interstate commerce.

Under the doctrine of the Stock Yards Cases (Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50), to exempt such a combination from the operation of the Sherman anti-trust law, it is necessary to satisfy the court—

(a) That there was no purpose to obstruct or restrain interstate commerce.

(b) That the combination was made with the object of regulating the conduct of a purely local business, and does not exceed its reasonable regulation.

(c) That said business must not be interstate commerce, but merely a local aid or facility.

(d) That the effect upon interstate commerce must be indirect and insignificant.

(e) That it must not prescribe any con-

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between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they entered into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them and permits one of their number to make his own bid, while the others are required to bid over him, so far as it applies to sales for delivery beyond the state in which the sale is made (Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96); by a combination of manufacturers of and wholesale dealers in red cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states, to fix an arbitrary price to wholesale and retail dealers, below which no one was permitted to buy or to sell, and the price so fixed marked a distinct increase of market price as it had stood theretofore, the association thus formed assuming and exercising the power to shut down all mills within the state at will, and for so long a time as it might deem necessary (Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120); a combination by the lumber manufacturers of a city to monopolize the local lumber market, and advance the price of lumber sold for use within the city, by refusing to sell finished and dried lumber to persons purchasing rough lumber at mills in an adjoining state, capable of supplying rough lumber only, unless such persons should agree to buy thereafter all lumber required from the city manufacturers, and pay in addition the difference between the price of the rough lumber actually purchased and the price charged for that kind of lumber by the members of the combination, since the advance of the price to the consumers was attained by thus shutting off the city trade in lumber from an adjoining state (Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182, Reversing 124 Fed. 956); an association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fire-place fixtures, in which the dealers agreed not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are considerably higher than prices to members, while the manufacturers agreed not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, although it was contended that the sale contemplated was a transaction wholly within the state, and therefore not a violation of the act of Congress (W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307); a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock yards, where such dealers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of cattle largely in different states from either (Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276); a combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such companies (Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 437); an agreement in connection with the sale of coal lands, mines, and boats that the seller would not engage, directly or indirectly, in the business of mining, marketing, or shipping coal in the territory traversed by certain rivers and their tributaries for a period of ten years (Monongahela River Consol. Coal & Coke Co. v. Jutte, 210 Pa. 288, 105 Am. St. Rep. 812, 59 Atl. 1088).

A more extended discussion of the question herein considered may be found in a case note in Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 10 L.R.A.(N.S.) 268.

dition upon which interstate traffic may be conducted.

If it be contended that the statement of Mr. Justice Brewer in the Northern Securities Case foreshadows a possible ruling by the Supreme Court that the statute extends only to those cases in which the restraint is unreasonable, or unlawful at common law, we say in reply that the combination set out in the complaint would still be within the statute, because such a combination is unreasonable, unlawful, and criminal at common law.

Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Martin v. McFall, 65 N. J. Eq. 91, 55 Atl. 465; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Arthur v. Oakes, 25 L.R.A 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; Purington v. Hinchliff, 219 Ill. 167, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; State v. Stewart, 59 Vt. 293, 59 Am. Rep. 710, 9 Atl. 559; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Crump v. Com. 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; Queen v. Rowlands, 17 Q. B. 685; Loewe v. California State Federation of Labor, 139 Fed. 71.

Wherever the question has arisen, the United States courts have uniformly held that labor combinations to restrain or obstruct interstate commerce are as much within the Sherman anti-trust law as similar combinations of capital.

United States v. Workingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994; Waterhouse v. Comer, 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149; United States v. Elliott, 62 Fed. 801; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?

Re Debs, supra.

Messrs. **John Kimberly Beach** and **John H. Light** argued the cause, and, with Robert De Forest and Howard W. Taylor, filed a brief for Lawlor et al.:

The fact that an article is manufactured for export to another state does not, of itself, make it an article of interstate commerce; and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and becomes commerce.

Coe v. Errol, 116 U. S. 517, 525, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475; Kidd v. Pearson, 128 U. S. 1, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

Although a state is bound to receive and permit the sale by the importer of any article of manufacture which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations, or diminish the profits of the importer, or lessen the revenue of the general government.

License Cases, 5 How. 504, 12 L. ed. 256; Leisy v. Hardin, 135 U. S. 116. 34 L. ed. 135, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

An agreement may, in a variety of ways, affect interstate commerce, just as state legislation may; and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct.

Hopkins v. United States, 171 U. S. 578, 594, 43 L. ed. 290, 296. 19 Sup. Ct. Rep. 40; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

In the cases relied upon by the plaintiffs in error, there has been present the element of a direct restraint by legislation, contract, or physical interference, of some transaction or operation admittedly belonging to interstate, as distinguished from intra-state, commerce; and it has been held that the Federal jurisdiction was not ousted because such legislation, contract, or interference also affected other operations and transactions admittedly belonging to intra-state commerce.

The converse of this proposition must be equally true; namely, that if the direct restraint of legislation, contract, or interference is confined to operations admittedly belonging to intra-state commerce, the state jurisdiction will not be ousted because such legislation, contract, or interference also affects other operations relating to the same general transaction, which admittedly belong to interstate commerce.

Where, as in this case, the jurisdiction depends upon the character of the conspiracy with respect to its direct incidence upon interstate commerce, it is clear that the facts must be stated, and the question of jurisdiction be determined upon those facts, and not upon the general averments of the intent and purpose with which they were done.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 457.

Up to the present time, the only combinations or conspiracies which have been held to be forbidden or unlawful under the act are:

(a) Conspiracies and combinations among common carriers engaged in interstate commerce, in violation of the rule of free competition among themselves.

(b) Combinations among manufacturers or between manufacturers and dealers engaged in interstate commerce, in violation of the rule of free competition among themselves, coupled, in some cases, with artificial restraints upon their dealings with nonmembers.

(c) Combinations among workingmen employed in and about the operations of interstate commerce, whose actual or threatened effect was to hinder and obstruct the carriage of goods or passengers in transit between the several states.

Northern Securities Co. v. United States, 193 U. S. 197, 331, 332, 48 L. ed. 679, 697, 698, 24 Sup. Ct. Rep. 436; United States v. E. C. Knight Co. supra; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 391, 51 L. ed. 241, 27 Sup. Ct. Rep. 65; United States v. Jellico Mountain Coke & Coal Co. 43 Fed. 898; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; United States v. Jellico Mountain Coal & Coke Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; Clark v. Central R. & Bkg. Co. 15 L.R.A. 683, 50 Fed. 338; United States v. Greenhut, 50 Fed. 469; Re Corning, 51 Fed. 205; Re Terrell, 51 Fed. 213; Bishop v. American Preservers' Co. 51 Fed. 272; Re Greene, 52 Fed. 104; United States v. Nelson, 52 Fed. 646; United States v. Trans-Missouri Freight Asso. 53 Fed. 440; Blindell v. Hagan, 54 Fed. 40; United States v. Workingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994; Waterhouse v. Comer, 19 L.R.A. 403, 5 Inters. Com. Rep. 564, 55 Fed. 149; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 605, 59 Fed. 280; Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 55 Fed. 851, 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58; United States v. E. C. Knight Co. 60 Fed. 306; United States v. E. C. Knight Co. 24 L.R.A. 428, 9 C. C. A. 297, 17 U. S. App 466, 60 Fed. 934; Southern California R. Co. v. Rutherford, 62 Fed. 796; United States v. Clune, 62 Fed. 798; United States v. Elliott, 62 Fed. 801, 5 Inters. Com. Rep. 148, 64 Fed. 27; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803; United States v. Agler, 62 Fed. 824; Re Charge, 4 Inters. Com. Rep. 781, 62 Fed. 828; Re Charge, 4 Inters. Com. Rep. 777, 62 Fed. 834; Re Charge, 4 Inters. Com. Rep. 784, 62 Fed. 840; United States v. Debs, 5 Inters. Com. Rep. 163, 64 Fed. 724; United States v. Cassidy, 67 Fed. 698; Pidcock v. Harrington, 64 Fed. 821; Lowenstein v. Evans, 69 Fed. 908; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 73 Fed. 438; The Charles E. Wisewall, 74 Fed. 802; United States v. Joint Traffic Asso. 76 Fed. 895; Greer, M. & Co. v. Stoller, 77 Fed. 1; United States v. Addyston Pipe & Steel Co. 78 Fed. 712, 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; United States v. Hopkins, 82 Fed. 529; United States v. Coal Dealers' Asso. 85 Fed. 252; Moore v. United States, 29 C. C. A. 269, 56 U. S. App. 471, 85 Fed. 465; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659; Block v. Standard Distilling & Distributing Co. 95 Fed. 978; Lowry v. Tile, Mantel, & Grate Asso. 98 Fed. 817, 106 Fed. 38; Union Sewer-Pipe Co. v. Connelly, 99 Fed. 354; Atlanta v. Chattanooga Foundry & Pipe Co. 101 Fed. 900; Gibbs v. McNeeley, 102 Fed. 594, 107 Fed. 210; United States ex rel. Griggs v. Chesapeake & O. Fuel Co. 105 Fed. 93; Bishop v. American Preservers Co. 105 Fed. 845; Otis Elevator Co. v. Geiger, 107 Fed. 131; Brown Saddle Co. v. Troxel, 98 Fed. 620; General Electric Co. v. Wise, 119 Fed. 922; National Harrow Co. v. Quick, 20 C. C. A. 410, 46 U. S. App. 70, 74 Fed. 239, Overruling 67 Fed. 130; National Folding-Box & Paper Co. v. Robertson, 99 Fed. 985; Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 306; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Metcalf v. American School Furniture Co. 108 Fed. 909, 122 Fed. 115; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; Foot v. Buchanan, 113 Fed. 156; W. W. Montague & Co. v. Lowry, 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307;

Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; United States v. Northern Securities Co. 120 Fed. 721; Board of Trade v. Christie Grain & Stock Co. 121 Fed. 608; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Atlanta v. Chattanooga Foundry & Pipeworks, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804; A. Booth & Co. v. Davis, 127 Fed. 875, 65 C. C. A. 269, 131 Fed. 31; Loewe v. Lawlor, 130 Fed. 633; Rice v. Standard Oil Co. 134 Fed. 464; Bobbs-Merrill Co. v. Straus, 139 Fed. 155; Loder v. Jayne, 142 Fed. 1010, 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21; Hadley Dean Plate Glass Co. v. Highland Glass Co. 74 C. C. A. 462, 143 Fed. 242; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 51; Mines v. Scribner, 147 Fed. 927; United States v. MacAndrews & F. Co. 149 Fed. 823, 149 Fed. 837; Thomson v. Union Castle Mail S. S. Co. 149 Fed. 933; Re Charge, 151 Fed. 834; United States v. Standard Oil Co. 152 Fed. 291; McConnell v. Camors-McConnell Co. 81 C. C. A. 429, 152 Fed. 321; Wheeler-Stenzel Co. v. National Window Glass Jobbers' Asso. 10 L.R.A.(N.S.) 972, 81 C. C. A. 658, 152 Fed. 864; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Cilley v. United Shoe Mach. Co. 152 Fed. 726; American Banana Co. v. United Fruit Co. 153 Fed. 943; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

None of the means for carrying out this design constitutes in itself a direct restraint upon interstate commerce.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Mr. Thomas Carl Spelling filed a brief for the American Federation of Labor et al.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action brought in the circuit court for the district of Connecticut under § 7 of the anti-trust act of July 2, 1890 [26 Stat. at L. 210, chap. 647, U. S. Comp. Stat. 1901, p. 3202], claiming threefold damages for injuries inflicted on plaintiffs by combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman act, and this rendered it unnecessary to pass upon any other questions in the case; and, upon plaintiffs declining to amend their complaint, the court dismissed it with costs. 148 Fed. 924; and see 142 Fed. 216, 130 Fed. 633.

[284] *The case was then carried by writ of error to the circuit court of appeals for the second circuit, and that court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: "Upon this state of facts can plaintiffs maintain an action against defendants under § 7 of the anti-trust act of July 2, 1890?"

After the case on certificate had been docketed here, plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted, and the whole record and cause being thus brought before this court, it devolved upon the court, under § 6 of the judiciary act of 1891, to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550.]

The case comes up, then, on complaint and demurrer, and we give the complaint in the margin.[†]

[†] The complaint alleged that the defendants were residents of the district of Connecticut and that complainants resided in Danbury, in that district, were copartners, and located and doing business as manufacturers and sellers of hats there; that they had "a factory for the making of hats, for sale by them in the various states of the Union, and have for many years employed, at said factory, a large number of men in the manufacture and sale of said hats, and have invested in that branch of their business a large amount of capital, and, in their business of selling the product of their factory and filling orders for said hats, have built up and established a large interstate trade, employing more than two hundred

[285] *The question is whether, upon the facts therein averred and admitted by the demurrer, this action can be maintained under the anti-trust act.

The 1st, 2d, and 7th sections of that act are as follows:

[286] *"1. Every contract, combination in the
form of trust or otherwise, or conspiracy,
in restraint of trade or commerce among the
several states, or with foreign nations, is
hereby declared to be illegal. Every person
[287] who shall make any such *contract or engage
in any such combination or conspiracy shall
be deemed guilty of a misdemeanor, and, on
conviction thereof, shall be punished by fine
not exceeding five thousand dollars, or by
imprisonment not exceeding one year, or by
both said punishments, in the discretion of
the court.

*"2. Every person who shall monopolize, or [288]
attempt to monopolize, or combine or conspire with any other person or persons to
monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty *of [289]
a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

*"7. Any person who shall be injured in [290]
his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this

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and thirty (230) persons in making and annually selling hats of a value exceeding four hundred thousand ($400,000) dollars.

"4. The plaintiffs, deeming it their right to manage and conduct their business without interference from individuals or associations not connected therewith, have for many years maintained the policy of refusing to suffer or permit any person or organization to direct or control their said business, and, in consequence of said policy, have conducted their said business upon the broad and patriotic principle of not discriminating against any person seeking employment because of his being or not being connected with any labor or other organization, and have refused to enter into agreement with any person or organization whereby the rights and privileges, either of themselves or any employee, would be jeopardized, surrendered to, or controlled by, said person or organization, and have believed said policy, which was and is well known to the defendants, to be absolutely necessary to the successful conduct of their said business and the welfare of their employees.

"5. The plaintiffs, for many years, have been and are now, engaged in trade and commerce among the several states of the Union, in selling and shipping almost the whole of the product of their said factory by common carriers, from said Danbury to wholesale dealers residing and doing business in each of the states of Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Illinois, Michigan, Wisconsin, Missouri, Nebraska, Arkansas, California, and other states, to the amount of many hundreds of thousands of dollars, and in sending agents with samples from said Danbury into and through each of said states to visit said wholesale dealers at their places of business in said several states, and solicit and procure from them orders for said hats, to be filled by hats to be shipped from their said factory at said Danbury, by common carriers, to said wholesale dealers, to be by them paid for after the delivery thereof at their several places of business.

"6. On July 25, 1902, the amount of capital invested by the plaintiffs in said business of making and selling hats approximated $130,000, and the value of the hats annually sold and shipped by them in previous years, to said dealers in states other than Connecticut, exceeded $400,000, while the value of hats sold by them in the state of Connecticut did not exceed $10,000.

"7. On July 25, 1902, the plaintiffs had made preparations to do a large and profitable business with said wholesale dealers in other states, and the condition of their business was such as to warrant the full belief that the ensuing year would be the most successful in their experience. Their factory was then running to its full capacity in filling a large number of orders from such wholesale dealers in other states. They were then employing about 160 men in the making and finishing departments, a large number in the trimming and other departments, whose work was dependent upon the previous work of the makers and finishers, and they then had about 150 dozens of hats in process of manufacture, and in such condition as to be perishable and ruined if work was stopped upon them.

"8. The plaintiffs then were and now are almost wholly dependent upon the sale and shipments of hats as aforesaid, to said dealers in states other than Connecticut, to keep their said factory running and to dispose of its product and their capital in said business profitably employed, and the restraint, curtailment, and destruction of their said trade and commerce with their said customers in said states other than Connecticut, by the combination, conspiracy, and acts of the defendants, as hereinafter set forth, have been and now are of serious damage to the property and business of the plaintiffs, as hereinafter set forth.

"9. The individual defendants, named in this writ, are all members of a combination or association of persons, styling themselves the United Hatters of North America, and said combination includes more than 9,000 persons, residing in the several states of Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Indiana, Illinois, Missouri, California, and the Province of act may sue therefor in any circuit court of [291] the United States in the district in *which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

[292] *In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several states," in the sense in which those words are used in the act, and the action can be maintained accordingly.

[293] *And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business.

*The combination charged falls within the [294] class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt *that (to [295] quote from the well-known work of Chief Justice Erle on Trade Unions) "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable *obstruction." But the [296] objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute.

Ontario in the Dominion of Canada. The said combination is subdivided into 20 subcombinations, each of which is by themselves styled a local union of the United Hatters of North America. Six of said subcombinations are in the state of Connecticut, and known as local Unions 1 and 2, 10 and 11, and 15 and 16 of the United Hatters of North America, and have an aggregate membership of more than 3,000 persons residing in the state of Connecticut.

"10. Said combination of persons, collectively known as the United Hatters of North America, owns, controls, edits, publishes, and issues a paper styled the Journal of the United Hatters of North America, in which are published reports of many of the acts of its agents, hereinafter mentioned, which circulates widely among its members and the public, and which affords a ready, convenient, powerful, and effective vehicle for the dissemination of information to its members and the public as to boycotts declared and pushed by them, and of the acts and measures of its members and agents for carrying such boycotts into effect, and was so used by them in connection with the acts of the defendants hereinafter set forth.

"11. Said combination owns and absolutely controls the use of a certain label or distinguishing mark, which it styles the Union Label of the United Hatters of North America, which mark, when so used by them, affords to them a ready, convenient, and effective instrument and means of boycotting the hats of any manufacturer against whom they may desire to use it for that purpose.

"12. The defendants in this suit are also all members of a combination or association of persons calling themselves and known as the American Federation of Labor, which includes more than 1,400,000 members residing in the several states and territories of the Union, and in the Dominion of Canada, and in all the places in the several states where the wholesale dealers in hats, hereinbefore mentioned, and their customers, reside and do business. Said combination is subdivided in subordinate groups, or combinations, comprising 110 national and international unions and combinations, of which the said combination of persons styling themselves the United Hatters of North America is one, composed of 12,000 local unions, 28 state federations or combinations, more than 500 central labor unions or combinations, and more than 2,000 local unions or combinations, which are not included in the above-mentioned national and international combinations.

"13. Said combination of persons collectively known as the American Federation of Labor owns, controls, edits, publishes, and issues a paper or magazine called the American Federationist, which it declares to be its official organ and mouthpiece, which has a very wide circulation among its members and others, and which affords a ready, convenient, powerful, and effective vehicle and instrument for the dissemination of information, as to persons, their products and manufactures, boycotted or to be boycotted, by its members, and as to measures adopted and statements to be published, detrimental to such persons and to the sale of their manufactures, and for boycotting such persons, their manufactures, and said paper has been and now is constantly used, printed, and distributed for said purposes among its members and the public, and was so used by the defendants and their confederates in boycotting the products of the firm of F. Berg & Company, of Orange, New Jersey, and H. H. Roelofs & Company, of Philadelphia, Pennsylvania, hat manufacturers, to their very great injury, and until the said firms successively yielded to their demands in pursuance of the general scheme of the defendant, hereinafter set forth.

"14. The persons united in said combination, known as the American Federation of Labor, including the persons in said subcombination known as the United Hatters of North America, constantly employ more than 1,000 agents in the states and territories of the United States, to push, enforce, and carry into effect all boycotts declared by the said members, including those in aid of the combined scheme, purpose, and effort hereinafter stated, to force all the manufacturers of fur hats in the United States, including the plaintiffs, to unionize

Thus, it is said that the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade [297] as well; that physical obstruction *is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

We think none of these objections are tenable, and that they are disposed of by previous decisions of this court.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; and Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, hold, in effect, that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law. Thus, in the Trans-Missouri Case it was said that, "assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration;" and, in the Northern Securities Case, that the act declares "illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states."

We do not pause to comment on cases such as United States v. E. C. Knight Co.

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their factories by restraining and destroying their interstate trade and commerce, as hereinafter stated, all of which said agents act under the immediate supervision and personal direction of one Samuel Gompers, who is chief agent of the said combination of persons for said purpose, and of each of the said combinations, and the said agents make monthly reports of their doings in pushing and enforcing, and causing to be pushed and enforced, said boycotts, and publish the same monthly in said paper known as the American Federationist, of which he is the editor, appointed by the said members, which said paper, in connection with said statement or summary, is declared to be the authorized and official mouthpiece of each of said subcombinations, including the said United Hatters of North America. Said statement is declared by the defendants to be a faithful record of the doings of said agents, and each of said statements, made during the period covered by the acts of the defendants against the plaintiffs herein stated, contains the announcement to the members of said combination and the public, that all boycotts declared by them are being by them and their agents pushed, enforced, and observed.

"15. Said combination of persons collectively known as the American Federation of Labor, of which the defendants are members, was, by the defendants and their other members, formed for the purpose, among others, of facilitating the declaration and successful maintenance of boycotts, by and for said combination of persons known as the United Hatters of North America, acting through the said Federation of Labor and its other component parts or members, and it and its component parts have frequently declared boycotts, at the request of the defendants, against the business and product of various hat manufacturers, and have vigorously prosecuted the same by and through the powerful machinery at their command as aforesaid, in carrying out their general scheme herein stated, to the great damage and loss of business of said manufacturers, and particularly during the years of 1901 and 1902, they declared, prosecuted, and waged, at the request of the defendants and their agents, a boycott against the hats made by and the business of H. H. Roelofs & Company, of Philadelphia, Pennsylvania, until, by causing them great damage and loss of business, they coerced them into yielding to the demand of the defendants and their agents, by the said factory of said Roelofs & Company be unionized, as termed by the defendants, and into agreeing to employ, and employing exclusively, members of their said combination in the making and finishing departments of said factory, and in large measure surrendering to the defendants and their agents the control of said factory and business, all of which was well known to the plaintiffs, their customers, wholesale dealers, and the public, and was, by the defendants and their agents, widely proclaimed through all their agencies above mentioned, in connection with their acts against the plaintiffs, as hereinafter set forth, for the purpose of intimidating and coercing said wholesale dealers and their customers from buying the hats of the plaintiffs, by creating in their minds the fear that the defendants would invoke and put into operation against them all said powerful means, measures, and machinery, if they should handle the hats of the plaintiffs.

"16. The defendants, together with the other persons united with them in said combination, known as the United Hatters of North America, have been for many years, and now are, engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as the United Hatters of North America, or, as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons other than the owners of the same, in a manner

156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; and Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality.

In Swift & Co. v. United States, 196 U. S. 395, 49 L. ed. 523, 25 Sup. Ct. Rep. 276, a bill was brought against a number of corporations, firms, and individuals of different states, alleging that they were engaged in interstate commerce in the purchase, sale, transportation, and delivery, and subsequent resale at the point of delivery, of meats; and that they combined to refrain from bidding against each other in the purchase of cattle; to maintain a uniform price at which the meat should be sold; and to maintain uniform charges in delivering meats thus sold through the channels of interstate trade to the various dealers and consumers in other states. *And that thus they artificially re-[298] strained commerce in fresh meats from the purchase and shipment of live stock from the plains to the final distribution of the meats to the consumers in the markets of the country.

Mr. Justice Holmes, speaking for the court, said:

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.

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extremely onerous and distasteful to such owners, and to carry out such scheme, effort, and purpose by restraining and destroying the interstate trade and commerce of such manufacturers by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product, and their customers, using therefor all the powerful means at their command as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories.

"17. The defendants and other members of said United Hatters of North America, acting with them and in pursuance of said general combined scheme and purpose, and in carrying the same into effect against said manufacturers, including the plaintiffs, and by use of the means above stated, and the fear thereof, have, within a very few years, forced the following named manufacturers of hats in the United States to yield to their demand, and unionize their factories, *viz.:* [Here follow 70 names of corporations and individuals]: and until there remained, according to the statements of the defendants, only 12 hat factories in the United States which had not submitted to their said demands, and the defendants, in pursuing their warfare against the plaintiffs, as hereinafter set forth, and in connection with their said acts against them, have made public announcement of that fact and of the firms so coerced by them, in order thereby to increase the effectiveness of their acts in intimidating said wholesale dealers and their customers in states other than Connecticut, from buying hats from plaintiffs, as hereinafter set forth.

"18. To carry out said scheme and purpose, the defendants have appointed and employed, and do steadily employ, certain special agents to act in their behalf, with full and express authority from them and the other members of said combination, and under explicit instructions from them, to use every means in their power to compel all such manufacturers of hats to so unionize their factories, and each and all of the defendants in this suit did the several acts hereinafter stated, either by themselves or their agents, by them thereto fully authorized.

"19. On or about March 1, 1901, in pursuance of said general scheme and purpose, the defendants and the other members of said combination, the United Hatters of North America, through their agents, the said John A. Moffit, Martin Lawlor, John Phillips, James P. Maher, and Charles J. Barrett, who acted for themselves and the other defendants, demanded of the plaintiffs that they should unionize their said factory, in the making and finishing departments, and also thereby acquire the right to use and use the said Union label, subject to the right of the defendants to recall the same at pleasure, in all hats made by them, and then notified the plaintiffs that, if they failed to yield to said demand, the defendants and all the other members of the said combination known as the United Hatters of North America would resort to their said usual and well-known methods to compel them so to do. After several conferences, and in April, 1901, the plaintiffs replied to the said demand of the defendants as follows:

" 'Firmly believing that we are acting for the best interests of our firm, for the best interests of those whom we employ, and for the best interests of Danbury, by operating an independent or open factory, we hereby notify you that we decline to have our shop unionized, and, if attacked, shall use all lawful means to protect our business interests.'

"The plaintiffs were then employing many union and nonunion men, and their said factory was running smoothly and satisfactory both to the plaintiffs and their employees. The defendants, their confederates and agents, deferred the execution of their said threat against the plaintiffs until the conclusion of their attack made in pursuance of the same general scheme and purpose against H. H. Roelofs & Company, which resulted in the surrender of Roelofs & Company on July 15, 1902, except that the defendants, their confederates and agents, in

When cattle are sent for sale from a place in one state, with the expectation that they will end their transit after purchase in another, and when, in effect, they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them.

. . . .

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct

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November, 1901, caused the said American Federation of Labor to declare a boycott against any dealer or dealers who should handle the products of the plaintiffs.

"20. On or about July 25, 1902, the defendants, individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully, and in violation of the provisions of the 'act of Congress approved July 2, 1890' [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in states other than Connecticut, in carrying on said trade and commerce among the several states, and to wholly prevent them from engaging in and carrying on said trade and commerce between them, and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said states other than Connecticut, and to prevent said dealers and customers in said other states from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said states as aforesaid, and thereby injure the plaintiffs in their property and business, and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, *viz.:*

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, the United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in states other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be sold or delivered, by the plaintiffs to said wholesale dealers in states other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several states; to procure and cause others of said combinations united with them in said American Federation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiff by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union-made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other nonunion manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats charges, they are alleged sufficiently as elements of a scheme. [299] It is *suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

And the same principle was expressed in Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3, involving a statute of Wisconsin prohibiting combinations "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever," etc., in which Mr. Justice Holmes said:

"The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts. 'The very plot is an act in itself.' Mulchay v. Queen, L. R. 3. H. L. 306, 317. But an act, which, in itself, is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor

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made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places after seven months' instruction, and had driven their employees to extreme measures 'by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said the United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and the customers' interstate trade aforesaid, and, in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs, and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and, in connection therewith, to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, the Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same.

"21. Afterwards, to wit, on July 25, 1902, and on divers days since hitherto, the defendants, in pursuance of said combination and conspiracy, and to carry the same into effect, did cause the concerted and simultaneous withdrawal, by means of threats and coercion made by them, and without previous warning or information thereof to the plaintiffs, of all but 10 of the nonunion makers and finishers of hats then working for them, as well as all of their union makers and finishers, leaving large numbers of hats in an unfinished and perishable condition, with intent to cripple, and did thereby cripple, the operation of the plaintiffs' factory until the latter part of October, 1902, and thereby prevented the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in states other than Connecticut, which they had engaged to fill, and were then in the act of filling, as well known to the defendants, and thereby caused the loss to the plaintiffs of many orders from said wholesale dealers in other states, and greatly hindered and delayed them in filling such orders, and falsely representing to said wholesale dealers, their customers, and the public generally in states other than Connecticut, that the plaintiffs had discriminated against the union men in their employ, and had discharged or thrown out of employment their union men in August, 1902; that they had driven their employees to extreme measures by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages down to a starvation scale, and giving boys and cheap, unskilled foreign labor preference over experienced and capable workmen; that skilled hatters had been discharged from said factory for no other cause than their devotion and adherence to the principles of organized labor in refusing to give up their union cards, and to teach the trade to boys who were intended to take the place of union workmen after seven months' instruction, and that, unable to submit longer to a system of petty tyrannies that might be tolerated in Siberia, but could not be borne by independent Americans, the workmen in the factory inaugurated the strike to the Constitution is sufficient to prevent the punishment of the plot by law."

In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, the petition alleged that the defendants were practically the only manufacturers of cast iron within thirty-six states and territories, that they had entered into a combination by which they agreed not to compete with each other in the sale of pipe, and the territory through which the constituent companies could make sales was allotted between them. This court held that the agreement, which, prior to any act of transportation, limited the prices at which the [300]pipe could be *sold after transportation, was within the law. Mr. Justice Peckham, delivering the opinion, said: "And when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce."

In W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, which was an action brought by a private citizen under § 7 against a combination engaged in the manufacture of tiles, defendants were wholesale dealers in tiles in California, and combined with manufacturers in other states to restrain the interstate traffic in tiles by refusing to sell any tiles to any wholesale dealer in California who was

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compel the firm to recognize their rights, in order to prejudice, and did thereby prejudice, the public against the plaintiffs and their product, and in order to intimidate, and did thereby intimidate, said wholesale dealers and their customers, in states other than Connecticut, from purchasing hats from the plaintiffs by reason of the fear of the prejudice created against said hats; and, in connection therewith, declared a boycott against all hats made for and so sold and delivered, and to be so sold and delivered to said wholesale dealers, in states other than Connecticut, and actively boycotted the same and the business of those who dealt in them in such other states, and thereby restrained and prevented the purchase of the same from the plaintiffs, and the sale of the same by those in whose hands they were, or might thereafter be, in the course of such interstate trade, and caused and procured others of said combinations united with them in the said American Federation of Labor to declare a boycott against the plaintiffs, their product, and against the business of such wholesale dealers in states other than Connecticut, as should buy or sell them, and of those who should purchase from such wholesale dealers any goods whatever, and further intimidated said wholesale dealers from purchasing or dealing in hats made by the plaintiffs, as aforesaid, by informing them that the American Federation of Labor had declared a boycott against the hats of the plaintiffs and against any dealer who should handle them, and that said boycott was to be actively pressed against them, and by sending agents and committees from various of said labor organizations, to threaten said wholesale dealers and their customers with a boycott from them if they purchased or handled the goods of plaintiffs, and by distributing in San Francisco, California, and other places, circulars containing notices that such dealers and their customers were to be boycotted, and threatened with a boycott, and did actively boycott the customers who did or should buy any goods whatever, even though union-made, of such wholesale dealers so boycotted, and used the daily press to advertise and announce said boycott and the measures taken in pursuance thereof by said labor organizations, particularly the San Francisco Bulletin, in its issues of July 2 and July 4, 1903, and a daily paper published in Richmond, Virginia, on December 10, 1902, and notified such wholesale dealers in states other than Connecticut, that they were at liberty to deal in the hats of any other nonunion hat manufacturer of similar quality to those of the plaintiffs, but they must not deal in hats made by the plaintiffs, under threats of being boycotted for so doing, and used the said union label of the United Hatters of North America as an instrument to aid them in carrying out said combination and conspiracy against the plaintiffs' and their customers' interstate trade, as aforesaid, and, in connection with such boycotting, by using the same, and its absence from the hats of the plaintiffs, as an insignia or device to indicate to the purchaser that the hats of the plaintiffs were to be boycotted, and to point them out for that purpose, and employed a large number of agents to visit said wholesale dealers and their customers at their several places of business in each of said states, particularly Philadelphia and other places in the state of Pennsylvania, in Baltimore, in the state of Maryland, in Richmond and other places in the state of Virginia, and in San Francisco and other places in the state of California, to intimidate and threaten them, if they should continue to deal in or handle the hats of the plaintiffs, and, among many other instances of like kind, the said William C. Hennelly and Daniel P. Kelly, in behalf of all said defendants, and acting for them, demanded the firm of Triest & Company, wholesale dealers in hats, doing business in said San Francisco, that they should agree not to buy or deal in the hats made by the plaintiffs, under threats made by them to said firm of boycotting their business and that of their customers, and, upon their refusing to comply with such demand and yield to such threats, the defendants, by their said agents, caused announcement to be made in the newspapers of said city that said Triest & Company were to be boy-not a member of the association, except at a prohibitive rate. The case was a commercial boycott against such dealers in California as would not or could not obtain membership in the association. The restraint did not consist in a physical obstruction of interstate commerce, but in the fact that the plaintiff and other independent dealers could not purchase their tiles from manufacturers in other states because such manufacturers had combined to boycott them. This court held that this obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the act. Mr. Justice Peckham, speaking for the court, said, concerning the agreement, that it "restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the nonmember."

The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other states, and that, for the direct purpose of destroying such interstate traffic, defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the state, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from *further negotiating with plaintiffs for [301] the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were, in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other end, after the physical transportation ended, was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us.

In an early case (United States v. Work-

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cotted therefor, and that the labor council of San Francisco would be addressed by them for that purpose, and that they had procured a boycott to be declared by said labor council, and thereupon the defendants, through their said agents, Hennelly and Kelly, printed, published, issued, and distributed to the retail dealers in hats, in several states upon the Pacific coast, the following circular, to wit:

"San Francisco Labor Council,
Affiliated with the American Federation of Labor,
Secretary's Office, 927 Market Street,
Rooms, 405, 406, 407 Emma Spreckel's Building.
Meets every Friday, at 1159 Mission St.
"Telephone, South, 447.
"Address all communications to 927 Market Street.

"San Francisco, July 3, 1903.

"To whom it may concern:

"At a special meeting of the San Francisco Labor Council held on the above date, the hat-jobbing concern known as Triest & Company, 116 Sansome street, San Francisco, was declared unfair for persistently patronizing the unfair hat-manufacturing concern of D. E. Loewe & Company, Danbury, Connecticut, where the union hatters have been on strike, for union conditions, since August 20, 1902. Triest & Company will be retained on the unfair list as long as they handle the product of this unfair hat-manufacturing concern. Union men do not usually patronize retail stores who buy from unfair jobbing houses or manufacturers. Under these circumstances, all friends of organized labor, and those desiring the patronage of organized workers, will not buy goods from Triest & Company, 116 Sansome street, San Francisco.

"Yours respectfully,
"G. B. Benham,
"President S. F. Labor Council.
"T. E. Zant,
"Secretary S. F. Labor Council. [L. S.]
"W. C. Hennelly,
"D. F. Kelley,
"Representing United Hatters of North America."

"Also the following, to wit:

"San Francisco Labor Council,
Affiliated with American Federation of Labor,
Secretary's Office, 927 Market Street,
Rooms 405, 406, 407 Emma Spreckel's Building.
Meets every Friday, at 1159 Mission St.
"Telephone, South, 447.
"Address all communications to 927 Market Street.

"San Francisco, July 14, 1903.

"Messrs. ——— ———.

"Gentlemen:—

"We beg leave to call your attention to the ingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994) the United States filed a bill under the Sherman act in the circuit court for the eastern district of Louisiana, averring the existence of "a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries," and it was contended that the statute did not refer to combinations of laborers. But the court, granting the injunction, said:

"I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, [302] *it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

. . . . . .

"It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well."

The case was affirmed on appeal by the circuit court of appeals for the fifth circuit. 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85.

Subsequently came the litigation over the Pullman strike and the decisions Re Debs, 5 Inters. Com. Rep. 163, 64 Fed. 724, 745, 755, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employees; that thereafter the four officers of

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following products which are on the unfair list of the American Federation of Labor.

"We do this in order that you refrain from handling these goods, as the patronage of the firms named below is taken by the organized workers as an evidence of a desire to patronize those who are opposed to the interests of organized labor. The declaration of unfairness regarding the firms mentioned is fully sanctioned and will be supported to the fullest degree by the San Francisco Labor Council.

"Trusting that you will be able to avoid the handling of these goods in the future, we are, Yours respectfully,

"G. B. Benham,
"President.

"T. E. Zant, Secretary. [L. S.]

"Unfair list.

"Loewe & Company, Danbury, Connecticut, and Triest & Company, 116 Sansome street, San Francisco, hat manufacturers.

"Cluett, Peabody, & Company, shirts and collars, Troy, New York, and 562 Mission street, San Francisco, California.

"United Shirt & Collar Company, Troy, New York, and 25 Sansome street, San Francisco, California.

"Van Zandt, Jacobs, & Company, Troy, New York; Greenbaum, Weil, & Michaels, selling agents, 27 Sansome street, San Francisco, California."

"and caused said circulars to be mailed to and personally delivered to the retail dealers in hats, and the other customers of said Triest & Company, upon the Pacific coast, and to many others, thereby causing the loss of many orders and customers to said Triest & Company and to the plaintiffs, for the purpose of intimidating and coercing said Triest & Company not to deal with the plaintiffs, and thereby cause the loss of many orders and customers to said Triest & Company and to the plaintiffs.

"22. By means of each and all of said acts done by the defendants in pursuance of said combination and conspiracy, they have greatly restrained, diminished, and, in many places, destroyed the trade and commerce of the plaintiffs with said wholesale dealers, in said states other than Connecticut, by the loss of many orders and customers directly resulting therefrom, and the plaintiffs have been injured in their business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by said act of Congress, to the amount of eighty thousand ($80,000) dollars, to recover threefold which damages, under § 7 of said act, this suit is brought."

the railway union combined together and with others to compel an adjustment of such dispute by creating a boycott against the cars of the car company; that, to make such boycott effective, they had already prevent-[303]ed certain *of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze, and break down any and every railroad which did not accede to their demands, and that the purpose and intention of the combination was "to secure unto themselves the entire control of the interstate, industrial, and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial, or commercial enterprises, save according to the will and with the consent of the defendants."

The circuit court proceeded principally upon the Sherman anti-trust law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal government had full power over interstate commerce and over the transmission of the mails, and, in the exercise of those powers, could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. But, in reference to the anti-trust act, the court expressly stated:

"We enter into no examination of the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

And, in the opinion, Mr. Justice Brewer, among other things, said:

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not [304]within *the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

The question answers itself; and, in the light of the authorities, the only inquiry is as to the sufficiency of the averments of fact. We have given the declaration in full in the margin, and it appears therefrom that it is charged that defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants, and that thereby they injured plaintiffs' property and business.

At the risk of tediousness, we repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty states other than the state of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the state of Connecticut; that, at the time the alleged combination was formed, they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in states other than Connecticut, and that, if prevented from carrying on the work of manufacturing these hats, they would be unable to complete their engagements.

That defendants were members of a vast combination called The United Hatters of North America, comprising about 9,000 members, and including a large number of subordinate unions, and that they were combined with some 1,400,000 others into another association known as The American Federation of *Labor, of which they were [305] members, whose members resided in all the places in the several states where the wholesale dealers in hats and their customers resided and did business; that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as the United Hatters of North America, or, as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort, and purpose by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product, and their customers, using therefor all the powerful means at their command as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories."

That the conspiracy or combination was so far progressed that out of eighty-two manufacturers of this country engaged in the production of fur hats, seventy had accepted the terms and acceded to the demand that the shop should be conducted in accordance, so far as conditions of employment were concerned, with the will of the American Federation of Labor; that the local union demanded of plaintiffs that they should unionize their shop under peril of being boycotted by this combination, which demand plaintiffs declined to comply with; that thereupon the American Federation of Labor, acting through its official organ and through its organizers, declared a boycott.

[306] *The complaint then thus continued:

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully, and in violation of the provisions of the 'act of Congress approved July 2, 1890' [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in states other than Connecticut, in carrying on said trade and commerce among the several states, and to wholly prevent them from engaging in and carrying on said trade and commerce between them and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said states other than Connecticut, and to prevent said dealers and customers in said other states from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said states, as aforesaid, and thereby injure the plaintiffs in their property and business, and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, *viz.:*

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said *combination, [307] the United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in states other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be so sold or delivered, by the plaintiffs to said wholesale dealers in states other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several states; to procure and cause others of said combinations united with them in said American Federation of Labor in like manner to declare a boycott against, and to actively boycott, the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiffs by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union-made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other nonunion manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to [308] give up their union cards and *teach boys, who were intended to take their places after seven months' instruction, and had driven their employees to extreme measures 'by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said the United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and, in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and, in connection therewith, to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, the Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same."

And then followed the averments that the defendants proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other states by employing the identical means contrived for that purpose; and that, by reason of those acts, [309] *plaintiffs were damaged in their business and property in some $80,000.

We think a case within the statute was set up and that the demurrer should have been overruled.

Judgment reversed and cause remanded with a direction to proceed accordingly.

R. ALLYN LEWIS and Laetitia M. Lewis,
Appts.,
v.
FRED HERRERA, Receiver of the International Bank in Nogales.

(See S. C. Reporter's ed. 309–316.)

Courts — following decisions of territorial courts — statutory construction.

1. The construction of a territorial statute by the local courts is of great, if not controlling, weight.

Acknowledgment — necessity to validate deed.

2. Acknowledgment by the grantor before a proper officer is made as much a prerequisite to the validity of a deed as the signing, by Ariz. Rev. Stat. 1901, ¶ 725, providing that "every deed or conveyance of real estate . . . must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

[No. 79.]

Submitted December 13, 1907. Decided February 24, 1908.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of the Third Judicial District of that Territory in and for the County of Maricopa, in favor of plaintiff in an action by a judgment creditor to set aside certain conveyances by the judgment debtor. Affirmed.

See same case below (Ariz.) 85 Pac. 245.

The facts are stated in the opinion.

Messrs. **Webster Street** and **J. L. B. Alexander** submitted the cause for appellants:

Acknowledgment is not a part of the deed.

Sicard v. Davis, 6 Pet. 124, 8 L. ed. 342; Holladay v. Dailey, 1 Colo. 467; 1 Cyc. Law & Proc. "Acknowledgments," pp. 514, 515; Harrington v. Fortner, 58 Mo. 468; Bennett v. Shipley, 82 Mo. 448; Fitch v. Lewiston Steam Mill Co. 80 Me. 36, 12 Atl. 732; 1 Am. & Eng. Enc. Law, 2d ed. p. 488.

Paragraph 220 of the Revised Statutes of 1887 of Arizona, which was changed into paragraph 725 in the revision of said statutes in 1901, was copied from article 630 of the statutes of Texas, after that statute had had a construction by the supreme court of Texas as to its effect upon instruments of conveyance, holding that an instrument of conveyance, without acknowledgment, was as much of a deed between grantor and grantee as though it were accompanied by an acknowledgment.

McLane v. Canales (Tex. Civ. App.) 25 S. W. 30; Frank v. Frank (Tex. Civ. App.) 25 S. W. 819; Kimmarle v. Houston & T. C. R. Co. 76 Tex. 686,-12 S. W. 700; Rodgers v. Burchard, 34 Tex. 452, 7 Am. Rep. 283; Coryell v. Holmes, 2 Posey, Unrep. Cas. (Tex.) 665.

Mr. **William Herring** submitted the cause for appellee:

A deed or conveyance of real property, to be valid under the law of Arizona, must be signed and acknowledged by the grantor.

Lewis v. Herrera (Ariz.) 85 Pac. 246.

The construction of this statute by the local court is of great, if not of controlling, weight.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474–482. 51 L. ed. 1143–1148, 27 Sup. Ct. Rep. 695; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Northern P. R. Co. v. Hambly, 154 U. S. 349–361, 38 L. ed. 1009–1014, 14 Sup. Ct. Rep. 983; Fox v. Haarstick, 156 U. S. 674–679, 39 L. ed. 576–578, 15 Sup. Ct. Rep. 457.

Similar statutes have been so construed by other courts.

Clark v. Graham, 6 Wheat. 577, 5 L. ed. 334; Summers v. White, 17 C. C. A. 631, 36 U. S. App. 395, 71 Fed. 106; Hendon v. White, 52 Ala. 597; Chadwick v. Carson, 78 Ala. 116; Carlisle v. Carlisle, 78 Ala. 542; French v. French, 3 N. H. 234; Merwin v. Camp, 3 Conn. 35; Heelan v. Hoagland, 10 Neb. 511, 7 N. W. 282; Hout v. Hout, 20 Ohio St. 124; Smith v. Hunt, 13 Ohio, 260, 42 Am. Dec. 201; Allston v. Thompson, Cheves L. 271.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a suit by the receiver of the bank as a judgment creditor in the district court of the third judicial district of the territory of Arizona, in and for the county of Maricopa, to set aside two deeds executed by Lewis, the debtor, to his wife, and have the property therein described subjected to the payment of his judgment.

The case was tried upon an agreed statement of facts. The district court held the deeds to be void as against complainant. Defendants appealed to the supreme court of Arizona, which affirmed the judgment of the lower court. 85 Pac. 245. From that judgment this appeal was taken.

The facts were sufficiently stated by counsel for appellee as follows:

"On August 25, 1903, while appellants, R. Allyn Lewis and Laetitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed conveying to her certain property situate in Phœnix, Maricopa county, Arizona, the consideration being love and affection. The execution of the deed was not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904, when he did acknowledge the same before a notary in the state of New York. On December 19, 1903, in the state of New York, Lewis signed and delivered to his wife a second deed, conveying to her the same property, but with a more accurate description; the consideration therefor being also love and affection. *This second deed was likewise not acknowledged by Lewis before any officer authorized to take acknowledgments until January 9, 1904. [313]

"After Lewis had signed the first deed, but before he had acknowledged it, and before he had either signed or acknowledged the second deed, to wit, between November 5, 1903, and December 15, 1903, he became indebted in a large sum to the International Bank in Nogales, a bank doing business in Nogales, Arizona, which indebtedness was thereafter reduced to judgment in an action before the district court in Arizona, brought by Fred Herrera, receiver for the bank. Execution was issued under this judgment; it was returned unsatisfied." The judgment remained unpaid.

"At the time Lewis signed the first deed to his wife, he was solvent and was not indebted to the said bank in any sum whatsoever; but at the time he signed the second deed, and on January 9, 1904, when, for the first time, he acknowledged before the notary the execution of both the first and second deeds, he was indebted to said bank, and he was not possessed of property within the territory of Arizona, subject to execution, sufficient to pay his existing debts."

It was admitted that there was no fraud in fact, and no intent in the mind of Lewis to defraud his creditors in the transfers made. Paragraph 2698 of the Revised Statutes of Arizona, 1901, is as follows:

"Every gift, conveyance, assignment, transfer, or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this territory, subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer, or charge shall not, on that account merely, be . . . decreed to be void as to subsequent creditors or purchasers."

Paragraph 725 of the Revised Statutes of Arizona, 1901, reads thus:

"725. Every deed or conveyance of real

[314]estate must be *signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

As to the second deed, it was both signed and acknowledged after Lewis became indebted to the bank; as it was a gift, and as it did not appear that, at the date of signing, he was possessed of property in Arizona subject to execution sufficient to pay his debts, it followed that under paragraph 2698 of the Revised Statutes of Arizona the deed was void as to his prior creditor, the bank, and Herrera, the receiver.

The first deed, however, was signed by Lewis before he became so indebted. But if, as is contended, that deed did not become effective as a conveyance until it was acknowledged, namely, on January 9, 1904, on which day Lewis was already indebted to the bank, the deed was void as to it, a prior creditor. And that makes the only question in this case to be whether or not, under the statutes of Arizona, a deed signed, but not acknowledged, was valid as a conveyance of real property as to third parties.

The courts below held that a deed or conveyance of real property, to be valid under the law of Arizona, must be signed and acknowledged by the grantor, and that, until acknowledged, a deed or conveyance was ineffectual to convey title.

The construction of the statute by the local courts is of great, if not of controlling, weight. Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983.

This principle was applied in Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695, in which it was argued that a statute of Arizona in reference to the territorial board of equalization of that territory had been taken almost *verbatim* from one of Colorado, and as that had been construed by the supreme court of that state contrary to the view taken by the supreme court of Arizona in the present case, it should be followed, and we de-[315]clined to do so, although various other *considerations were stated to sustain the ruling. In this case the same point is urged as respects paragraph 725, as having been transferred from the statutes of Texas in that regard, and having been construed differently from the judgment of the supreme court of Arizona here. But paragraph 220 of the Revised Statutes of Arizona of 1887, which was in the exact language of the Texas statute, and as follows: "220. Every deed or conveyance of real estate must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses thereto; or must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration," was changed in the Arizona Revised Statutes of 1901, paragraph 725, so as to read: "725. Every deed or conveyance of real estate must be signed by the grantor, and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration." Thus the legislative assembly of Arizona of 1901, so far from adopting the construction of the Texas statute, changed the language entirely and made it imperative that the deed should be signed and acknowledged before a proper officer. It made the acknowledgment by the grantor before a proper officer a prerequisite to the validity of the deed as much as the signing.

Paragraph 732 of the Revised Statutes of Arizona of 1901 is as follows:

"When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this title, the same shall, nevertheless, be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit."

But it is unnecessary to consider here whether the unacknowledged deed of Lewis to his wife might, under the provisions of this section, be claimed to be good as a contract, as that is not a question in this case. These deeds were finally and properly acknowledged, but the bank was then a prior *creditor, and as to a prior creditor the[316] deeds, being gifts, were void, it not being made to appear that Lewis was then possessed of property in Arizona sufficient to pay his existing debts.

Judgment affirmed.

CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY and the Detroit & Cleveland Navigation Company, Appts.,

v.

CLEVELAND STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 316-321.)

Admiralty jurisdiction — maritime tort.

A court of admiralty has no jurisdiction of a libel *in rem* against a vessel, based on injuries inflicted to the piers or abutments of a railroad bridge spanning a navigable

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NOTE.—As to what places the jurisdiction of admiralty is confined—see note to Allen v. Newberry, 16 L. ed. U. S. 110.

stream, to the piling placed around the center abutment in order to protect vessels from injury, and to a shore dock or wharf.

[No. 84.]

Argued December 17, 18, 1907. Decided February 24, 1908.

APPEAL from the District Court of the United States for the Northern District of Ohio, Eastern Division, to review a decree dismissing, for want of jurisdiction, a libel *in rem* against a vessel for injuries inflicted to a railroad bridge and a dock or wharf. Affirmed.

Statement by Mr. Chief Justice **Fuller**:

This is an appeal from a final decree of the United States district court for the northern district of Ohio, eastern division, in admiralty, dismissing appellants' libel on the appellee's exception thereto, on the ground that the court had not jurisdiction of the subject-matter. It comes here directly, on a certificate as to the jurisdiction, under § 5 of the act of 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

The libel was *in rem* against the steam propeller William E. Reis, owned by appellee, and was based on injuries inflicted to the center pier of the swinging or drawbridge spanning the Cuyahoga river, a navigable stream at Cleveland, Ohio; to the protecting piling work surrounding such center pier, and one of the shore abutments of such bridge; and to a dock or wharf next below such bridge, all caused as described in the libel in substance as follows:

The steamer Reis, during a heavy flood, [317] broke from her *winter moorings, and, drifting down the river, struck the merchant propeller Moore at her moorings, forcing her against the steamer Eads, putting her adrift, the three being carried down with the current. The Cleveland Terminal & Valley Railroad Company owned and operated a bridge across the Cuyahoga river below the mooring point of the above-named vessels, the bridge being equipped with a swinging span, supported by a center abutment or pier in the navigable channel. Surrounding the center abutment was piling intended to protect vessels from damage. The railroad company and the Detroit & Cleveland Navigation Company jointly owned a dock below, constructed on piles driven in the bed of the stream and on the shore. It was floored over, but open underneath. As the vessels drifted down, the Moore struck and damaged this dock, for which claim is made. The Eads's stern brought up against a pier below the bridge. The Moore brought up against the dock abreast the Eads, and the Reis, drifting stern first, entered between the Eads and the Moore, and, it is said, in so doing, forced the Eads into collision with the center pier of the railroad company's bridge, thereby damaging the protection piling about the same, for which damages were claimed. It was also averred that, as the three vessels were wedged together at the bridge, the stream was partially dammed, causing the water to rise, increasing the velocity of the current underneath the keels of the Eads and the Reis, so that the current undermined the center pier and shore abutment and carried away some of the protection piling, and for restoring that piling and the support under the center pier and the pier damages were claimed. And it was further claimed that, by reason of the disaster, the railroad company was deprived of the use of its bridge for a period of ten days, and necessarily incurred expense to a large amount.

The usual process issued, the vessel was arrested, and later claimed and bonded by appellee, which subsequently filed its exception to the libel. On the hearing the district court sustained the exception and dismissed the libel "on the ground *that, although the property injured by said disaster, said dock, said center pier, and said protection piling work, stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of and the cause of action set forth in the libel." [318]

Mr. **Roger M. Lee** argued the cause, and, with Messrs. Virgil Kline and Kline, Tolles, & Goff, and Lee & Marty, filed a brief for appellants:

Previously to The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46, this court had merely held that locality is the sole test of admiralty jurisdiction in tort, that all or at least the substance and consummation of the wrong must be complete upon navigable waters, that this involves the feature that the thing injured must be in or upon navigable water; that when flames negligently emitted from a vessel on water communicate to and injure a building on land, the tort is not maritime; and that, for the purpose of applying the test of admiralty jurisdiction *ex contractu*, a dry dock permanently built into the land adjoining the Erie canal is not to be treated as land.

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; Ex parte

Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; Homer Ramsdell Transp. Co. v. La Compagnic Générale Transatlantique, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 33, 48 L. ed. 73, 80, 24 Sup. Ct. Rep. 8; Cope v. Vallette Dry Dock Co. 119 U. S. 625, 627, 30 L. ed. 501, 502, 7 Sup. Ct. Rep. 336.

The force and authority of lower court decisions, in so far as they hold wharves and bridges to be land because they are attached to the river bed by piles, are completely done away with by the holding in the Blackheath Case, that the attachment of a beacon and its support or foundation to the bottom soil of a water way by piling makes the same at most only technically land, and that this form of attachment is not sufficient to bar the admiralty jurisdiction.

A constitutional grant of jurisdiction is not to be construed more broadly in favor of the government to which it is made than in favor of private individuals, or to be construed as including a certain class of injuries to the property of the government, but not the same class of injuries to the same sort of property owned by the subjects of such government.

The Siren (The Siren v. United States) 7 Wall. 152, 19 L. ed. 129; The Davis (United States v. Douglas) 10 Wall. 15, 19 L. ed. 875; United States v. Cornell S. B. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648.

The passengers carried in a ship are not instruments of or aids to navigation, nor are their personal effects or luggage. Yet actions *ex delicto* for injuries received by them in navigable waters are within the cognizance of admiralty, and the ship is impressed with a maritime lien to secure such a claim, where death does not ensue, at least.

The New World v. King, 16 How. 469, 14 L. ed. 1019; The Willamette Valley, 71 Fed. 714; Schofield v. Palmer, 134 Fed. 753; Quinette v. Bisso, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825; Re Clyde S. S. Co. 134 Fed. 98; Elder Dempster Shipping Co. v. Pouppirt, 60 C. C. A. 500, 125 Fed. 732.

A ship's cargo may consist of almost any form of personal property, iron ore, grain, mules, locomotives, or street cars. It surely cannot be said that a locomotive or street car is an instrument of or aid to navigation upon water. Yet this court has repeatedly held that collision injury to a vessel's cargo constitutes a maritime tort.

The Commander in Chief (La Tourette v. Burton) 1 Wall. 43, 17 L. ed. 609; The New York, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67; The Beaconsfield, 158 U. S. 303, 307, 39 L. ed. 993, 994, 15 Sup. Ct. Rep. 860.

And it has been held in the lower courts that admiralty has jurisdiction of a libel against a vessel for collision damage inflicted upon a floating bath house, moored to the shore.

The M. R. Brazos, 10 Ben. 435, Fed. Cas. No. 9,898.

Again, a parent may maintain a libel in the admiralty for the wrongful abduction of his child, and in carrying him beyond the sea. Steele v. Thacher, 1 Ware, 91, Fed. Cas. No. 13,348; Stephens v. Felt, 2 Blatchf. 37, Fed. Cas. No. 13,368; yet the child had not even so much to do with navigation as would a passenger. The forcible deportation of a citizen in an American ship, pursuant to a sentence of banishment by an illegal and self-constituted body of men, is a maritime tort. The Yankee v. Gallagher, McAll. 467, Fed. Cas. No. 18,124. In these cases the cause of action was maritime because the *locus* of the injured person or property was navigable water, and because the disaster was characterized as maritime through the fact that the offending instrument was a ship engaged in navigation. In another class of cases decided by this court the offending thing was not an instrument of or an aid to navigation, as in the cases above cited, but the *locus* of the injury was navigable water, and the disaster was characterized as maritime by the fact that the injured thing was a ship engaged in navigation. In Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433, the cause of the injury consisted of certain piling left standing in navigable water, with which a vessel collided, to the injury of the vessel. In Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619, the offending thing was a stone pier in the channel of a navigable river, with which a vessel collided, the vessel being injured; and in Panama R. Co. v. Napier Shipping Co. 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572, the cause of the injury was an obstruction lying upon the bottom of a slip, which struck and pierced a vessel's bottom. In each of the cases above cited, beginning with the cases relating to injuries to passengers, either the thing injured or the thing causing the injury could not be characterized as an instrument of or an aid to navigation; in part of them the thing injured was such an instrument or aid, while in the others the thing causing the injury was such instrument or aid. It seems to have been regarded as immaterial whether such characterization applied to the one or the other, provided the disaster was maritime in nature because relating in some way to a navigating ship, and the *locus* of the injury was navigable water.

Indeed, this court has sustained the admiralty jurisdiction in a case where neither the instrument causing the injury nor the person injured could be classed as an aid to or instrument of navigation.

Leathers v. Blessing, 105 U. S. 626, 26 L. ed. 1192.

If, however, it be the view of this court that a structure standing in navigable water must be an aid to navigation in order that physical injury thereto caused by a vessel may be a maritime tort, yet we encounter no difficulty, as the structures mentioned in our libel are each and all of that character.

Atlee v. Northwestern Union Packet Co. supra; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

The constitutional grant of admiralty jurisdiction should be construed to cover the case made in this libel.

The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The St. Lawrence (Meyer v. Tupper) 1 Black, 522, 527, 17 L. ed. 180, 183; Jackson v. The Magnolia, 20 How. 296, 299, 15 L. ed. 909, 911; Benedict, Admiralty, §§ 48, 61, 107, 124, 126, 127, 150, 151, 172, 173, 175; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776.

Every case of physical injury to person or property, caused by the negligent act of a ship, while such ship is in navigable water, should be held to fall within the jurisdiction of admiralty, regardless of the locality of the person or property so injured.

The Uhla, L. R. 2 Adm. & Eccl. 29, note; The Swift [1901] P. 168.

Messrs. **Harvey D. Goulder** and **Frank S. Masten** argued the cause, and, with Mr. S. H. Holding, filed a brief for appellee:

For many years, in cases of tort, locality has been regarded as the test of jurisdiction, and the meaning of "locality" has been that the origin of the wrong and its consummation or substantial consummation must be on or in navigable waters and the interest damaged, maritime in character; that the locality is the place of the thing injured, and not of the agent causing it.

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20–34, 18 L. ed. 125–128; Ex parte Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254.

In any consideration of jurisdiction in admiralty, convenience and desirability may not be regarded; the sole question in every case is and must be whether the constitutional grant of jurisdiction includes or excludes the particular claim.

Cooley, Const. Lim. p. 88; The Genesee Chief v. Fitzhugh, 12 How. 443, 460, 13 L. ed. 1058, 1065; The Eagle (The Eagle v. Fraser) 8 Wall. 15–25, 19 L. ed. 365–369; The St. Lawrence (Meyer v. Tupper) 1 Black, 522–526, 17 L. ed. 180–182.

The lower courts uniformly accept the doctrine of The Plymouth as declaring the true test, and they would deny jurisdiction herein.

Hermann v. Port Blakely Mill Co. 69 Fed. 646; The Strabo, 90 Fed. 110; The Mary Garrett, 63 Fed. 1009; The John C. Sweeney, 55 Fed. 540; The C. Accame, 20 Fed. 642; The City of Lincoln, 25 Fed. 835; The Strabo, 39 C. C. A. 375, 98 Fed. 998; The Albion, 123 Fed. 189; The Haxby, 95 Fed. 170; The Curtin, 152 Fed. 588; Chalmers v. Howell, 8 Ben. 547, Fed. Cas. No. 9,302; The Neil Cochran, Brown, Adm. 162, Fed. Cas. No. 7,996; The Mary Stewart, 5 Hughes, 312, 10 Fed. 137; The H. S. Pickands, 42 Fed. 239.

Bridges and wharves are not instruments of maritime commerce.

The Neil Cochran, supra; The Ottawa, Brown, Adm. 356, Fed. Cas. No. 10,616; Milwaukee v. The Curtis, 3 L.R.A. 711, 37 Fed. 706.

The dock is a mere extension of the shore and is realty.

Smith v. New York, 68 N. Y. 552; The Haxby, 94 Fed. 1016; 3 Wash. Real Prop. 4th ed. p. 389.

The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46, does not change any previously-announced principle, but simply brings within these principles a damage to property located in navigable waters, solely an aid to navigation, and maritime in nature, and having no other purpose or function.

There must be something more than location of the damaged property in or immediately contiguous to navigable waters; the maritime character must be present.

Campbell v. H. Hackfeld & Co. 62 C. C. A. 274, 125 Fed. 696; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The certificate below included the libel in full and certified four questions; but we are not called upon to answer them seriatim, and must determine the case on our conclusion as to whether the record discloses a maritime tort justifying the exercise of admiralty jurisdiction.

In The Plymouth (Hough v. Western

Transp. Co.) 3 Wall. 20, 18 L. ed. 125, Mr. Justice Nelson, delivering the opinion of the court, said that the true meaning of the rule of locality in cases of maritime torts was that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters, to be within the admiralty jurisdiction. A substantial cause of action arising out of the wrong must be complete within the locality on which the jurisdiction depended. Ex parte Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25.

In Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254, the jib boom of a vessel towed by a steam tug in the Chicago river, at Chicago, struck a building on land through the negligence of the tug and caused damage to it, and it was held that the cause of action was not a maritime tort of which the admiralty court of the United States would have jurisdiction. And Mr. Justice Blatchford said: "Under the decisions of this court in The Plymouth, and in Ex parte Phenix Ins. Co. [320] supra, at the *present term, it must be held that the cause of action in this case was not a maritime tort of which a district court of the United States, as a court of admiralty, would have jurisdiction; and that the remedy belonged wholly to a court of common law; the substance and consummation of the wrong having taken place on land, and not on navigable water, and the cause of action not having been complete on such water."

It is unnecessary to cite the numerous cases to the same effect to be found in the books. The rule stated has been accepted generally by bench and bar, and has never been overruled, though counsel express the hope that it may be because of our decision in The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46. In that case Mr. Justice Brown, in concurring, announced the view that the effect of the decision was to overrule what had previously been laid down in the cases we have cited. But the court held that the opinion was not opposed to the prior adjudications, and, without entering into the elements of distinction between that case and The Plymouth, said: "It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea."

The case was a libel *in rem* against a British vessel for the destruction of a beacon, number 7, Mobile ship channel lights, caused by the alleged negligent running into the beacon by the vessel. The beacon stood 15 or 20 feet from the channel of Mobile river, or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. The damage was to property located in navigable waters, solely an aid to navigation, and maritime in nature, and having no other purpose or function.

In the present case damage to shore dock, and to bridge, protection piling, and pier, by a vessel being forced against *each of [321] them by the vessel proceeded against, as well as damage to shore dock, abutment, protection piling, pier and dock foundation by a wash said to be due to the increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against, was sought to be recovered. But the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.

The proposition contended for is that the jurisdiction of the admiralty court should be extended to "any claim for damages by any ship," according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years, because of some supposed convenience.

Unless we do that, this decree must be affirmed, and it is so ordered.

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†DULUTH & SUPERIOR BRIDGE COMPANY, Appt.,
v.
STEAMER "TROY," her Boilers, Engines, etc.

(See S. C. Reporter's ed. 321-323.)

Admiralty jurisdiction — maritime tort.
Redress cannot be afforded in admiralty for injuries inflicted by a colliding vessel upon the draw of a bridge over a navigable stream, and to its center pier protection.

[No. 232.]

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†This case is reported by the official Reporter under the title of "The Troy."

NOTE.—As to what places jurisdiction of admiralty is confined—see preceding case (Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.) and footnote thereto.

Submitted December 20, 1907. Decided February 24, 1908.

APPEAL from the District Court of the United States for the Western District of Wisconsin to review a decree dismissing, for want of jurisdiction, a libel *in rem* against a vessel for injuries inflicted to the draw of a bridge over a navigable stream, and to its center pier protection. Affirmed.

The facts are stated in the opinion.

Mr. **Charles E. Kremer** submitted the cause for appellant. Mr. John A. Murphy was on the brief:

There are numerous decisions of the district and circuit courts, in the books, in which controversies arising out of collisions between steamers and bridges have been tried in the admiralty courts.

Etheridge v. Philadelphia, 26 Fed. 43, Assante v. Charleston Bridge Co. 40 Fed. 765; Hill v. Essex County, 45 Fed. 260; Greenwood v. Westport, 53 Fed. 824; Boston v. Crowley, 38 Fed. 202.

Damage by wharf.

Ball v. Trenholm, 45 Fed. 588; The City of Lincoln, 25 Fed. 835.

Damage by obstruction to navigation.

Oregon City Transp. Co. v. Columbia Street Bridge Co. 53 Fed. 549.

The decision of the Supreme Court in The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46. is a direct overruling of Milwaukee v. The Curtis, 3 L.R.A. 711, 37 Fed. 705, and also of The Neil Cochran, Brown, Adm. 162, Fed. Cas. No. 7,996, on which it relied, and The John C. Sweeney, 55 Fed. 540, which followed it. And a reference to The Arkansas, 5 McCrary, 364, 17 Fed. 383, with approval in The Blackheath, supra, is a direct adoption of the reasoning of Judge Love as the reasoning of the Supreme Court, and the same reference to The F. & P. M. No. 2, 33 Fed. 511, in The Blackheath decision, supra, is also an approval of the interpretation put upon The Arkansas Case by the court in that case, and an authoritative denial of the position taken regarding The Arkansas Case in The Professor Morse, 23 Fed. 803, and the approval of the same by Judge Jenkins in The Curtis Case.

Justice Holmes's approval and reference to The Arkansas and The F. & P. M. No. 2 is most significant, and his omission of all reference to The Neil Cochran, The Curtis, and The John C. Sweeney is proof positive that he intended to overrule those cases and the doctrine of locality on which they were based, and also The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125, and to establish the more reasonable rules of maritime nature of tort, in consonance with The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, and also New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 20 L. ed. 90.

The Blackheath, in 122 Fed. 112, also cited Spencer, Marine Collisions, § 11.

A reference to the text of Spencer shows that all the above cases are cited in support of the rule there laid down. It follows, therefore, that this section, and cited cases, having been before the court when considering The Blackheath appeal (there being no other question in the case except the one of jurisdiction), that if the court did not intend to overrule all the above-mentioned cases, it would have named the exception in the opinion.

Messrs. **Harvey D. Goulder, Hermon A. Kelley,** and **Frank S. Masten** submitted the cause for appellee. Messrs. H. R. Spencer and S. H. Holding were on the brief.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Duluth & Superior Bridge Company owned and operated a bridge between the cities of Duluth, Minnesota, and Superior, Wisconsin, over the St. Louis river,—a navigable stream. The bridge was equipped with a swinging span, supported to a turntable resting on a base of stone and piles driven into the bottom of the river, leaving a space for the passage of vessels on either side of the supporting structure. When closed its ends rested upon permanent abutments, forming a passageway over the stream for street cars and foot passengers, and when opened allowing the passage of the largest lake steamers.

On August 11, 1906, the merchant steamer Troy, inbound, struck the center pier protection and glanced into the draw of the bridge, inflicting heavy damage. The bridge company filed a libel against the Troy in the district court for the western district of Wisconsin, in admiralty, claiming large damages. The Western Transit Company, owner of the Troy, filed exceptions to the libel, as follows:

"1st. That it appears from the averments of the libel that the bridge alleged to have been injured was a structure on land, for purposes of land travel and convenience exclusively, not erected, maintained, or operated in any sense or in any degree in aid of navigation, but, on the contrary, an obstruction and impediment to the navigation of a public navigable water channel and highway, a part of the public waters of the United States, then and there navigable to ships engaged in commerce and navigation.

"2d. That whatever of damage came to [323]the bridge occurred *on land and no part of the same occurred or was suffered on water in place or manner within the jurisdiction of an admiralty court of the United States.

"3d. That the claim of damage propounded in the libel fails to show a case within the admiralty jurisdiction of this honorable court, according to the grant of such jurisdiction in the Constitution of the United States and the course and practice in admiralty courts of the United States."

The court sustained the exceptions and dismissed the libel with costs, whereupon the case was brought by appeal to this court, the question of jurisdiction being certified.

The Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. [just decided] 208 U. S. 316, ante, 508, 28 Sup. Ct. Rep. 414, involved substantially the same questions of jurisdiction that are involved in this case. There the steamer Reis collided with the center protection of a bridge located in the navigable channel of the Cuyahoga river and injured it, and, at the same time, the abutment or shore end of the bridge, and the wharf or dock in the vicinity. In that case the bridge itself was not injured, while in this case the center protection and bridge were both injured. The views we have expressed in that case must govern the disposition of this case, and the decree is affirmed.

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[324]*ALBERTO ARMSTRONG, as Liquidator of the Firm of Boysen & Company, Appt.,
v.
EDUARDO FERNANDEZ, Juan Bautista Pacheco, and Genara Jusino.

(See S. C. Reporter's ed. 324-332.)

Bankruptcy — petition — amendments.

1. A court of bankruptcy does not abuse its discretion by permitting a defective verification of an involuntary petition to be cured by amendment, or by allowing an amendment to such petition to show that the alleged bankrupt does not come within the excepted classes of persons who may not be declared bankrupt.

Appeal — necessity of raising objection below.

2. The objection of the want of evidence or findings respecting the acts of bankruptcy is not available on appeal from the adjudication of bankruptcy to creditors who only contested the proceedings on the ground of the occupation of the alleged bankrupt, and raised no objection below to the want of proof of the acts of bankruptcy, and asked no findings in respect thereto, and did not object to the findings that were made for deficiencies in that regard.

[No. 114.]

Submitted January 17, 1908. Decided February 24, 1908.

APPEAL from the District Court of the United States for the District of Porto Rico to review an adjudication of bankruptcy. Affirmed.

Statement by Mr. Chief Justice **Fuller**:

Appellees, residing in Juana Diaz, Puerto Rico, filed, on the 29th day of March, A. D. 1906, their petition in duplicate, praying that Pascasio Alvarado, also of Juana Diaz, be adjudged a bankrupt. They averred that Alvarado had, for the greater portion of six months next preceding the filing of the petition, his principal place of business at Juana Diaz, and owed debts to the amount of $1,000, and that petitioners were his creditors and had provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500, the nature and amount of each of said claims being specified.

The petition further stated "that said Pascasio Alvarado is insolvent, and that within four months next preceding the date of this petition the said Pascasio Alvarado committed an act of bankruptcy, in that he did heretofore, to wit, on the *28th day of[325] February, A. D. 1906, permit and suffer several of his creditors, to wit, Alberto Armstrong et al., to secure and obtain an advantage through legal proceedings over his creditors, in that he suffered and permitted the said —— to attach all of his properties and interest, real and personal, by virtue of a writ of fieri facias issued out of the United States district court for Porto Rico on January 20, A D. 1906, on a judgment rendered in the above said court at the January term, A. D. 1906, in favor of the said Alberto Armstrong et al., and against the said Pascasio Alvarado. And your petitioners further represent that within four months next preceding the date of this petition, the said Pascasio Alvarado did commit another act of bankruptcy in that he did heretofore, to wit, on the 14th day of March, 1906, in a letter addressed to Eduardo Fernandez, one of the petitioners, admit his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground."

Alvarado was served with process March 30, returnable April 13, and on April 24 an order was made by the clerk of the court reciting the absence of the judge from the division of the district, and referring the petition to a referee in bankruptcy in the city of Ponce and district of Puerto Rico.

On the 28th of April counsel for Armstrong, as liquidator of the firm of Boysen & Company, creditors of Alvarado, moved the referee to dismiss the petition because of the defectiveness of verification. The alleged defect was because the justice of the peace who took the jurat had omitted to attach to his signature of "justice of the peace" the words "of Juana Diaz, Porto Rico."

On the 8th of May the referee overruled a motion to amend, and dismissed the petition with costs. Afterwards he filed in the clerk's office an order, dated July 6, stating that a motion for rehearing had been granted, and setting aside the order of dismissal, at the same time directing that the amendment might be made.

Thereafter, July 16, 1906, motion was made [326]by counsel for *Armstrong and others in the district court, before the judge thereof, to set aside the order of the referee dated July 6, whereupon the court set aside the clerk's order of reference and ordered the case back for further proceedings. And then the court denied the motion of counsel for Armstrong et al., and gave the petitioning creditors until the 18th to amend their petition in the matter of the verification. On the 17th of July the amendment was made by inserting after the words "justice of the peace," at the close of the verification, the words "of Juana Diaz, Puerto Rico;" and the justice of the peace so certifying.

July 18, Armstrong's attorneys again moved to dismiss on the ground that the petition did not make the averment that the alleged bankrupt did not come within the excepted classes of persons who might not be declared bankrupt. This motion was denied by the court, and the petitioning creditors were allowed to amend in the particular named.

The amendment was made so as to aver that Pascasio Alvarado "is not a wage-earner nor a person engaged chiefly in farming or the tillage of the soil, and who is chiefly engaged in commercial business."

July 19 Armstrong and others by answer denied "the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the bankruptcy act, and that he has committed the acts of bankruptcy therein alleged."

On the same day the court heard the testimony of the petitioning creditors, Fernandez et al., "upon the issue raised by said answer." At its conclusion counsel for opposing creditors moved that the petition be dismissed, which motion was denied. Then the court heard "the testimony offered by the opposing creditors, and at the conclusion of all the testimony overrules said answer and denial, and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong et al. except."

The order of adjudication was thereupon entered.

*An appeal to this court was prayed and[327] allowed, and errors assigned to the effect that the referee in bankruptcy erred in granting a rehearing by his order of July 6; that error was committed in refusing to annul that order of the referee; that the court also erred in overruling the motion of July 18, to dismiss the petition; and that the court erred in adjudicating Alvarado a bankrupt.

The district judge filed findings of fact and conclusions of law under general order 36, as follows:

"On July 16, 1906, when the present incumbent of this bench held his first term of court at Ponce, in this district, the above-entitled matter came on for hearing, and it developed that the petition for involuntary bankruptcy had theretofore been duly filed and sent out to the referee, who, it appears, had first dismissed the petition for informality as to the verification thereof, but thereafter rescinded his order in that regard and permitted the petition to stand. On this state of affairs, Armstrong & Company, in open court, moved that the petition be dismissed for improper verification, in accordance with the first action of the referee. Other creditors resisted this motion. The court thereupon entered an order recalling the matter from the hands of the referee, and in open court permitted the verification *nunc pro tunc* to be corrected and the petition to be considered as filed, as thus amended. Then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Company, and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject. From the evidence thus adduced the following facts appear:

"That Pascasio Alvarado is now a feeble old man living at Juana Diaz, near said Ponce, with his sons, one of whom conducts his business, which it appears is being wound up; *that for more than twenty-five[328] years last past he has been engaged in conducting a large merchantile business at said place, and that he kept a stock of goods ranging from $25,000 upwards, continuously, and was well known to the wholesale merchants of Europe, and perhaps of the United States; that during the last two years he has been, or at least his sons, for him, have been, engaged in selling out the remainder of his stock of goods and in endeavoring to collect the debts belonging to the estate, in cash and in coffee and other products; that at the time the business was put into liquidation and this son took charge of it, and since, the estate was in possession, or quasi possession, of several pieces of land under mortgage, which it collected payments from in the way of portions of the coffee and other crops raised, and perhaps the estate was the absolute owner of some small portion of land itself, on which some coffee is raised. Most of the evidence thus taken is transmitted herewith, duly certified. The court, of course, had the benefit of the full record of the case and of the arguments of counsel and statements made in open court at the time.

"The court held, on this evidence, that the defendant was not a 'wage-earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes were created as a merchant, and that he could, therefore, be declared a bankrupt, and so held. From this action of the court, Armstrong & Company, who have some attachment or other liens on some of his estate, not four months old at the time of the filing of the petition, have appealed."

Messrs. **N. B. K. Pettingill** and **Harry P. Leake** submitted the cause for appellant:

Neither the referee nor the court had any jurisdiction to reinstate the cause after the order of dismissal made by the referee on May 8, 1906.

Neustadter v. Chicago Dry-Goods Co. 96 Fed. 830; Re T. L. Kelly Dry-Goods Co. 102 Fed. 747; Re Rosenberg, 116 Fed. 402.

The bankrupt act does not, of course, provide a method for obtaining a review of the actions and rulings of referees; the method thereby provided is exclusive.

Re Schiller, 96 Fed. 400; Re Russell, 105 Fed. 501; Re Hawley, 116 Fed. 429.

The occupation of the alleged bankrupt must be negatived in the petition.

Re Mero, 128 Fed. 630; Re Callison, 130 Fed. 987; Re Brett, 130 Fed. 981; Re White, 135 Fed. 199; Rise v. Bordner, 140 Fed. 566; Re Taylor, 42 C. C. A. 1, 102 Fed. 728.

The burden of proof is on the petitioning creditors to prove the allegations of their petition.

Re Pilger, 118 Fed. 206; Re McLaren, 125 Fed. 835; Re Doddy Jourdan & Co. 127 Fed. 771; Jones v. Burnham, W. & Co. 71 C. C. A. 240, 138 Fed. 986.

The allegations respecting the obtaining of an execution were altogether insufficient to constitute an act of bankruptcy, even if proved, because not only must it be alleged that execution has been issued against the bankrupt's property, but that it is within five days of sale thereunder, and the bankrupt has not yet vacated or discharged it.

Seaboard Steel Casting Co. v. William R. Trigg Co. 124 Fed. 75; Re Vastbinder, 126 Fed. 417.

As to when a person will be considered as chiefly engaged in farming, see:

Re Mackey, 110 Fed. 355; Re Hoy, 137 Fed. 175; Rise v. Bordner, supra; Wulbern v. Drake, 56 C. C. A. 643, 120 Fed. 493; Re Drake, 114 Fed. 229.

No appearance for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an appeal from a court of bankruptcy, "not within any organized circuit of the United States," from a judgment adjudging Pascasio Alvarado a bankrupt under § 24*a* and § 25*a* of the bankruptcy act, and general order 36, ¶ 3.

The errors assigned in reference to the action of the referee and of the court in permitting the amendment of the verification and other amendments we regard as without merit. The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court. We think there was no abuse of discretion here, and that the court was fully justified in its orders in reference to amendments.

Nor do we see any reason to question the conclusion of the district court "that the defendant was not a 'wage-earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes were created as a merchant, and that he could therefore be declared a bankrupt."

The appellant, Armstrong, now contends, however, that the petitioning creditors "lost sight of every controversy except that as to the occupation of the bankrupt, and that the court *later also made the same error, **[331]** as there is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged, or any act of bankruptcy whatever."

The acts alleged were that Alvarado permitted Armstrong to obtain an execution against him; and also that Alvarado admitted in a letter addressed to Fernandez "his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground."

And the record shows that the court heard testimony on behalf of Fernandez and others, petitioning creditors, as to the commission of the acts of bankruptcy as well as to the occupation of the bankrupt. The court then denied Armstrong and others' motion to dismiss, and heard testimony on their behalf, and at the conclusion of all the testimony directed the order of adjudication. From that order of adjudication this appeal was prayed, but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy, or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words, Armstrong and others permitted the findings to be made as they were, and now say that other findings should have been made in relation to proof of acts of bankruptcy, without having objected that they were not made, or that the findings as made were, on that account, fatal to the judgment. The presumption is that if such a suggestion had been made to the court, the alleged deficiencies, if really existing, could have been supplied and would have been supplied. But the record and the certificate of the judge leave no doubt that the petition as to acts of bankruptcy was sustained by the facts.

The last error assigned is that the district court erred in finding from the evidence offered on July 19, 1906, "upon the issue between said petitioning creditors and these opposing creditors, that said Pascasio Alvarado should be adjudged a bankrupt, and in so adjudging him," and that, of course, was broad enough to cover any question in-
[332] volved upon the evidence; *but we think that that was intended to cover the finding as to Alvarado's being a merchant, and not a wage-earner, etc., and therefore susceptible of being declared a bankrupt.

The findings of fact and conclusions of law made by the district judge for transmission to this court, under the general order in that regard, set forth, among other things, that, after the petition was amended, "then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Company, and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject." And from that evidence the court stated the facts which appeared, and his finding and conclusion that Alvarado was a merchant, etc.

It seems clear that the acts of bankruptcy had been previously determined as committed, and that the case was only contested on the other point, and hence that this contention is an afterthought, which ought not to be entertained, let alone that from the findings that were made it is obvious enough that Alvarado was in liquidation and might properly be adjudged a bankrupt.

Decree affirmed.

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*UNITED STATES, Plff. in Err., [333]
v.
ADRIAN H. LARKIN, Intervener and Claimant of One Ring Set with Two Cabochon Rubies and Surrounded with Eight Small Diamonds, etc.

(See S. C. Reporter's ed. 333–340.)

Error to district court — when jurisdiction is in issue.

A judgment of a Federal district court, dismissing, for want of a lawful seizure in the district, an information for the forfeiture of certain jewels alleged to have been smuggled into the United States, does not present a question respecting the jurisdiction of that court as a Federal court, which is essential to sustain the direct writ of error from the Supreme Court of the United States authorized by the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, when the jurisdiction of the lower court is in issue.

[No. 356.]

Argued January 7, 8, 1908. Decided February 24, 1908.

IN ERROR to the District Court of the United States for the Northern District of Ohio to review a judgment dismissing, for want of a lawful seizure in the district, an information for the forfeiture of certain jewels alleged to have been smuggled into the United States, which judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit. Dismissed for want of jurisdiction.

Statement by Mr. Chief Justice **Fuller**:

This was an information filed on behalf of the United States June 8, 1905, in the district court for the northern district of Ohio, for the forfeiture of certain jewels which, it was set forth, had been fraudulently imported into the United States without the payment of duty, and that, upon May 19, 1905, the jewels so smuggled had been seized by Charles F. Leach, collector of the district of Ohio, within the said district.

July 5, 1905, Adrian H. Larkin, being interested as a claimant, *came in, and, enter- [334]

NOTE.—On direct review in Federal Supreme Court of judgments of district and circuit courts, see note to Gwin v. United States, 46 L. ed. U. S. 741.

ing his appearance specially, filed his plea therein to the jurisdiction of the court below to adjudicate the forfeiture of said jewels. To this plea a demurrer was filed, which, upon argument, was overruled. A reply to the plea was then filed, and to this reply Larkin demurred, and the demurrer was sustained. The government, declining to amend its reply or plead further, the court, May 22, 1906, sustained the plea and dismissed the information.

The district judge expressed the opinion that, "considering the circumstances under which the collector of customs obtained possession of the articles of jewelry which are the subject of this action, as shown by the statement of facts, and especially by the receipt which the collector gave for them, it is quite apparent that no seizure of them could be made in this district."

The United States prayed an appeal to the United States circuit court of appeals for the sixth circuit, which was allowed, and the appeal was duly prosecuted. April 5, 1907, a judgment was entered by that court affirming the decision of the United States district court, and an opinion was filed, which is reported in 82 C. C. A. 247, 153 Fed. 113. The mandate from the circuit court of appeals and the opinion of that court were filed below May 7, 1907.

On the same day Larkin applied to the district court for an order for the delivery of the property to him. Before this was acted on the United States, May 21, 1907, petitioned that court for a writ of error from the Supreme Court of the United States, which was allowed notwithstanding the proceedings and judgment in the circuit court of appeals, and the court certified "that the judgment and decree herein was based solely on the ground that the district court of the United States for the northern district of Ohio, on the facts as they appear by the record, had no jurisdiction in the premises."

It appeared from the pleadings that the articles against which this proceeding in forfeiture was begun were illegally imported through the port of New York, and were [335] subsequently *found in the state of New York and in the possession of Larkin as bailee. They had been pledged to one Friend, and he, learning that a claim had been made that the articles had been illegally and surreptitiously imported through the port of New York, visited the Secretary of the Treasury and disclosed his possession of the same and his rights, and agreed with the Secretary that the same should be kept in the city of New York, open to the inspection and examination of any official of the Department. Friend, not being himself a resident of New York, placed them in the custody of Larkin as bailee and attorney, with authority to conduct any transactions with the Treasury Department growing out of the claim that they had been fraudulently imported.

At the request of the Department, Mr. Leach, collector of customs at Cleveland, went to New York for the purpose of examining the articles and determining by inspection whether they had been illegally imported and whether they were subject to seizure and forfeiture. He applied to Larkin to be allowed an inspection, and this was permitted.

The plea then stated that Leach informed said Larkin that certain of said jewelry had not been wrongfully imported and that he did not care to make further examination thereof, but that certain of said pieces he was in doubt about and would like to exhibit them to a person located in New York city, who was expert in such matters, for his opinion, and asked permission to take the jewelry away from Larkin's office for that purpose, he agreeing to return the same to Larkin at his office, in New York city, on the afternoon of that day. Thereupon Larkin, relying upon the promise and agreement of Leach, delivered the property into his possession and custody, receiving from Leach a receipt therefor in writing, which read: "New York, March 14, 1905. Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification:" (Then followed list of jewelry.) The receipt was signed "Chas. F. Leach, Collector of Customs."

The plea then averred that Leach, in violation of his agreement, *carried the articles [336] to Cleveland. That from there he returned certain articles to Larkin as not subject to seizure, and assumed to seize the remainder at Cleveland, and then caused this proceeding in forfeiture to be instituted in the district court for the northern district of Ohio. After demurrer to the plea had been overruled, the district attorney replied; but, in the view taken of the case, it is unnecessary to restate the contents of that reply. The district judge said: "An examination of the reply discloses practically the same question as that which was heretofore presented on the demurrer to the plea." The circuit court of appeals held the reply to be evasive, and not to deny the substantial averments of the plea, and said: "We quite agree with the court below that, under the circumstances of this case, these jewels were not subject to seizure in Cleveland, but should have been seized in the district of New York. The articles were found in the latter district, and should have been there seized."

Assistant Attorney General **Sanford** argued the cause and filed a brief for plaintiff in error:

The adjudication that the district court did not acquire jurisdiction by reason of the fact that there was no lawful seizure within the district, brought in issue the jurisdiction of the court, within the meaning of § 5 of the judiciary act of 1891.

The analogous rule is well settled that, in actions *in personam*, the question whether the court acquired jurisdiction of the defendant by proper service of process upon him is one involving the jurisdiction of the court, within the meaning of § 5 of that act.

Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

Likewise in Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293, it was held that the action of the circuit court in dismissing an action of ejectment on the ground that the particular land in dispute was not of sufficient value to give the court jurisdiction was reviewable by this court under § 5 of the court of appeals act.

Mr. **H. H. McKechan** argued the cause for defendant in error. Messrs. A. C. Dustin, and Hoyt, Dustin, & Kelley filed a brief for defendant in error:

This court has no jurisdiction to entertain this action, for want of a proper certificate of the issue of jurisdiction in the court below.

Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; The Bayonne, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; Merritt v. Bowdoin College, 169 U. S. 551, 42 L. ed. 850, 18 Sup. Ct. Rep. 415; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Davis v. Geissler, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634.

It must appear either that the question of jurisdiction was certified to this court, or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681.

The record also should show an intention to appeal to the Supreme Court on the ground of jurisdiction.

The Bayonne, supra.

While by searching the record in this case the court would find, on the facts set forth in the pleadings and the opinion of the court, that the case was disposed of below on the ground that no lawful seizure could be made in that district (whether that constitutes jurisdiction will be argued under the next head), yet the court will not search the record.

Van Wagenen v. Sewall, 160 U. S. 373, 40 L. ed. 461, 16 Sup. Ct. Rep. 390.

Where several questions are presented to the court below, the sole question of jurisdiction must be certified with great particularity; where there is in reality only one question, and that one of jurisdiction. it must be made to appear, in the absence of a formal certificate, from the decree itself, without searching the record, that the court below decided the case on that ground, and that alone.

Van Wagenen v. Sewall, supra; Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. 15 Sup. Ct. Rep. 570; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Chappell v. United States and Excelsior Wooden Pipe Co. v. Pacific Bridge Co. supra.

This case is not one where the jurisdiction of the court below was in issue within the meaning of § 5 of the judiciary act.

Louisville Trust Co. v. Knott. 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

*Mr. Chief Justice **Fuller** delivered the opinion of the court: [338]

The question is presented at the threshold of the case as to whether or not the proceedings in the circuit court of appeals for the sixth circuit and the judgment therein rendered were absolutely void for want of jurisdiction. If they were not, this writ of error cannot be maintained, as judgments of the circuit courts of appeals cannot be reviewed in this way.

Plaintiffs in error grounded their application as coming within the first of the classes of cases enumerated in § 5 of the judiciary act of 1891, in which appeals or writs of error may be taken directly to this court, and which reads: "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." [26 Stat at

L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

The word "jurisdiction," as used in that paragraph, is, as Judge Taft said in United States ex rel. Mudsill Min. Co. v. Swan, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647, applicable to "initial questions of the jurisdiction of a United States district or circuit court, whether in law or equity, over the subject-matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular Federal jurisdiction for adjudication;" and it has long been settled that it is the jurisdiction of the United States courts as such which is referred to. Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211.

Ordinarily a formal certificate is essential, and it must be made at the same term as that at which the judgment is rendered. Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866. But where the record shows that the only matter tried and decided in the circuit court was one of jurisdiction, and the petition upon which the writ of error was allowed asked only for a review [339] of the judgment that the court *had no jurisdiction of the action, the question of jurisdiction alone is sufficiently certified. Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Smithers v. Smith, 204 U. S. 632, 51 L. ed. 656, 27 Sup. Ct. Rep. 297; Petri v. F. E. Creelman Lumber Co. 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293. The formal certificate in this case was not made at the term at which judgment was rendered, and came too late; but the judgment itself was rendered upon the holding that there was no lawful seizure in the Cleveland district, and there must be such a seizure in order to sustain the jurisdiction of that particular district court. Rev. Stat. § 734, U. S. Comp. Stat. 1901, p. 586. Doubtless this was no case for a certificate, and the judgment itself proceeded on the ruling as to the existence of seizure at Cleveland. District courts are the proper courts of the United States to adjudicate forfeiture, and the question involved was not the jurisdiction of the United States courts as such, but whether this district court had jurisdiction or the district court for the southern district of New York.

It was not, and could not be, contended that some district court of the United States was not the proper court to adjudicate on the question of forfeiture, but, to make a case within the jurisdiction of a particular district court, there must be a lawful seizure within that district. The district court held here that there was no seizure in the Cleveland district, and dismissed the information for that reason. That question was submitted on error to the circuit court of appeals for the sixth circuit, and the judgment of the district court was affirmed. The question, therefore, of the right of the collector to seize these particular goods in Cleveland, has been finally determined, and no reason is perceived for holding that the circuit court of appeals did not have jurisdiction to render its judgment. Whether that judgment was correct or not is therefore not open to consideration on this writ.

Where the question of the jurisdiction of the circuit or district court of the United States as a court of the United States is in issue, and is certified to this court under § 5 of the act of 1891, *whereby no other [340] question can be considered, our jurisdiction is exclusive (American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646); but this is not necessarily so as to the other classes of cases enumerated in that section. And as to these classes it has been repeatedly held that the act of 1891 did not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts (McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Columbus Constr. Co. v. Crane Co. 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174).

Inasmuch as, in our opinion, the controversy here did not involve the jurisdiction of the district court as a Federal court, the case was appealable to the circuit court of appeals, and the writ of error from this court directly cannot be maintained.

Writ of error dismissed.

GEORGE DICK, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 340–359.)

Intoxicating liquors — bringing into Indian country.

1. The words, "Indian country," as used

in U. S. Rev. Stat. § 2139, as amended and re-enacted by the act of July 23, 1892 (27 Stat. at L. 260, chap. 234), forbidding the introduction of intoxicating liquors into such country, do not, standing alone, embrace territory in which, at the time, the Indian title had been extinguished, and over which, with its inhabitants, the jurisdiction of the state, for all purposes of government, was full and complete.

Indians—power of Congress over ceded and allotted lands — commerce in intoxicating liquors.

2. The stipulation in the agreement of May 1, 1893, between the United States and the Nez Percé Indians, that the Federal laws prohibiting the introduction of intoxicating liquors into the Indian country shall, for a period of twenty-five years, apply to the lands thereby ceded to the United States and to those retained by the Indians and to those allotted to them in severalty, was a valid regulation, based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was not an invasion of the sovereignty of the state of Idaho, which had, by the act of 1890 (26 Stat. at L. 215, chap. 656), been admitted into the Union upon an equal footing with the other states.

[No. 62.]

Submitted December 3, 1907. Decided February 24, 1908.

IN ERROR to the District Court of the United States for the District of Idaho to review a conviction for having introduced intoxicating liquor into the Indian country. Affirmed.

The facts are stated in the opinion.

Mr. **Frank E. Fogg** submitted the cause for plaintiff in error:

There can be, in police matters, no such thing as a divided sovereignty.

Re Heff, 197 U. S. 505, 49 L. ed. 855, 25 Sup. Ct. Rep. 506.

It cannot be successfully maintained that Congress, by the act of ratifying the agreement with the Nez Percés, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor. The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

The contention of the government that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and, at the same time, deny to the state the right to subject them to the same complete and inclusive police control that it may its other citizens—is untenable.

Re Celestine, 114 Fed. 553; Re Now-ge-zhuck, 69 Kan. 410, 76 Pac. 880.

The jurisdiction of the United States is limited to the protection of the lands allotted from alienation or encumbrance, and, incidentally, perhaps, the protection of the improvements upon said lands.

Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; United States v. McBratney, 104 U. S. 621–624, 26 L. ed. 869, 870.

The government contends that the United States has jurisdiction because of a clause in the treaty or agreement with the Nez Percés Indians, ratified on the 3d day of May, 1893, providing, in substance, that the laws of the United States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years.

Congress was without constitutional authority to authorize such an agreement with the Indians, or to ratify the clause in question. The effect of such an agreement would be to establish a divided sovereignty of certain definite territory, and deprive the state of full police control of its own citizens within its own territory. It would seem further that, in so far as it attempted to provide for the future police control of the territory ceded, the clause is void for the additional reason that it amounts to the government bartering with its own citizens to place a limitation upon its future policy in regard to matters of mere police regulation.

Boyd v. Alabama, 94 U. S. 650, 24 L. ed. 304; New York & N. E. R. Co. v. Bristol, 151 U. S. 567, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; Holden v. Hardy, 169 U. S. 392, 42 L. ed. 791, 18 Sup. Ct. Rep. 383.

Attorney General **Bonaparte** and Mr. **William R. Harr** submitted the cause for defendant in error:

It was competent for Congress to stipulate that the lands ceded by the Nez Percés should be subject, for a definite period, to the laws of the United States, regulating the introduction of liquor into the Indian country.

Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 197, 198, 23 L. ed. 848.

The power of the United States to deal with the Indians is the same, whether exercised by law or treaty. A treaty has no superior force or sanctity to an act passed in pursuance of the Constitution. Both are equally declared to be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. An act of Congress may repeal a treaty, and *vice versa.* Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623. Whether a given subject within the jurisdiction of the United States shall be regulated by law or treaty depends upon the exigencies of the case. But, whatever the form of the exercise of the power, both are equally potent.

Congress has the right to attach conditions and limitations to its grant of citizenship and subjection to state jurisdiction so far as the property of an Indian is concerned.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Re Heff, 197 U. S. 509, 49 L. ed. 857, 25 Sup. Ct. Rep. 506; Ex parte Viles, 139 Fed. 68.

Mr. Justice **Harlan** delivered the opinion of the court:

By indictment returned in the district court of the United States for the district of Idaho, the plaintiff in error, Dick, was charged with the offense of having unlawfully and feloniously introduced intoxicating liquor—whisky—into the Indian country, to wit, into and upon the Nez Percé Indian Reservation, in the county of Nez Percé, state of Idaho.

The indictment was based upon § 2139 of the Revised Statutes as amended and reenacted by the act of July 23d, 1892 (27 Stat. at L. 260, chap. 234). That amended section reads: "No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the *Indian country.* Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the *Indian country* shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. . . ."

The accused demurred to the indictment upon the following *among other grounds; **[342]** That at the time charged in the indictment there was no Indian country within the county of Nez Percé or within the district of Idaho, known or designated as the Nez Percé Indian Reservation; that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as the Nez Percé Indian Reservation was, by the act admitting Idaho as a state into the Union, relinquished to the state of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the state, been extinguished by the allotment of the lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that such allotments and purchase have been ratified by the public laws and acts of Congress; and further, that the former reservation, known and designated as the Nez Percé Indian Reservation, had, prior to the time of the commission of the acts mentioned in the indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in the indictment, settled and appropriated by citizens of the state; that various townsites within the boundaries of the former reservation had been settled by citizens, and the title thereto transferred from the United States to the inhabitants, and that municipal governments, namely, villages, had been organized and were in existence within the boundaries of the former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in the indictment, Indian country, or lands reserved for the use and occupation of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the authority *or control in nature of the guardianship of **[343]** the person. Other grounds of demurrer were assigned, but they need not be here set out.

The demurrer was overruled, and the case went to trial, the accused pleading not guilty. At the close of the evidence he asked the court to direct a verdict of not guilty, but that request was denied and the result of the trial was a verdict of guilty. Motions for arrest of judgment and for a new trial having been denied, the defendant was, on May 16th, 1905, sentenced to pay a fine of

$100 and costs and to be imprisoned in the penitentiary for the term of one year and ten days.

In order that the grounds of the demurrer may be clearly apprehended it is necessary to bring into view certain legislation by Congress and an agreement or treaty made between the United States and the Nez Percé Indians.

By the act of Congress of February 8th, 1887, chap. 119, providing for the allotment of lands in severalty to Indians on the various Indian reservations, and to extend the protection of the laws of the United States and the territories over the Indians, it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same, by patent, to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, That the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expira- [344] tion of the time above *mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; . . ." 24 Stat. at L. 389, § 5.

Section 6 of that act is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Idaho was admitted into the Union in 1890 (26 Stat. at L. 215, chap. 656), the act of admission containing no provision about Indian lands or reservations. But the Constitution of Idaho, which Congress accepted, ratified, and confirmed, contained this provision: "And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or *held by any Indians or [345] Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." [Amendments, art. 21, § 19.]

In the act of August 15th, 1894, chap. 290 (28 Stat. at L. 286, 326, 327, 330), making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes, will be found the provisions of an agreement between the Nez Percé tribe of Indians upon the Lapwai Reservation in Idaho, from which it appears that in making that agreement the parties proceeded under the authority of the above act of 1887. By that agreement the Indians ceded, sold, relinquished, and conveyed to the United States all their claim, title, and interest in and to all the unallotted lands within the limits of that reservation, except certain specified tracts, which they retained. The parties stipulated that the land so ceded should not be open for public settlement until trust patents for the allotted lands had been duly issued and recorded and the first payment made to the Indians. Article 9 of that agreement has a particular bearing upon this case. It reads: "It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the Nez Percé Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Percé Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians." The agreement by its terms was not to take effect and be in force until ratified by Congress. It was accepted, ratified, and confirmed by the above act of August 15th, 1894, chap. 290.

From the above statement it appears—

That the lands allotted in severalty to Indians in conformity with the act of February 8th, 1887, were to be held for the period of twenty-five years by the United States in [350] trust for the sole *use and benefit of the Indian allottee or his heirs, when a formal patent was to be issued by the United States to the Indian or his heirs in fee, free from all charge or encumbrance whatever,—such period subject to be extended by the President, in his discretion.

That upon the completion of the allotments and patenting of the lands to the allottees, as in that act provided, every member of the respective bands or tribes of Indians to whom allotments have been made was to have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which he resided; also, that every Indian born within the United States, to whom an allotment was made under the act of 1887 or under any treaty, and every Indian born within the United States who had voluntarily taken up within such limits his residence, separate and apart from any Indian tribe, and adopted the habits of civilized life, was declared to be a citizen of the United States and entitled to all the rights, privileges, or immunities of such citizen; and

That by the agreement of 1893 with the Indians the lands thereby ceded, those retained, *and* those allotted to the Nez Percé Indians, were to be subject for the period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Percé Indian allottees, whether under the care of an Indian agent or not, should for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to the Indians. It also appears that at the date of such agreement it was made an offense against the United States, punishable by fine and imprisonment, for anyone either to sell, exchange, give, barter, or dispose of ardent spirits, ale, beer, wine or intoxicating liquor of any kind to any Indian under charge of an Indian superintendent or agent, or to introduce or attempt to introduce ardent spirits, ale, beer, wine, or intoxicating liquor of any kind into the Indian country.

There are certain facts which the accused insists are decisive in his favor. They are as follows:

*1. That the village of Culdesac, although [351] within the boundaries of the Nez Percé Reservation as established before Idaho was admitted into the Union, was, at the time specified in the indictment, an organized village or town of that state.

2. The accused, Dick, is a Umatilla Indian who, at the date of the offense, held, and for three years had held, an allotment in severalty and also what is called a trust patent. On or about the 13th of March, 1905, he purchased at Culdesac five bottles of whisky, the contents of two bottles of which he and some other Indians drank up. Part of the money paid for the whisky was furnished by Te-We-Talkt, a Nez Percé Indian, living on the Nez Percé Reservation and holding an allotment and also a preliminary trust patent. Dick gave one bottle of the whisky to Te-We-Talkt, but afterwards it was taken from the latter by the superintendent and acting agent of the Nez Percé Indians. The purchasing of the whisky, the giving of the one bottle to Te-We-Talkt, and the taking of that bottle from the latter all occurred within the limits of the village of Culdesac. Nothing happened in relation to the transaction outside of the village. The superintendent of the Nez Percé Indians testified: "I do not know of any reservation or any part of the reservation used for government purposes or for Indian purposes within the boundary of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is 7 or 8 miles from the exterior boundaries of the Indian school reservation."

3. The lands upon which the village of Culdesac is located were part of those ceded to the United States by the agreement of 1893 with the Indians, and before the above transaction in that village about whisky occurred the title to such lands had passed by patent from the United States under the town-site laws to the probate judge of Nez Percé county, in trust for the inhabitants of the village. 72 C. C. A. 667, 141 Fed. 5, 7.

We need not stop to consider the scope, meaning, or validity of that part of amended § 2139 of the Revised Statutes which makes it an offense against the United States to sell, exchange, *give, barter, or dis- [352] pose of ardent spirits, ale, beer, wine, or intoxicant liquors "to any Indian under charge of any Indian superintendent or agent." No case is here for trial under that clause of the statute; for the only charge in the indictment is that the accused unlawfully and feloniously introduced intoxicating liquors into the "Indian country."

Section 2139, as amended and re-enacted in 1892, makes it an offense against the United States for anyone to introduce intoxicating liquors into the "Indian country," and the offense charged against Dick was the introduction by him of whisky into that country on the 15th day of March, 1905. The transaction out of which the present prosecution arose occurred, as we have seen, within the village of Culdesac, a municipal organization existing under and by virtue of the laws of Idaho, and the parties involved in it were Dick and Te-We-Talkt, who were at that time Indian allottees in severalty and holders of trust patents, and therefore, according to the decision in Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, citizens of the United States. If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words "Indian country" to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the state, for all purposes of government, was full and complete. Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396.

But this case does not depend upon the construction of the Federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Percé Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Percé Indians, and those retained as well as those allotted [353] to the Indians (which embraced all *the lands in the original reservation) should be subject, for the limited period of twenty-five years, to all Federal laws prohibiting the introduction of intoxicants into the Indian country.

Now, the principal contention of the accused is that the United States has no jurisdiction for purposes of local police control over lands within a state which are owned in fee by white citizens of such state, although they may have been once the property of an Indian tribe, and were acquired by the United States subject to the condition that the acts of Congress relating to a named subject should remain in force, for a prescribed period, over such territory. We could not allow this view to control our decision without overruling former decisions, the correctness of which, so far as we are aware, has never been questioned. In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a state, upon its admission into the Union, is thereafter upon an equal footing with every other state and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any state within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the state has over all persons and things within its jurisdiction. So, the authority of the state cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

At the date of the agreement of 1893 with the Nez Percé Indians the reservation upon which they lived was their *property, and [354] they and their lands were subject to Federal jurisdiction, although the lands of that reservation were within the limits of the state of Idaho, which had been previously admitted into the Union upon an equal footing with other states. The future of those lands was a matter to be determined primarily between the Indians owning them and the United States, under whose exclusive jurisdiction, at that time, were both the Indians and their lands. The Indians—such is the fair interpretation of the agreement—desired to retain some of their lands, but were willing to cede a part of them to the United States, to be allotted in severalty to men of their tribe, provided the lands then constituting the reservation, "those ceded, those retained, *and* those allotted" to the Nez Percé Indians, were protected by the Federal laws prohibiting the introduction of intoxicants into the Indian country. We may assume that they particularly had in mind the lands allotted in severalty, because the allottees, after receiving preliminary trust patents, would become citizens of the United States, and it was necessary that the Indians remaining on the unallotted and retained lands should be protected against the pernicious influences that would come from having the allotted lands used by citizens of the United States as a storehouse for intoxicants. Only the authority of the United States could have adequately controlled the conduct of such citizens. If intoxicants could be kept upon the lands of the allottees in severalty, it is easy to perceive what injury would be done to the Indians living on the other lands, who, in order to obtain intoxicating liquor, could go regularly or frequently to the places near by, on some allotted lands, where intoxicants were stored for sale or exchange. Therefore, the provision in the agreement, by which the lands allotted in severalty, as well as those retained and ceded, were made subject (not for all time, but only for a limited period, reasonable in duration) to any Federal statute forbidding the introduction of intoxicants into the Indian country, was one demanded by the highest considerations of pub-[355]lic policy, whether we look to the *proper government of the Indian tribes by the United States or to the safety and happiness of the Indians themselves.

This question, as to the validity of article 9 of the agreement of 1893, is, we think, concluded by principles announced in former decisions in this court. A leading case is that of United States v. 43 Gallons of Whisky (United States v. Lariviere) 93 U. S. 188, 193, 195, 197, 23 L. ed. 846-848. That was a libel of information by the United States against a lot of whisky seized and sought to be forfeited by virtue of an act of Congress, approved June 30th, 1834 [4 Stat. at L. 729, chap. 161], and amended March 15th, 1864 [13 Stat. at L. 29, chap. 33]. The liquors were introduced into an organized village of the state of Minnesota, which village was located upon territory that had been ceded to the United States by a treaty made in 1863 and proclaimed in 1864 with certain bands of Indians. The case proceeded upon the ground that the carrying of the whisky into the Minnesota village was in violation of an existing act of Congress, making it a crime to introduce spirituous liquors or wines into the "Indian country." The treaty with the Indians, which was involved in that case, provided that the statutes of the United States prohibiting the introduction and sale of spirituous liquors into the Indian country should be the law throughout all the country ceded, until otherwise directed by Congress or the President. In that case the contention was that the place where the whisky was found was not Indian country; that it ceased to be such when the territory was transferred to the United States; and that the extension, by force alone of the Indian treaty, of the Federal laws relating to lands in an organized county of the state was an infringement of the state's lawful jurisdiction and an invasion of its sovereignty, the state having been admitted into the Union upon an equal footing with the original states.

This court said: "The Red Lake and Pembina band of Chippewa Indians ceded to the United States, by treaty, concluded October 2, 1863 [13 Stat. at L. 667], a portion of the lands occupied by them, reserving enough for their own use. The 7th article is in these words: 'The laws of the United States now in force, *or that may hereafter[356] be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded until otherwise directed by Congress or the President of the United States.' The ceded country is now part of an organized county of the state of Minnesota; and the question is whether the incorporation of this article in the treaty was a rightful exercise of power. If it was, then the proceedings to seize and libel the property introduced for sale in contravention of the treaty were proper, and must be sustained. Few of the recorded decisions of this court are of greater interest and importance than those pronounced in Cherokee Nation v. Georgia, 6 Pet. 1, 8 L. ed. 25, and Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483. Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equaled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of a state within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the states, and providing that intercourse and trade with *the Indians should be carried on solely[357] under the authority of the United States.

Congress very early passed laws relating to the subject of Indian commerce, which were, from time to time, modified by the lessons of experience. . . . The power is in nowise affected by the magnitude of the traffic or the extent of the intercourse. As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it, and why cannot Congress forbid its introduction into a place *near by, which they would be likely to frequent?* It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it, and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions should country adjacent to their reservations be used to carry on the liquor traffic with them."

After referring to United States v. Holliday, 3 Wall. 409, 18 L. ed. 182, in which it was held that Congress could regulate commerce with the individual members of Indian tribes, the court proceeded: "The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the 'Indian country' that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, if there was no cession, they were already sufficiently protected by the extent of their reservation. Under such [358] circumstances *it was natural that they should be unwilling to sell until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other states. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the states, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without states' lines. Based, as it is, exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of state equality."

The result in that case was that the whisky was forfeited because illegally introduced, in violation of the treaty with the Indians, and this notwithstanding the place in which it was found and seized was within a state.

In Bates v. Clark, 95 U. S. 204, 208, 209, 24 L. ed. 471-473, the court said that Indian lands ceased, without any further act of Congress, to be Indian country after the Indian title had been extinguished, but it took care to add the qualifying words, "unless, by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case." Referring to the treaty involved in the case of the 43 Gallons of Whisky, the court further said: "When this treaty was made, in 1864, the land ceded was within the territorial limits of the state of Minnesota. The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made, *by reason of the special clause to the contrary in the treaty, though within the boundaries *of a state.* It follows from [359] this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*" See also Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 561, 27 L. ed. 1030, 1032, 3 Sup. Ct. Rep. 396.

Following our former decisions, we adjudge that the agreement between the United States and the Nez Percé Indians, whereby the Indian lands ceded, retained, and allotted to the Nez Percé Indians should be subject (not without limit as to time, but only for twenty-five years) to any Federal statutes prohibiting the introduction of intoxicants into the Indian country, was not liable to objection on constitutional grounds; in which case the demurrer to the indictment was properly overruled, and the plaintiff in error rightfully convicted.

In view of some contentions of counsel and of certain general observations in the case of 43 Gallons of Whisky, above cited, not necessary to the decision of that case, but upon which some stress has been laid, it is well to add that we do not mean, by anything now said, to indicate what, in our judgment, is the full scope of the treaty-making power of Congress, nor how far, if at all, a treaty may permanently displace valid state laws or regulations. We go no further in this case than to say that the requirement, in the agreement of 1893, that the Federal liquor statutes protecting the Indian country against the introduction of intoxicants into it should, for the limited period of twenty-five years, be the law for the lands ceded and retained by, as well as the lands allotted to, the Nez Percé Indians, was a valid regulation, based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians, and was not inconsistent, in any substantial sense, with the constitutional principle that a new state comes into the Union upon entire equality with the original states. The judgment must, for the reasons stated, be affirmed.

It is so ordered.

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[360]*ATLANTIC TRUST COMPANY, Petitioner,
v.
EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal & Irrigation Company, et al.

(See S. C. Reporter's ed. 360-378.)

Receivers — expenses of receivership — liability of person procuring appointment.

The trustee in a mortgage of the property of a canal and irrigation company, who brings a suit for foreclosure and sale, and obtains the appointment of a receiver to take charge of and manage the property *pendente lite*, does not, by reason of such action, become personally liable for money borrowed, expenses incurred, and certificates issued by the receiver under orders of the court, in keeping the corporation on its feet as a going concern, which the proceeds of the sale proved insufficient to pay.

[No. 109.]

Argued January 15, 16, 1908. Decided February 24, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, on a second appeal, affirmed a decree of the Circuit Court for the Northern District of California, holding a complainant in a suit to foreclose a mortgage personally responsible for the expenses incurred by a receiver appointed on his motion, which the proceeds of the sale of the property proved insufficient to pay. Reversed and remanded for further proceedings.

See same case below, 76 C. C. A. 396, 145 Fed. 820.

The facts are stated in the opinion.

Mr. **Stanley W. Dexter** argued the cause, and, with Mr. Edward B. Whitney, filed a brief for petitioner:

The circuit court was without power to compel the complainant to pay the deficit of a receivership which was, in all respects, regular, after final judgment in complainant's favor.

Farmers' Loan & T. Co. v. Oregon P. R. Co. 31 Or. 237, 38 L.R.A. 424, 65 Am. St. Rep. 822, 48 Pac. 706.

A receiver is an agent of the court, and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed.

Booth v. Clark, 17 How. 322, 331, 15 L. ed. 164, 167; Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 236, 34 L. ed. 341, 346, 10 Sup. Ct. Rep. 1013; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 97, 36 L. ed. 632, 637, 12 Sup. Ct. Rep. 787; Texas & St. L. R. Co. v. Rust, 5 McCrary, 348, 17 Fed. 282; Central Trust Co. v. Wabash, St. L. & P. R. Co. 23 Fed. 863; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 278.

The receiver thus being the agent of the court, and not the agent of either party, there is no legal principle upon which his contract may be treated as the contract of either party.

Turner v. Peoria & S. R. Co. 95 Ill. 146, 35 Am. Rep. 144; McCurdy v. Bowes, 88 Ind. 585.

There is no one personally liable for the payment of receiver's certificates.

Beach, Receivers, § 416.

Such a certificate is payable solely from the funds of the receivership, and there is no responsible principal back of them, to be made liable in case of default.

Smith, Receiverships, § 287; High, Receivers, § 398c, e; 30 Am. L. Rev. 162.

In England, where receivers' certificates do not seem to be used, the receivers are personally liable, unless special arrangements are made to the contrary. They are indemnified out of the fund; but the idea that the parties applying for receivers are personally liable upon any theory seems never to have suggested itself.

Kerr, Receivers, London ed. 1900, pp. 195, 208; Burt v. Bull, [1895] 1 Q. B. 279.

The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the court by whose authority they were issued.

Beach, Receivers, § 416.

The holders of these certificates must see to it that, in the order distributing the purchase money, the proper provision is made for their redemption; because, if once the property is sold, and the court makes a final decree without providing for the payment of the certificates, there is, in some sort, an end of the matter. The receiver cannot then be sued; the court has no longer either the suit or the property under its control, and is powerless to compel payment of such obligations.

Beach, Receivers, § 418; Anderson, Receivers, § 344.

The certificates may not follow the property out of the court. But they constitute a charge upon it in the particular cause, enforceable in this court, and must be satisfied or provided for before the property or the proceeds of it, after the sale, shall pass out of its control. The certificates are not debts of the company, but of the receivers, backed by the pledged faith of the court that the property on the proceeds of which they are charged is in its possession, subject to be, and that it will be, disposed of by it for the payment of them.

Meyer v. Johnston, 53 Ala. 349.

The most that can be predicated of them is that they are evidence in the hands of the holder that he is entitled to receive from the fund under the control of the court that authorized its officer to issue them the amount specified, if the fund is sufficient to pay in full all holders of such certificates; or, if it is not sufficient, then only a *pro rata* share with other holders.

Turner v. Peoria & S. R. Co. 95 Ill. 145, 35 Am. Rep. 144.

A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the questions as to who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership.

Kneeland v. American Loan & T. Co. 136 U. S. 89, 98, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950.

Costs of this kind, in absence of a statute, should, in all cases, be governed by equitable considerations; and, upon the case now presented, the equities are with the petitioner.

Chapman v. Atlantic Trust Co. 56 C. C. A. 61, 119 Fed. 257; Farmers' Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142; Espuela Land & Cattle Co. v. Bindle, 11 Tex. Civ. App. 262, 32 S. W. 582; Wills Valley Min. & Mfg. Co. v. Galloway, 139 Ala. 276, 35 So. 850; 1 Foster, Fed. Pr. 3d ed. 718.

It appears that the bulk of the certificates were not regarded at the time as being issued for the benefit of the complainant, but as issued for the benefit of those other persons whom the receiver was bound equally to consider; namely, that portion of the public for whose benefit the canals and ditches and laterals and dams had been constructed and up to that time maintained. In such a case the receiver is not appointed for the benefit of either of the parties, but of all concerned. Davis v. Gray, supra. *Non constat* but had the parties both asked an abandonment of the irrigation service *pendente lite*, the court might have considered it in the public interest to disregard their wishes. Indeed, probably it would have refused any such request; and the receiver is the bailiff of the court, deriving no authority from the parties (24 Am. & Eng. Enc. Law, 2d ed. p. 26; Union Nat. Bank v. Bank of Kansas City; Quincy, M. & P. R. Co. v. Humphreys; and Texas & St. L. R. Co. v. Rust,—supra; Central Trust Co. v. Wabash, St. L. & P. R. Co. 23 Fed. 868; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. supra); nor could the company, prior to the receivership, have abandoned the irrigation work without subjecting itself to suit on behalf of the farmers of the vicinage (see Baldwin, Am. Railroad Law, 41, 491, 492; Union P. R. Co. v. Hall, 91 U. S. 343, 354, 23 L. ed. 428, 432).

The receiver is estopped by his own laches from seeking to recover from complainant.

Stumpf v. Hallahan, 101 App. Div. 383, 91 N. Y. Supp. 1062; Patterson v. Hewitt, 195 U. S. 309, 317–319, 49 L. ed. 214, 217, 218, 25 Sup. Ct. Rep. 35; 18 Am. & Eng. Enc. Law, 2d ed. p. 97; Hoyt v. Latham, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; New York v. Pine, 185 U. S. 93, 99, 46 L. ed. 820, 823, 22 Sup. Ct. Rep. 592; Curtis v. Lakin, 36 C. C. A. 222, 94 Fed. 251; McMurray v. Noyes, 72 N. Y. 523, 28 Am. Rep. 180; Townsend v. Vanderwerker, 160 U. S. 171–186, 40 L. ed. 383–388, 16 Sup. Ct. Rep. 258; 2 Pom. Eq. Jur. § 816; Simmons v. Burlington, C. R. & N. R. Co. 159 U. S. 278, 291, 40 L. ed. 150, 154, 16 Sup. Ct. Rep. 1.

In all cases where a complainant has been charged personally with the expenses of a receivership, he was held to be in some way in the wrong.

Pittsfield Nat. Bank v. Bayne, 140 N. Y. 331, 35 N. E. 630; French v. Gifford, 31 Iowa, 428; McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168; Link Belt Machinery Co. v. Hughes, 195 Ill. 413, 59 L.R.A. 673, 63 N. E. 186; Beach v. Macon Grocery Co. 11 Am. Bankr. Rep. 104; Couper v. Shirley, 21 C. C. A. 288, 44 U. S. App. 586, 75 Fed. 168; Cutter v. Pollock, 7 N. D. 631, 76 N. W. 235; Highley v. Deane, 168 Ill. 266, 48 N. E. 50; St. Louis v. St. Louis Gaslight Co. 87 Mo. 223; Ferguson v. Dent, 46 Fed. 98; Elk Fork Oil & Gas Co. v. Foster, 39 C. C. A. 615, 99 Fed. 495; Tome v. King, 64 Md. 166, 21 Atl. 279; Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177; Knickerbocker v. McKindley Coal & Min. Co. 67 Ill. App. 291; Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436; Wills Valley Min. & Mfg. Co. v. Galloway, 139 Ala. 276, 35 So. 850.

The circuit court had no jurisdiction, after the final decree of foreclosure and sale, to make any new disposition of the costs of the suit, as by charging any portion personally upon the complainant.

The decree of foreclosure and sale is the final decree in the cause.

Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Whiting v. Bank of United States, 13 Pet. 6, 10 L. ed. 33; Forgay v. Conrad, 6 How. 201, 203, 204, 12 L. ed. 404–406.

A decree is final which settles all the rights of the parties, and leaves nothing to be done but to make the sale and pay out the proceeds.

Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 431, 27 L. ed. 237, 238, 1 Sup. Ct. Rep. 414; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Missouri, K. & T. R. Co. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640, 2 Sup. Ct. Rep. 9.

Mr. **Edgar C. Chapman**, *in propria persona*, argued the cause and filed a brief for respondents:

The circuit court has power to compel petitioner to pay the deficit of the receivership.

Knickerbocker v. McKindley Coal & Min. Co. 67 Ill. App. 295; Pacific Bank v. Madera Fruit & Land Co. 124 Cal. 525, 57 Pac. 462; Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177; Chapman v. Atlantic Trust Co. 56 C. C. A. 61, 119 Fed. 270.

A final decree is not conclusive as to the receiver who is not a party to the litigation.

Bosworth v. St. Louis Terminal R. Asso. 174 U. S. 187, 43 L. ed. 943, 19 Sup. Ct. Rep. 625; Chapman v. Atlantic Trust Co. supra; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Whiting v. Bank of United States, 13 Pet. 6, 10 L. ed. 33; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Pacific Bank v. Madera Fruit & Land Co. supra; Beach, Receivers, § 796; State v. Gibson, 21 Ark. 140; Ireland v. Nichols, 40 How. Pr. 85; Whiteside v. Prendergast, 2 Barb. Ch. 471; Field v. Jones, 11 Ga. 418; Garniss v. Superior Court, 88 Cal. 415, 26 Pac. 351.

A receiver has the right to appeal from an order refusing to settle his final and supplemental accounts, and from an order discharging an order to show cause why the deficit of a receivership should not be charged to the complainant personally.

Bosworth v. St. Louis Terminal R. Asso. 174 U. S. 183, 43 L. ed. 941, 19 Sup. Ct. Rep. 625.

Mr. Justice **Harlan** delivered the opinion of the court:

The principal question in this case—now before us upon writ of certiorari for the review of a final order of the circuit court of appeals for the ninth circuit—is stated by counsel to be this: Is a complainant who has, in good faith, prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?

The Woodbridge Canal & Irrigation Company, a corporation of California, executed July 17th, 1891, a mortgage conveying all its property and franchises to the Atlantic Trust Company, a New York corporation, in trust to secure certain bonds, with interest coupons attached, issued by the mortgagor company for the purpose of raising money to fully complete and equip its canal and headworks, and of paying its indebtedness then existing or to be subsequently incurred. The bonds were made payable with interest semiannually at the office of the trust company in the city of New York.

In the event of default in the payment of semiannual interest of the bonds for six months, or of any tax or assessment for the same period, the trustee and its successors were authorized, on the written request of the majority of the holders of the outstanding bonds, or, if the principal of the bonds shall be due, upon the request of the holders of outstanding bonds, to take actual possession of the mortgaged property. and, by themselves or agents, hold, use, and en- [365] joy *the same, and from time to time make repairs, replacements, alterations, additions, and improvements as fully as the company might have done before such entry, and receive all tolls, income, rent, issues, and profits arising from the property. The trustee and its successor or successors were authorized, on such default, to sell the mortgaged property at public auction, after at least two months' notice, and execute to the purchaser or purchasers a deed in fee simple, or otherwise, for all the right, title, interest, and estate reversionary or in possession which they might be entitled to receive, have, or hold of the company, such sale to be a complete bar against the company, its successors or assigns, and all persons claiming from or under it.

The mortgage made provision as to the disposal of moneys received from tolls, income, profits, etc., and provided that, "nothing herein shall be construed as limiting the right of the trustee to apply to any competent court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said trustee, or its successor, may, in its discretion, so proceed."

The Canal & Irrigation Company, having made default in the payment of the principal and interest due on its bonds, its board of directors, by formal action, recognized their inability to meet its obligations, and requested the trustee to bring the present suit for the foreclosure of the mortgage, and enforce the payment of the principal and interest of the bonds. The bringing of the suit was also in conformity with the written request of the owners and holders of fifty-five of the outstanding bonds, who expressed their election and option that the principal of the bonds should forthwith become due and payable.

The bill filed by the trust company prayed: 1. That a receiver be appointed to take charge of the mortgaged property and to maintain and operate the canals pending the suit and until sale under a judgment of foreclosure. 2. That the court ascertain the number and amount of outstanding [366] bonds, fix *the compensation of the receiver and his attorney, and that the plaintiff have judgment against the Canal & Irrigation Company, for the amount due for principal and interest on the bonds, and for attorney's fee, trustee's commissions, costs, and expenses of the suit. 3. That the mortgaged property be sold at public auction, and that out of the proceeds the expenses of sale, costs of suit, trustee's commissions, and counsel fees be paid, the balance to be applied in payment of outstanding bonds.

The court, on motion of the trust company, the Canal & Irrigation Company appearing and consenting thereunto, appointed E. C. Chapman receiver of the mortgaged property, with authority to take possession of it. The receiver was empowered by the order of court to continue the operation of the main and branch canals of the mortgagor company in the usual and ordinary way as the same were then operated, discharging, so far as practicable, contracts for water supplies entered into by the company, collecting rents, tolls, moneys payable under water contracts, keeping the property in good condition and repair, employing needful agents and servants at such compensation as he deemed reasonable, paying for needful labor, supplies, and materials as might seem to him to be necessary and proper in the exercise of a sound discretion, "with leave to apply to the court from time to time, as he may be advised, for instructions in the premises." "He shall," the order proceeded, "do whatever may be needful to preserve and maintain the corporate franchises of said defendant corporation and its rights to the use of the water and all its property, until final judgment in this action, and to defray the necessary and proper expenses incident thereto." The above order was made October 3d, 1894.

In the progress of the cause the receiver, upon his own motion, and not, so far as the record shows, by direction of the plaintiff, applied to the court and obtained its authority to borrow money and issue certificates, which were used by him in the operation of the property, paying debts, etc.

*Certain parties were permitted to inter- [367] vene, and the litigation lingered until September 18th, 1897, when a decree of foreclosure and sale was entered, nearly three years after the receiver was appointed. There was great difficulty in effecting a sale, partly because of the washing away of a dam. Finally, a bid of $21,000 by one Thompson, acting on behalf of the receiver and his attorneys, was accepted. That amount was just enough to cover the fees of the receiver and his counsel and the expenses of the sale, and to make a small *pro rata* payment on the accrued interest on receiver's certificates. This left unpaid all other expenses and certificates of the receiver. The sale was confirmed August 15th, 1898, and the commissioner was directed to deliver a deed for the property.

The order confirming the sale directed the clerk of the court to report the balance remaining unpaid on account of the fees of officers or appointees of the court, or of advances made by them, and on account of receiver's certificates, time checks, or other expenses of the receiver's administration. The order also directed the receiver to render an account of his receipts, disbursements, and expenses in the management and care of the property between the date of the decree of foreclosure and the date of the sale and transfer of possession.

The clerk made the required report, from which it appeared that the proceeds of sale, $21,000, were absorbed by these claims: Compensation of receiver, $9,000; receiver's attorneys, $9,000, and fees of commissioner, master, advertising, etc., $3,000. He further reported that of the amounts found due by the decree of foreclosure of September 18th, 1897, there remained unpaid, on the following accounts, these sums: Receiver's certificates, $12,292.47; receiver, for advance made by him, care, and management of property, $3,105.72; time checks issued by receiver, $5,728.89; work done for receiver, $2,269.85; expenses of operating canal system, $5,728.54; other sums, $13,723.49; total, $42,848.96.

On the 3d of August, 1899, nearly five years after the appointment of the receiver, **[368]**he filed his final report and petition, *in which he prayed that the balance due him on account of his receipts and disbursements after the making of the decree, also the balance due to his employees after the making of the report upon which the decree was based, and the compensation to be allowed to him and his counsel since the date of the decree, be fixed and established by the court, and judgment entered "*against the plaintiff* in this cause for the full amount of the deficiency hereinbefore stated, with the sum so allowed for services and expenses since the date of said decree, and that the proper process of court be issued for the collection thereof from plaintiff, and that, when collected, the same be paid into court, to be by the court disbursed to the several persons entitled thereto."

The petition alleged that the Canal & Irrigation Company was insolvent and unable to respond to any judgment for deficiency that had been or might be entered in the cause. Upon this report and petition being filed, the circuit court ordered the trust company to show cause why the amount due the receiver and his employees should not be settled and allowed, and why judgment for such deficiency should not, when ascertained, be entered against that company and it be required to pay the same into court.

The trust company appeared and demurred to the receiver's report and motion for judgment against it. The circuit court, after hearing, sustained the demurrer and discharged the rule to show cause. Upon appeal to the circuit court of appeals the order of the circuit court was reversed, the former court being of opinion that the trust company was liable to a personal judgment for the alleged deficiency. Chapman v. Atlantic Trust Co. 56 C. C. A. 61, 119 Fed. 257.

The grounds upon which the circuit court and the circuit court of appeals, respectively, proceeded, appear in the margin.†

*Upon the return of the case to the cir- **[369]** cuit court the trust company filed its answer to the receiver's petition, and the cause was submitted, by consent, as upon bill and answer, on *the issues joined by the **[370]** receiver's final report and petition and the answer of the trust company. In conformity with the opinion of the circuit court of appeals, the circuit court gave personal

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†Circuit court—Judge Morrow: "I am of the opinion that provisions should have been made when this suit was commenced, or at the time when the receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the court, and I am of the opinion that the court is without authority to do so now. In Farmers' Loan Co. v. Oregon P. R. Co. 31 Or. 237, 38 L.R.A. 424, 65 Am. St. Rep. 822, 48 Pac. 706, this question was fully considered, and the views there expressed are in accord with my opinion in the present case."

Circuit court of appeals—Judge Ross: "Those who render services in and about the receivership are justly entitled to be paid the fair value of such services, and when the issuance of receiver's certificates becomes necessary for the proper preservation of the property, and such certificates are authorized by the court to be issued by the receiver for money to be used for such purposes, those who buy the obligations are entitled to have them paid. How? In cases like the present, out of the property or its proceeds, certainly. No one, we apprehend, will question that. But the property having been sold for but a trifle more than the amount theretofore allowed the receiver and his attorney for their services in and about the receivership, and they credited with such allowance on their bid, who is to suffer? The complainant, at whose instance the receiver was appointed, or those who, relying upon his acts, based upon the authority and sanction of the court, invested their money and rendered their services in and about the operation and preservation of the property? It is not difficult to determine on which side of this question are the equities. With due deference we are unable to see any force in the suggestion of the supreme court of Oregon in the case cited that, as the complainant in such a suit has no control over the re-judgment against that company for $36,207.57, as the amount due the receiver. That judgment was affirmed by the circuit court of appeals. Atlantic Trust Co. v. Chapman, 76 C. C. A. 396, 145 Fed. 820.

We are of opinion that the court of appeals erred in holding that the trust company was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In Booth v. Clark, 17 How. 322, 331, 15 L. ed. 164, 167, it was said: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, [371] pending the suit, where *it does not seem reasonable to the court that either party should do it. Wyatt, Practical Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan (Ir.) 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Verplanck v. Mercantile Ins. Co. 2 Paige, 452." In Porter v. Sabin, 149 U. S. 473, 479, 37 L. ed. 815, 818, 13 Sup. Ct. Rep. 1008, 1010, the court said: "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it,"—citing Wiswall v. Sampson, 14 How. 52, 65, 14 L. ed. 322, 328; Peale v. Phipps, 14 How. 368, 374, 14 L. ed. 459, 461; Booth v. Clark, 17 How. 322, 331, 15 L. ed. 164, 167; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013; Thompson v. Phenix Ins. Co. 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019. Ought the receiver, in this case, to have been authorized to burden the property with indebtedness on account of money borrowed or on account of certificates which should become a first lien? Ought some limit have been put on expenses of that kind? These were matters to be determined by the court, in the light of all the circumstances. It was for the court to say whether the Canal & Irrigation Company should

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ceiver, if he be held liable for the expenses of the receivership, in the event the property prove insufficient to pay them, he may be bankrupted. At the same time it is conceded by that learned court that where it appears probable that the property will prove insufficient, the court may require, as a condition to the appointment of a receiver, a guaranty of the payment of the expenses of such officer, and a like guaranty subsequently, on pain of the discharge of the receiver, when it becomes evident that the property will prove insufficient to pay the expenses. The theory of this manifestly is, that in these two instances the complainant can inform himself of the probable outcome of the property, and if he be not willing to give the guaranty he will not secure the appointment of a receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things must and should be held to have much better information regarding the value of the property and its probable outcome than the court. Indeed, it is not easy to see how the court can be properly expected to know anything about it. The appointment of a receiver, if made at all, is usually made at the request of the complainant,—occasionally, as in the case at bar, with the consent of the defendant. If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the court to make the appointment, incur the liabilities, and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and whenever it became unwilling to further stand good for any deficiency, to ask the court to bring to an end the business it undertook and was conducting on complainant's petition." [56 C. C. A. 72, 119 Fed. 268.]

be kept on its feet by moneys borrowed or obtained, under its orders, by the receiver. The wishes of the parties could not control as to such matters. Indeed, they need not in strictness have been consulted as to what should be done from time to time in the management of the property. If the situation was such as to render it uncertain or [372]doubtful whether the property *would ultimately bring, at a sale, enough to meet the expense incurred in connection with its management, the court might well have declined to permit its receiver to issue certificates or to borrow any money on the property as security for its payment. So, if the condition and apparent prospects of the property made such a course proper, the court, in the exercise of a sound judicial discretion, and looking to the interests of all who might be affected by its action, could, at the outset, have made it a condition of the appointment of a receiver that the plaintiff and those whom it represented should be liable for any deficiency in the funds required for the expenses of the receivership; or it might have made it a condition of any order authorizing receiver's certificates or the borrowing of money, that the plaintiff, or those whom it represented, should make good any deficiency that might be disclosed after applying the proceeds of the sale according to the rights of parties. Still further, the court—if it had been proper, under all the circumstances, to pursue such a course—could have refused to operate the canals in question at all, and required the parties to proceed to a final decree of foreclosure and sale at the earliest practicable moment. But none of these things were done. Under the responsibility imposed upon it by law, the court determined to carry on the business of the Canal & Irrigation Company for a time; and, under the same responsibility, it authorized the receiver to borrow money, issue receiver's certificates, and incur expenses, without any security for indebtedness incurred in this way, except the property or the fund in the control of the court, and the good faith, discretion, and care of the court in its administration. No other security seems to have been contemplated by the court or the receiver or any party to the cause. No hint or warning was given, in the progress of the cause, that the absent trustee was to be liable in the event that the property or fund under the control of the court proved insufficient to meet the expenses of the receivership. The trust company, it is true, invoked the jurisdiction of the court by bringing this suit for [373]foreclosure and sale and *making a motion for the appointment of a receiver to hold and manage the property *pendente lite.* That, surely, the trust company had the right to do, but it did not thereby make itself ultimately liable for money borrowed and receiver's certificates issued by order of the court. The one person who was in a position to inform the court from time to time of the condition and probable value of the property, and of what was or what seemed to be necessary in order to preserve it for the parties interested in it, was its officer and representative, the receiver. It was at his instance and because of his report of the condition and needs of the property, that money was borrowed and certificates issued in order that expenses incurred in the administration of the property might be met. To hold the trust company liable for indebtedness thus created would be most inequitable, and would not, we think, be in accord with sound principle.

It is true that cases are cited in which the party bringing a suit in which a receiver is appointed has been held liable for expenses incurred by the receiver in excess of the proceeds arising from the sale of the property. But in most, if not in all, of those cases, the circumstances were peculiar and were such as to make it right and equitable, in the opinion of the court, that that should be done. As, for instance, in Ephraim v. Pacific Bank, 129 Cal. 589, 592, 62 Pac. 177, 178, in which arose a question as to the party to whom a receiver should look for reimbursement or payment of his expenses, the court recognized the fact that the general rule that the compensation of a receiver was a charge upon the fund in his hands did not apply without qualification to every case, and said: "If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed; and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was *unauthorized and[374] conferred upon him no right to charge it with any expenses." In Farmers Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142, the supreme court of Minnesota said: "The second proposition is that, a receiver being an officer of the court, subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. The parties to the action are not personally liable therefor, unless they have given a bond or other contract to pay them as a condition of the appointment or continuance of the receiver. This may be conceded to be correct as a general rule, but there are cases where the court will, if the fund in court be insufficient to give the receiver reasonable compensation and indemnity, require the parties at whose instance he is placed in possession of the property to pay him. Johnson v. Garrett, 23 Minn. 565; Knickerbocker v. McKindley Coal & Min. Co. 67 Ill. App. 293; High, Receivers, § 796. The special facts of this case fully justify the order of the trial court. It is not a case where the party asking for the appointment of a receiver is required to pay the receiver's charges without having received any benefit from the receivership. It is a case where the benefits so received were more than five times as great as the amount required to be paid. . . . The order of the court requiring the appellant to pay the receiver is, in effect, the enforcement of the receiver's equitable right to be paid from a fund growing out of the receivership." In Cutter v. Pollock, 7 N. D. 631, 634, 76 N. W. 235, 237, the supreme court of North Dakota, speaking by its chief justice, said: "We do not believe that any case can be found to uphold the palpably unjust rule that one who is shown to have had no right to maintain the action, and no interest whatever in the property which he claims, can require that the defendant, who has paid out of his own pocket the expenses of a receivership, shall not call upon him (the plaintiff in the action) for reimbursement." See High, Receivers, 3d ed. § 796; Beach, Receivers, § 774.

The above cases relied upon in the circuit court of appeals—[375]*and others of like kind could be cited—proceeded upon their special facts. They do not, in our judgment, authorize the order made by that court, although they tend to support the rule that cases *may* arise in which, because of their special circumstances, it is equitable to require the parties, at whose instance a receiver of property was appointed, to meet the expenses of the receivership, when the fund in court is ascertained to be insufficient for that purpose. Here, it is not asserted that the plaintiff trustee was not in the exercise of his strict rights when bringing a suit for foreclosure and sale and asking that the property be put in possession of a receiver. It gave no assurances as to the probable value of the property or of the profits to arise from its management. It misled no one who loaned money to the receiver, or who purchased the certificates. It acted as an ordinary litigant, submitting to the action of the court in all particulars. We do not think that the mere insufficiency of the property or fund to meet the expenses of a receivership entitled the receiver to hold the plaintiff in the suit personally liable, if all that could be said was that he instituted the suit and moved for the appointment of the receiver to take charge of the property and maintain and operate it pending the suit. A receiver, as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters, from time to time, under the order of the court, are, in a substantial sense, the contracts and engagements of the court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in the possession of the court, and not liabilities of the parties. They have no authority over him and cannot control his acts.

When neither the order appointing a receiver nor the order authorizing him to borrow money and issue certificates were conditioned upon the plaintiff's (in a suit for foreclosure and sale) being liable for the expenses of the receivership, and when no special circumstances appear which, upon equitable principles, would authorize the court to fix liability upon the plaintiff *for such expenses, the general rule [376] should be applied which makes such expenses a charge upon the property or fund under the control of the court, without any personal liability therefor upon the part of the plaintiff, who invoked the jurisdiction of the court. The mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit by obtaining the relief asked,—namely, a decree of foreclosure and sale.

The considerations which, in our judgment, should control in cases like this, are well stated by the supreme court of Oregon in the above case of Farmers' Loan Co. v. Oregon P. R. Co. 31 Or. 237, 38 L.R.A. 424, 65 Am. St. Rep. 822, 48 Pac. 706. That, it is true, was the case of a railroad receivership, but what is said is equally applicable to other quasi-public corporations having public duties to perform, as in the case of water and irrigation companies. The particular question in that case was whether the plaintiff in a suit brought to foreclose a railroad mortgage could be held liable for the wages of employees of the receiver, who had no funds with which to pay them, having exhausted his power to float receiver's certificates. After observing that the plaintiff at whose instance a receiver is appointed thereby consents to the absolute control and management of the mortgaged property by the court and its agents, and to the priority of claims for the expenses incurred in its operation and management, and after declaring that it was not perceived upon what ground it could be claimed that, because the expenses of the receivership were allowed, without any fault of his, to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition, the court in that case proceeded to say that the plaintiff "has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. [377] Such a *rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, 'shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order. 30 Am. L. Rev. 161; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 399. If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it become apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employees must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They *are the employees and servants [378] of the court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

Without further elaboration, or further citation of authorities, we adjudge that the final orders of the circuit court and of the circuit court of appeals, whereby the trust company was held liable to make good the deficiency found to exist in the funds required for the expenses of the receivership, were erroneous. Those orders must be set aside, and the petition of the receiver, so far as it seeks to impose such liability on the plaintiff, must be dismissed. To that end the decree is reversed and the cause remanded for such proceedings as will be consistent with this opinion and be in conformity with law.

Reversed.

Mr. Justice **McKenna** did not sit in this case.

COSMOPOLITAN CLUB, Plff. in Err.,
v.
COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 378-386.)

Constitutional law — impairing contract obligations — revoking corporate charter.

1. The obligation of the contract between the state and a social club, arising out of the mere granting of the club's charter, is not impaired by the revocation of such charter, which, under Va. act March 12, 1904, p. 214, chap. 116, automatically followed a judgment that such club was being conducted for the purpose of violating and evading the laws of the state regulating the licensing and sale of liquors.

Constitutional law — due process of law — revoking corporate charter.

2. Due process of law is not denied a social club by the revocation of its charter, which, under Va. act of March 12, 1904, automatically followed a judgment of a court of competent jurisdiction, rendered with all

the parties before it, after giving full opportunity to be heard, that such club was being conducted for the purpose of violating and evading the laws of the state regulating the licensing and sale of liquors.

[No. 130.]

Argued January 23, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment denying a writ of error to review a judgment of the Corporation Court of the City of Norfolk, in that state, that a social club was being conducted for the purpose of violating and evading the laws of the state regulating the licensing and sale of liquors. Affirmed.

The facts are stated in the opinion.

Mr. **R. Randolph Hicks** argued the cause and filed a brief for plaintiff in error:

Since the decision of the case of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, this court has uniformly held that charters of incorporation are within the protection of the provision of the Constitution of the United States, prohibiting the passage of laws impairing the obligations of contracts.

The courts have modified this doctrine to the extent that it does not deprive the state of any of its police power, nor deprive it of the right of forfeiting a charter for misuser or nonuser.

Boston Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. ed. 992.

But the legislature could not take away the contractual rights as set out in the charter of incorporation, as a punishment for the misuse of the privilege of selling intoxicating liquors, granted by a subsequent act of the legislature, when those contractual rights were perfectly innocent, not inhibited by the statute, nor even subject to inhibition by the legislature.

Cooley, Const. Lim. 6th ed. p. 710; Washington Bridge Co. v. State, 18 Conn. 53; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; State v. Noyes, 47 Me. 189; Pingry v. Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Miller v. New York & E. R. Co. 21 Barb. 513; People v. Jackson & M. Pl. Road Co. 9 Mich. 307; Sloan v. Pacific R. Co. 61 Mo. 24, 21 Am. Rep. 397; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425.

If this conclusion is not correct, then the legislature may, at any time, destroy any charter by prohibiting some one power in the charter, which is properly a subject of police regulation, and imposing as a punishment the destruction of all the other innocent rights, and thus do indirectly what it cannot do directly. Undoubtedly the contract evidenced in the charter may be forfeited like any other contract by nonuser or misuser, in regard to matters which are of the essence of the contract between the corporation and the state.

Dartmouth College v. Woodward, 4 Wheat. 658, 4 L. ed. 664; State ex rel. Dilworth v. Council Bluffs & N. Ferry Co. 11 Neb. 356, 9 N. W. 564; Com. v. Commercial Bank, 28 Pa. 389; Hodsdon v. Copeland, 16 Me. 314.

But this misuser must be a misuser or nonuser of the rights granted in the charter, which was not the case with plaintiff in error.

Mr. **William A. Anderson** argued the cause and filed a brief for defendant in error:

It was competent for the state to annul the charter and franchises of the corporation for "malfeasance, abuse, or misuse" of its franchises.

Green's Brice, Ultra Vires, p. 786; London v. Vanacre, 12 Mod. 271; Peter v. Kendal, 6 Barn. & C. 703; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Dartmouth College v. Woodward, 4 Wheat. 518–563, 4 L. ed. 629–641; Mumma v. Potomac Co. 8 Pet. 281–287, 8 L. ed. 945–948; 2 Morawetz, Priv. Corp. § 1024; 5 Thomp. Corp. §§ 6609–6615; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 346, 347, 46 L. ed. 936, 942, 22 Sup. Ct. Rep. 691; Com. v. Union F. & M. Ins. Co. 5 Mass. 230, 4 Am. Dec. 50; People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; Eel River R. Co. v. State, 155 Ind. 456, 57 N. E. 388.

In the exercise of its police power, one of the attributes of sovereignty still remaining to the states, the state governments may regulate and control the manufacture and sale of ardent spirits within their territorial limits, may prohibit the same, and may make and punish infractions of their statutes in this behalf, as crimes, or by such penalties sanctioned by the lawmaking power of the state as may be appropriate to the end desired to be reached.

License Cases, 5 How. 504–631, 12 L. ed. 256–313; Mugler v. Kansas, 123 U. S. 623, 658, 659, 664, 670–674, 31 L. ed. 205, 209–211, 213–215, 8 Sup. Ct. Rep. 273.

The violation, by an incorporated social club, of a law forbidding the sale of intoxicating liquors to its members, is such an abuse and misuse of its charter powers and franchises as to furnish legal cause for the annulment of its charter.

State v. Easton Social, Literary, & Musical Club, 73 Md. 97, 10 L.R.A. 64, 20 Atl. 783; Eureka Club v. Com. 105 Va. 564, 54 S. E. 470.

No Federal question is presented in this case.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 346, 350, 46 L. ed. 936, 942, 943, 22 Sup. Ct. Rep. 691; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Foster v. Kansas, 112 U. S. 201-206, 28 L. ed. 629-697, 5 Sup. Ct. Rep. 8, 97.

Mr. Justice **Harlan** delivered the opinion of the court:

Complaint having been made in due form that the Cosmopolitan Club, a corporation of Virginia, formed to promote social intercourse, athletic and physical culture, and to encourage manly sports, had violated and evaded the laws of that commonwealth regulating the licensing and sale of liquors, the corporation court of the city of Norfolk, where the club had its domicil, gave notice that it would, on a named day, inquire into the truth of the charge.

The proceeding was based on a statute of Virginia passed March 12th, 1904, amendatory of a previous statute, and providing that "upon complaint of any person that any such corporation so chartered as a social club is being conducted, or has been conducted, for the purpose of violating or evading the laws of this state regulating the licensing and sale of liquors, and after service of such complaint on such corporation at least ten days before the hearing of said complaint, the circuit court of the county or the corporation court of the city wherein is located its place of business or meeting, or the judge thereof in vacation, shall in-[382]quire into the truth of said complaint; *and if the court, or judge in vacation, shall adjudge that the said corporation is being conducted, or has been conducted, for the purpose of violating or evading the laws of the state regulating the licensing and sale of liquors, the chartered rights and franchises of said corporation shall cease and be void without any further proceedings, and the said corporation and all persons concerned in the violation or evasion of said law shall be subject to the penalties prescribed herein."

At the hearing of the case the club, by its counsel, moved to dismiss the complaint on the ground that, under the Constitutions of Virginia and of the United States, the court had no power to entertain it, and that the act under which it was filed was contrary to those Constitutions. The motion to dismiss was overruled and the parties introduced their evidence. The result was a judgment by the corporation court that the club had been conducted for the purpose of violating and evading the laws of Virginia regulating the licensing and sale of liquors. The defendant then applied to the supreme court of appeals of Virginia for a writ of error and supersedeas. The latter court, upon inspection of the record, refused the application upon the ground that the judgment was plainly right. The president of that court allowed a writ of error for the review of its judgment by this court.

It is contended by the plaintiff in error that the judgment against it was inconsistent with the contract clause of the Constitution of the United States. The charter of the club, it is insisted, was a contract between it and Virginia, which could not be amended or annulled unless, at the time it was granted, the state, by constitutional provision or by legislative act, had retained or reserved the right of repealing, forfeiting, or modifying it. Neither the state Constitution nor any statute, it was alleged,—and we assume such to be the fact,—contained any such reservation at the time the club's charter was granted.

Assuming that the charter of the club constituted a contract between it and the state, it would not follow that the statute *of[383] Virginia, enacted in 1904, after the granting of such charter, was inconsistent with the clause of the Constitution forbidding a state from passing any law impairing the obligation of a contract. The principle is well established that the charter of a private corporation may be forfeited or annulled for the misuse of its corporate privileges and franchises, and that its forfeiture or annulment by appropriate judicial proceedings, for such a reason, would not impair the obligation of the contract arising between the state and the corporation out of the mere granting of the charter. In Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 580, 28 L. ed. 1084, 1087, 5 Sup. Ct. Rep. 681, 683, an insurance company contested the validity, under the contract clause of the Constitution, of a statute of Illinois prescribing certain regulations (not in force when the company's charter was granted) in reference to the conduct of life insurance business in that state. This court overruled the contention, observing: "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. Terrett v. Taylor, 9 Cranch, 43, 51, 3 L. ed. 650, 653; Angell & A. Priv. Corp. 9th ed. § 774, note. Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created. Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Com. v. Farmers & M. Bank, 21 Pick. 542, 32 Am. Dec. 290; Commercial Bank v. [384] *State, 4 Smedes & M. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with a duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These principles were expressly reaffirmed, upon a review of the adjudged cases, in New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 347, 46 L. ed. 936, 942, 22 Sup. Ct. Rep. 691.

It must, therefore, be held that the contract between the club and the state did not authorize the club to disregard the valid law of the state regulating the licensing and sale of liquors. Such a course upon the part of the club was alleged to be a misuse of its corporate privileges and franchises. The distinct charge against the club in the corporation court was that it was being conducted for the purpose of violating and evading the statute regulating the licensing and sale of liquors,—a statute which the commonwealth could rightfully enact under its power to care for the health and morals of its people. And the court adjudged that the charge against the club was sustained,—the result being that, by the statute, the chartered rights and franchises of the club ceased without any further proceedings. Even if this court could re-examine the judgment of the corporation court on the facts, the present record would not justify us in holding that error was committed.

Was this result consistent with the due process enjoined by the Constitution? This question must be answered in the affirmative. The proceedings against the club were had in a *court competent under the Constitution [385] and laws of Virginia to determine the questions raised by the complaint against the club. This must be assumed to be the case after the highest court of Virginia refused a writ of error, upon the ground that the judgment of the corporation court was plainly right. The mode of proceeding against the club was not unusual in such cases. As early as Terrett v. Taylor, 9 Cranch, 43, 51, 3 L. ed. 650, 653, this court said: "A private corporation created by the legislature may lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture." So, in New Orleans Waterworks Co. v. Louisiana, above cited, the first of several questions raised there was that, since the charter of a certain waterworks company prescribed mandamus as the remedy to maintain a lawful tariff of water rates, was not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of the property without due process of law, and a denial of the equal protection of the laws? The court answered the question by saying: "The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the state court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by quo warranto at the suit of the state, through its attorney general. The claim that, by so proceeding, there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation. An examination of this question, among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question."

It thus appears that the club ceased to exist as a corporation *in virtue of a judgment [386] of a court of competent jurisdiction, all the parties being before it and given full opportunity to be heard. Such a judgment cannot be held to have violated any right belonging to the club under the contract or other clause of the Federal Constitution. Foster v. Kansas, 112 U. S. 201, 206, 28 L. ed. 629, 697, 5 Sup. Ct. Rep. 8, 97; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; New Orleans Waterworks Co. v. Louisiana, above cited.

Judgment affirmed.

JACOB BASSING, Plff. in Err.,
v.
PHILO V. CADY, Sheriff of Bristol County, State of Rhode Island.

(See S. C. Reporter's ed. 386–393.)

Appeal — record.

1. Papers or documents used at the hearing in the court below cannot, in strictness, be examined on appeal to, or writ of error from, the Federal Supreme Court, unless they are made part of the record by bill of exceptions or some other proper mode.

Extraditing twice for same offense.

2. A second indictment for the same offense may serve as the basis for the second extradition of a person as a fugitive from justice without violating any rights secured to him by the Federal Constitution or laws, where the first indictment, on which the accused was originally extradited, was dismissed on motion of the state's attorney before the accused was placed in jeopardy.

Extradition — who is fugitive from justice.

3. A person indicted the second time for the same offense is none the less a fugitive from justice within the meaning of U. S. Const., art. 4, § 2, and Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, governing extradition, because, after the dismissal of the first indictment, on which he was originally extradited, he left the state with the knowledge of, or without objection by, the state authorities.

[No. 426.]

Argued January 8, 1908. Decided February 24, 1908.

IN ERROR to the Superior Court of the State of Rhode Island to review a decree discharging a writ of habeas corpus to inquire into a detention under an extradition warrant. Affirmed.

The facts are stated in the opinion.

Mr. **Edward D. Bassett** argued the cause, and filed a brief for plaintiff in error:

The plaintiff in error is not a fugitive from justice within the meaning of article 4, § 2, of the Constitution of the United States, and § 5278 of the Revised Statutes.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291;

NOTE.—As to right of Federal Supreme Court to review questions not involved in the record—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 576.

Who are fugitives from justice, for purposes of extradition.

The decisions as to the necessity, for extradition purposes, of the actual presence of the accused in the demanding state, and the insufficiency of a merely constructive presence at the time of the alleged commission of the offense, having already been set forth in a note to Hyatt v. New York, 47 L. ed. U. S. 657, the present note will include only cases involving other aspects of the question.

To be a fugitive from justice within the meaning of the act of Congress, it is not necessary that the person charged should have left the state in which the crime is alleged to have been committed after indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having, within a state, committed that which, by its laws, constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction, and is found within the territory of another state. Robters v. Reilly, 116 U. S. 97, 29 L. ed. 549, 6 Sup. Ct. Rep. 291; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122; Ex parte Brown, 28 Fed. 653; Re Keller, 36 Fed. 681; Re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; Hughes v. Pflanz, 71 C. C. A. 234, 138 Fed. 980; Depoilly v. Palmer, 28 App. D. C. 324; Ex parte Dickson, 4 Ind. Terr. 481, 69 S. W. 943; State ex rel. Burner v. Richter, 37 Minn. 436, 35 N. W. 9; Hibler v. State, 43 Tex. 197.

His motive in leaving the state where the offense was committed is immaterial (Re Bloch, 87 Fed. 981); and his departure need not be secret or sudden, with a consciousness of his having committed an offense, or in apprehension of being charged therewith (Johnson v. Ammons, 6 Ohio Dec. Reprint, 747).

The belief of the accused, when leaving the demanding state, that he had not committed any crime against the laws of that state, does not prevent his being a fugitive from justice. Appleyard v. Massachusetts, supra.

To the authority above arrayed one case only is opposed,—Degant v. Michael, 2 Ind. 396,—in which it was held that to be a fugitive from justice a person must have left the state in which he committed the crime for the purpose of escaping punishment for it.

Under the act of Congress the accused may insist upon proof that he was in the demanding state at the time he was alleged to have committed the crime charged, and

Streep v. United States, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282; Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, ante, 121, 28 Sup. Ct. Rep. 58.

He has afforded an opportunity to the state of New York to prosecute him for his alleged offense, being returned on former extradition proceedings, and has been within the jurisdiction of that state several times since the commission of his alleged offense was known.

Kingsbury's Case, 106 Mass. 227.

He has complied with the purpose and spirit of the Constitution and statute, and his continued residence in Rhode Island should be protected from action on the part of the state of New York, branding him as a fugitive from justice.

Appleyard v. Massachusetts and Illinois ex rel. McNichols v. Pease, supra.

His delivery to the state of New York on the first extradition warrant gave the demanding state rightful possession of his person, and it could lawfully subject him to criminal process for the offense charged.

Streep v. United States, supra; Bruce v. Rayner, 62 C. C. A. 504, 124 Fed. 481.

And the state of New York could then have prosecuted him for that or any other offense it had against him, or acted toward him as it saw fit.

Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687.

Leaving the state of New York with express assent and knowledge of its authorities negatives the fact that he is a fugitive from justice.

Re Tod, 12 S. D. 386, 81 N. W. 637; Patterson's Case, 2 Moore, Extradition, § 569.

Mr. **J. Jerome Hahn** argued the cause and filed a brief for defendant in error:

The number of extraditions which may be issued is in the discretion of the executive, the sole requirement for interstate extradition being "simply that having, within a state, committed a crime, he (the petitioner) has left its jurisdiction, and is found within the territory of another when it is sought to subject him to criminal process."

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, ante, 121, 28 Sup. Ct. Rep. 58; 2 Moore, Extradition, p. 933; Re White, 45 Fed. 239.

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subsequently withdrew from her jurisdiction so that he could not be reached by her criminal process. If the accused had in fact never been in the demanding state, he could not be said to have fled from its justice. Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148.

The fact that a person has been indicted for an offense which, in its own nature, implies the actual presence of the offender within the jurisdiction of the demanding state, is sufficient prima facie evidence of his having fled from justice when found within another state.

Leary's Case, 6 Abb. N. C. 67.

A person who commits a crime within the state, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded as a fugitive from the justice of such state, whose laws he has infringed. Re Voorhees, 32 N. J. L. 141.

The fact that a person has committed a crime in one state and has been found in another establishes conclusively that he is a fugitive from justice. Re Strauss, 63 C. C. A. 99, 126 Fed. 327; Ex parte Edwards (Miss.) 44 So. 827; People ex rel. Draper v. Pinkerton, 17 Hun, 199.

One who goes into a state and commits a crime and then returns home is a fugitive from justice. Re Roberts, 24 Fed. 132; Re Adams, 7 Law Rep. 386; Re Hess, 5 Kan. App. 763, 48 Pac. 596; Kingsbury's Case, 106 Mass. 223; Johnson v. Ammons, 6 Ohio Dec. Reprint, 747; Ex parte Swearingen, 13 S. C. 74.

Where a person is charged with a crime of a continuous nature, such as keeping a gambling house, going back and forth between it and a place outside of the state, both before and after the date alleged in the indictment, proof that he was personally present at each time a game was exhibited therein is not essential to constitute him a fugitive from justice. Hayes v. Palmer, 21 App. D. C. 450.

A person may flee from justice although no process has been issued against him. The departure of the offender from the vicinity of the place within which the offense was committed to his usual residence in another state, for the purpose of avoiding punishment for that or any other offense, is a fleeing from justice. United States v. White, 5 Cranch, C. C. 38, Fed. Cas. No. 16,675.

A prisoner in a reformatory, who violates a parole permitting him to go into one state by going into another, is a fugitive from justice within U. S. Const. art. 4, § 2; as is one who escapes from prison before the expiration of his sentence for a crime of which he has been convicted, and flees into another state. Drinkall v. Spiegel, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830.

That a person who, after having been convicted of a crime and released on parole, Mr. Justice **Harlan** delivered the opinion of the court:

There was some difference of opinion between counsel upon [389] *the question whether certain papers, printed by the defendant, constituted any part of the record which this court could examine upon the present writ of error. While this is not an important matter, in view of our conclusion as to the controlling questions in the case, it is appropriate to say that, on appeal or writ of error to this court, papers or documents used at the hearing in the court below cannot in strictness be examined here unless they are made part of the record by bill of exceptions or in some other proper mode. For the purposes of our decision we take the case to be substantially as the plaintiff in error insists that it is on the record. He cannot ask more.

The governor of Rhode Island on the 10th day of July, 1907, issued a warrant of arrest addressed to the sheriff of the county of Bristol, in that state, reciting that information had been communicated to him by the governor of New York that Jacob Bassing (the present plaintiff in error) was charged with the crime of grand larceny, first degree, committed in New York, was a fugitive from the justice of the latter state, and was supposed to be then in Rhode Island; and that the governor of New York had transmitted to him a copy of an indictment, warrant, and other papers, certified by him to be authentic, charging Bassing with the above crime, and demanded his delivery to the agent of New York, according to the Constitution and laws of the United States. The warrant of the governor of Rhode Island commanded the arrest of Bassing and his delivery to the person designated by the governor of New York to receive and convey him to the latter state, to be there dealt with according to law.

Having been arrested under that warrant, and being in the custody of the sheriff of Bristol county, Bassing sued out the present writ of habeas corpus from the superior court of Rhode Island. The material part of that petition is in these words: "Your petitioner further shows that he has been extradited at a prior time, to wit, March 12th, 1907, on requisition of the governor of the state of New York for the same offense as is alleged in the present indictment. Your petitioner [390] *further shows that on April 15th, A. D. 1907, he was discharged from custody by the state of New York, to which he had been extradited, where he was held in custody for the same alleged offense for which he is now held for extradition, and your petitioner offers to produce in court the warrant under which he is now held, together with a copy of the indictment for the offense on which he is now held, it being impossible to procure a copy of said warrant on the presentation of this petition, on account of the shortness of the time since said warrant has been issued, and because said sheriff of Bristol county threatens to immediately remove said Bassing out of the jurisdiction of this court. Your petitioner further shows that his detention and imprisonment, as aforesaid, is unlawful, in this, to wit: First. That the warrant of the governor of Rhode Island and the order for his delivery to the agent of the state of New York were issued without authority of law and contrary to the Constitution and laws of the state of Rhode Island, as well as contrary to the Constitution and laws of the United States [relating to fugitives from justice], especially § 2, article 4, of the Constitution of the United States, and § 5278 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3597), in that your petitioner is not a fugitive from justice. Wherefore he prays that he may be relieved of said unlawful restraint and imprisonment, and that a writ of habeas corpus may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may direct."

The sheriff justified under the warrant issued by the governor of Rhode Island.

At the hearing of the case in the Rhode Island court it appeared that the accused was charged by indictment in one of the courts of New York, with the crime of grand larceny, first degree, committed on the 6th

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violates the conditions of such parole, and goes into another state, is a fugitive from justice within the meaning of the extradition statute, is also held in Hughes v. Pflanz, supra.

A person is not a fugitive from justice, subject to surrender by extradition warrant, when he goes from one state to another at the request and in pursuance of the business of the party who demands his surrender. Re Tod, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637.

Convicted prisoners, *en route* to the penitentiary, are not fugitives from justice, so as to require extradition proceedings in order to hold them in custody in another state through which they pass. Re Maney, 20 Wash. 509, 72 Am. St. Rep. 130, 55 Pac. 930.

As to who are fugitives from justice, within the meaning of the statute of limitations, see State v. Washburn, 48 Mo. 240; United States v. Brown, 2 Low. Dec. 267, Fed. Cas. No. 14,665; United States v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908; United States v. Smith, Brunner, Col. Cas. 87, Fed. Cas. No. 16,332.

of February, 1907; and that on the 14th of March of that year the governor of New York made his requisition on the governor of Rhode Island, in due form, for the arrest of Bassing as a fugitive from justice. That requisition was honored by the governor of [391]Rhode Island, *and Bassing was taken to New York. He was there arraigned and pleaded to the indictment. After one or two continuances the district attorney moved to dismiss the indictment, stating orally, as a reason for his action (so Bassing testified in this case), that he had not sufficient evidence to hold the accused. The motion was sustained and Bassing returned to Rhode Island without, so far as the record shows, any objection on the part of the New York authorities. Shortly thereafter a second indictment was found in the New York court against Bassing for the same offense as that charged in the first indictment, and this was made the basis of a second requisition upon the governor of Rhode Island on the 14th of June, 1907. Upon that requisition the governor of Rhode Island issued the warrant of arrest of which Bassing complained in his present petition for a writ of habeas corpus.

The question arises on these facts whether the governor of Rhode Island was authorized by the Constitution and laws of the United States to issue a second warrant for the arrest of Bassing and his delivery to the agent of New York, such warrant being based upon a second indictment for the same offense as that charged in the former indictment. We have not been referred to, nor are we aware of, any judicial decision covering this precise question. If the proceedings in the New York court, after the appearance there of the accused under the first requisition by the governor of that state, had so far progressed, before the dismissal of the first indictment, as to put him in legal jeopardy of his liberty, it might be—but upon that point we forbear any expression of opinion—that the governor of Rhode Island could rightfully have declined to honor a requisition to meet a second indictment for the same offense. But no such case is presented. The accused had not been put in jeopardy when the first indictment was dismissed. It may have been that the dismissal was because the state was without sufficient evidence at the time to hold the defendant; or there may have been other and adequate reasons for the course taken by the state's attorney. His mere arraign[392]ment and pleading *to the indictment did not put him in judicial jeopardy. 1 Wharton, Crim. Law, §§ 544, 590, and authorities cited under each section. Suffice it to say that when the second warrant of arrest was issued by the governor of Rhode Island the accused had not been tried, nor put on final trial, in New York, nor placed in jeopardy there for the offense with which he was charged in that state. We do not, therefore, perceive any reason, based on the Constitution and laws of the United States, why the governor of Rhode Island could not honor, as he did, the second requisition of the governor of New York, and issue thereon a second warrant of arrest. It is certain that no right secured to the alleged fugitive by the Constitution or laws of the United States was thereby violated.

The plaintiff in error insists, as one of the grounds of his discharge, that he was not a fugitive from justice. Undoubtedly it was competent for him to show that he was not a fugitive, but he did not establish that fact by evidence. The warrant of arrest issued by the governor of Rhode Island established prima facie the lawfulness of his arrest, and, nothing to the contrary appearing in proof, it was to be taken by the court which heard this case that the accused was a fugitive from the justice of the state in which he stood charged by indictment with crime. So far as the record shows it did not appear by proof that the accused was not in New York at the time the crime with which he was charged was committed. If he was in New York at that time (and it must be assumed upon the record that he was) and thereafter left New York, no matter for what reason or under what belief, he was a fugitive from the justice of that state within the meaning of the Constitution and laws of the United States. These views are in accord with the adjudged cases. Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed 161, 27 Sup. Ct. Rep. 122, and authorities cited; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, ante, 121, 28 Sup. Ct. Rep. 58, and authorities cited. He was none the less such a fugitive, within the meaning of the Constitution and laws of the United States, because, after the *dismissal of the first in[393]dictment, he left New York and returned to Rhode Island with the knowledge of, or without objection by, the New York authorities.

The judgment of the state court refusing the discharge of the accused from custody must be affirmed.

It is so ordered.

UNITED STATES, Plff. in Err.,
v.
JOHN BITTY.

(See S. C. Reporter's ed. 393–403.)

Appeal — right of government to writ of error in criminal case.

1. Constitutional rights of the accused

are not violated by the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), authorizing the United States to bring up a criminal case from a circuit court to the Supreme Court by a direct writ of error where an indictment has been quashed or set aside, or a demurrer to the indictment or any count thereof has been sustained, on the ground of the invalidity or construction of the statute upon which the indictment was founded, although such statute does not allow the accused to bring up the case in the same way when a demurrer to the indictment or some count thereof has been overruled.

Aliens — importation for immoral purpose.

2. The importation of an alien woman into the United States in order that she may live with the person importing her as his concubine is for an immoral purpose, within the meaning of the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389), making it a crime against the United States to import alien women for the purpose of prostitution or for any other immoral purpose.

[No. 503.]

Submitted January 27, 1908. Decided February 24, 1908.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to an indictment for importing a alien woman for an immoral purpose. Reversed and remanded with directions to overrule the demurrer.

See same case below, 155 Fed. 938.

The facts are stated in the opinion.

Attorney General **Bonaparte** and Assistant Attorney General **Cooley** submitted the cause for plaintiff in error:

The rule *ejusdem generis* does not apply.

Wilkinson v. Leland, 2 Pet. 662, 7 L. ed. 554; State v. Holman, 3 M'Cord, L. 306; State v. Williams, 2 Strobh. L. 474; Queen v. Payne, L. R. 1 C. C. 27; Willis v. Mabon (Willis v. St. Paul Sanitation) 48 Minn. 155, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; Webber v. Chicago, 148 Ill. 314, 36 N. E. 70; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Woodworth v. State, 26 Ohio St. 196; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788; St. Joseph v. Elliott, 47 Mo. App. 418; Foster v. Blount, 18 Ala. 687; Haigh v. Sheffield, L. R. 10 Q. B. 102; Bows v. Fenwick, L. R. 9 C. P. 339.

The courts have repeatedly refused, even when applying the rule *ejusdem generis*, to apply it in a narrow sense.

Misch v. Russell, 136 Ill. 22, 12 L.R.A. 125, 26 N. E. 528; Queen v. Edmundson, 2 El. & El. 77; Union County v. Ussery, 147 Ill. 204, 35 N. E. 618.

The conduct of the defendant in error was "immoral" as matter of strict law.

1 Bouvier's Law Dict. p. 984, "immorality;" Ralston v. Boady, 20 Ga. 449; Girardy v. Richardson, 1 Esp. 13; Jennings v. Throgmorton, Ryan & M. 251; Com. v. Harrington, 3 Pick. 26; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748; Walker v. Perkins, 3 Burr. 1568, 1 W. Bl. 517; Nye v. Moseley, 6 Barn. & C. 133; Walker v. Gregory, 36 Ala. 180; Winebrinner v. Weisiger, 3 T. B. Mon. 33; Reed v. Brewer (Tex. Civ. App.) 36 S. W. 99; Mackbee v. Griffith, 2 Cranch, C. C. 336, Fed. Cas. No. 8,660.

Mr. **Edward A. Alexander** submitted the cause for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a criminal prosecution under an act of Congress regulating the immigration of aliens into the United States.

By the act of March 3d, 1875, chap. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding $5,000, for anyone knowingly and wilfully to import or to cause the importation of women into the United States for the purposes of "prostitution." 18 Stat. at L. 477, U. S. Comp. Stat. 1901, p. 1285.

*By the act of March 3d, 1903, chap. 1012, [398] it was provided: "That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years, and pay a fine not exceeding five thousand dollars." 32 Stat. at L. 1213, 1214.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20th, 1907. By that act the prior act of 1903 (except one section) was repealed. The 3d section of this last statute was in these words: "That the importation into the United States of any alien woman or girl for the purpose of prostitution, *or for any other immoral purpose*, is hereby forbidden; and whoever shall, directly or indirectly, import,

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NOTE.—As to right of state to appeal in criminal case—see note to People ex rel. Hodson v. Miner, 19 L.R.A. 342.

or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution. or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practising prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act." 34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389.

The defendant in error, Bitty, was charged [399]by indictment in *the circuit court of the United States for the southern district of New York with the offense of having unlawfully, wilfully, and feloniously imported into the United States from England a certain named alien woman for "an immoral purpose," namely, "that she should live with him as his concubine."

The circuit court having sustained a demurrer to the indictment and dismissed the case, the United States prosecuted this writ of error under the authority of the act of March 2d, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209). That statute authorizes a writ of error, on behalf of the United States, from the district or circuit courts directly to this court in all criminal cases in which an indictment is quashed or set aside or in which a demurrer to the indictment or any count thereof is sustained, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

The demurrer to the indictment was sustained and the indictment dismissed upon the ground that the statute, properly construed, did not make it an offense for one to bring and import an alien woman into the United States for the purpose of having her live with him as his concubine. The case is, therefore, one in which the United States was entitled, under the above act of 1907, to prosecute a writ of error from this court unless, as the accused suggests, the act is unconstitutional in that it authorizes the United States in the cases specified to bring the case directly to this court, but does not allow the accused to bring it here when a demurrer to the indictment or to some count thereof is overruled. There is no merit in this suggestion. Except in cases affecting ambassadors and other public ministers and consuls and those in which a state shall be a party—in which cases this court may exercise original jurisdiction—we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which, by the Constitution, the judicial power of the United States extends. Const. art. 3, § 2. What such exceptions and regulations *should be it is for Congress, in its wisdom,[400] to establish, having, of course, due regard to all the provisions of the Constitution. If a court of original jurisdiction errs in quashing, setting aside, or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed. Surely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused. Taylor v. United States, 207 U. S. 120, ante, 130, 28 Sup. Ct. Rep. 53. Congress was not required by the Constitution to grant to an accused the privilege of bringing here, upon the overruling of a demurrer to the indictment, and before the final determination of the case against him, the question of the sufficiency of the indictment simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute.

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution. But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman "for the purpose of prostitution *or* for any other immoral purpose;" and the indictment distinctly charges that the defendant imported the alien woman in question "that she should live with him as his [401]concubine;" *that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The circuit court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being, in its opinion, an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of "prostitution." Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of "prostitution." It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to "the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Murphy v. Ramsey, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747, 764. Congress, no doubt, proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people. Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. Now, the addition in the last statute of the words, "or for any other immoral purpose," after the word "prostitution," must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of "prostitution." In forbidding the importation of alien women "for any other immoral purpose," Congress [402]evidently thought *that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words "any other immoral purpose" must be one of the same general class or kind as the particular purpose of "prostitution" specified in the same clause of the statute. 2 Lewis's Sutherland, Stat. Constr. § 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that, in using the words "or for any other immoral purposes," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. . . . The case must be a strong one indeed which would justify a court in departing from the plain *meaning of words,[403] especially in a penal act, in search of an intention which the words themselves did not suggest." United States v. Wiltberger, 5 Wheat. 76, 95, 96, 5 L. ed. 37, 42, 43. In United States v. Winn, 3 Sumn. 209, 211, Fed. Cas. No. 16,740, Mr. Justice Story said that the proper course is "to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." To the same effect are United States v. Morris, 14 Pet. 464, 10 L. ed. 543; American Fur Co. v. United States, 2 Pet. 358, 367, 7 L. ed. 450, 453; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10

Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2d ed. 282; Maxwell, Interpretation of Statutes, 2d ed. 318. Guided by these considerations and rules, we must hold that Congress intended by the words "or for any other immoral purpose," to include the case of anyone who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion.

It is so ordered.

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[404]*R. M. HENNINGSEN and Edward W. Clive, Copartners, the National Bank of Commerce of Seattle, and R. R. Spencer, Appts.,

v.

UNITED STATES FIDELITY & GUARANTY COMPANY of Baltimore, Maryland; Sylvester E. Brown, Doing Business as S. E. Brown & Company.; Bryant Lumber & Shingle Mill Company; Carstens Packing Company; E. C. Macdougall and H. T. Dinham, Copartners as E. C. MacDougall & Company; W. O. Nelson, E. E. Caine, and the C. B. Smith Company.

(See S. C. Reporter's ed. 404-412.)

Appeal — from circuit court of appeals.

1. An appeal from a circuit court of appeals to the Federal Supreme Court will not be dismissed on the ground that the jurisdiction of the circuit court was invoked solely on the grounds of diverse citizenship, where grounds of suit and relief were also based upon Federal statutes which were necessary elements of the decision of the circuit court of appeals.

Subrogation — of surety.

2. The surety on the bond of a public contractor, conditioned, in compliance with the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), for the faithful performance of the contract, and the prompt and full payment of laborers and materialmen, has an equity, under the doctrine of subrogation, in the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned, to be used as he saw fit, either in the performance of his building contract or in any other way.

[No. 78.]

Argued December 16, 17, 1907. Decided February 24, 1908.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Washington, enforcing the right of a surety on the bond of a public contractor to a first lien upon sums due under the contract. Affirmed.

See same case below, 74 C. C. A. 484, 143 Fed. 810.

Statement by Mr. Justice **Brewer**:

R. M. Henningsen and Edward W. Clive, as copartners, in May, 1903, contracted with the United States for the construction of certain buildings at Fort Lawton, in the state of Washington, and entered into a bond with the United States Fidelity & Guaranty Company of Baltimore (hereinafter called the guaranty company, as surety in the penal sum of $11,625 for the faithful performance of the contract, and to "promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract." The buildings were constructed in accordance with the terms of the contract, but the contractors failed to pay certain just and lawful claims for labor and materials, amounting in the aggregate to $15,409.04. After such default the guaranty company instituted a suit in the United States circuit court for the district of Washington, in which it made the contractors and all persons to whom they were indebted for labor and materials defendants, confessing its own liability to the full amount of the bond. A decree was entered, adjudging the *company liable to such creditors of the con- [405] tractors in the full sum of the bond,—$11,625,—and awarding payment to such creditors *pro rata*. It also adjudged that, upon such payment, the liability of the company upon the bond should be discharged. On March 16, 1904, pending the performance of the contract, the contractor, or rather Henningsen alone, for Clive had ceased to

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NOTE.—As to subrogation of sureties—see notes to Prairie State Nat. Bank v. United States, 41 L. ed. U. S. 412, and Nelson v. Webster, 68 L.R.A. 520.

have any connection with the performance of the contract, made a written assignment of all payments which were then due, or might thereafter become due on account of the contract, to R. R. Spencer, in trust for the National Bank of Commerce of Seattle, to secure payment of a loan made by the bank to the contractors, October 10, 1903, of $3,500, and also subsequent loans, and, at the same time, gave as further security an order addressed to the United States quartermaster, requesting him to deliver to said Spencer all checks of the government on account of said contract. The moneys so loaned were paid directly by the bank to Henningsen, and handled and disbursed by him, without any supervision or control upon the part of the bank or Spencer. This suit was commenced by the guaranty company by a bill in the circuit court of the United States for the district of Washington to restrain the appellants from collecting or accepting the balance due on the contract from the United States. It appeared at the time of the commencement of the suit that there was in the hands of the quartermaster, due upon the contract, the sum of $13,066, which he was about to pay to Spencer under the assignment and order. On June 17, 1904, an arrangement was made between the parties, by which the sum of $8,024.21 was paid to certain creditors, and the balance, $5,041.79, was applied in conditional payment of the indebtedness of the contractors to the bank, with a stipulation that, if it should be finally determined that the guaranty company was entitled to receive it, then the bank should pay it to the guaranty company. This suit proceeded to a decree in favor of the guaranty company for $5,041.79, which decree was affirmed by the circuit court of appeals. February 12, **[406]**1906; 74 C. C. A. 484, 143 Fed. 810. *The bond of the guaranty company was given under the requirements of the act of Congress of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), which reads:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution: Provided, That such action and its prosecutions shall involve the United States in no expense."

Mr. **George E. De Steiguer** argued the cause, and, with Mr. W. W. Wilshire, filed a brief for appellants:

The fact that the rights of the complainant, as claimed in its bill of complaint, arose through a bond required and given under the statutes of the United States, is sufficient to sustain the jurisdiction of the circuit court on the ground that the cause arose under a statute of the United States.

Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; Feibelman v. Packard, 109 U. S. 421, 423, 27 L. ed. 984, 985, 3 Sup. Ct. Rep. 289; Bachrack v. Norton, 132 U. S. 337, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; Reagan v. Aiken, 138 U. S. 109, 34 L. ed. 892, 11 Sup. Ct. Rep. 283; Bock v. Perkins, 139 U. S. 628, 630, 35 L. ed. 314, 315, 11 Sup. Ct. Rep. 677; Walker v. Windsor Nat. Bank, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 76.

The facts requiring the application of a Federal statute being stated, the court will take judicial notice of that statute.

Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 142, 17 L. ed. 571, 575; Warner v. Searle & H. Co. 191 U. S. 195, 205, 48 L. ed. 145, 147, 24 Sup. Ct. Rep. 79; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 528, 47 L. ed. 575, 580, 23 Sup. Ct. Rep. 365.

As the respondent in this case, both in the circuit court and the circuit court of appeals, has relied upon its alleged rights under the laws of the United States, it should now be bound by its contentions there made.

Cooke v. Avery, 147 U. S. 375, 386, 37 L. ed. 209, 213, 13 Sup. Ct. Rep. 340.

In Union P. R. Co. v. Harris, 158 U. S. 326, 327, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, an argument very similar to that made in this case seems to have been made, but the objection to the jurisdiction was overruled. See also Northern P. R. Co. v. Amato, 144 U. S. 466, 36 L. ed. 508, 12 Sup. Ct. Rep. 740.

There is no default of which the government can take advantage. So far as it is concerned, the contract has been fully performed.

United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400; United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549.

There was, therefore, no right or equity left in the United States to which the complainant could be subrogated.

Liles v. Rogers, 113 N. C. 197, 37 Am. St. Rep. 627, 18 S. E. 104.

Aside from some statutory or contract provision, laborers or materialmen have no claim, legal or equitable, either against the property improved, or the contract price.

Lawrence v. United States, 71 Fed. 228; South Fork Canal Co. v. Gordon, 6 Wall. 561, 571, 18 L. ed. 894, 896; Withrow Lumber Co. v. Glasgow Invest. Co. 42 C. C. A. 61, 101 Fed. 868; Mechanics' & T. Nat. Bank v. Winant, 16 N. Y. S. R. 902, 1 N. Y. Supp. 660; Randolph v. New York, 53 How. Pr. 68; Phillips, Mechanics' Liens, § 1; 20 Am. & Eng. Enc. Law, 2d ed. pp. 269, 293.

Of course, in no case is there such a claim in the case of public property.

20 Am. & Eng. Enc. Law, 2d ed. p. 295.

The surety may acquire the right of the original creditor, but he cannot acquire any greater rights.

27 Am. & Eng. Enc. Law, 2d ed. p. 206.

The right of subrogation does not arise until the surety has made payment.

Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 265; Prairie State Nat. Bank v. United States, 164 U. S. 231, 41 L. ed. 416, 17 Sup. Ct. Rep. 142; Conwell v. McCowan, 53 Ill. 363; Columbia Finance & T. Co. v. Kentucky Union R. Co. 9 C. C. A. 264, 22 U. S. App. 54, 60 Fed. 794: Vert v. Voss, 74 Ind. 565; James v. Day, 37 Iowa, 164.

If the complainant has no lien upon or peculiar right to the fund in question, the defendants, Henningsen and Clive, had a right to see that it was applied in payment of the bank's claim, in pursuance of Henningsen's agreement; and this would be true, even if no effect were given to the assignment. However, § 3477 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 2320, declaring such assignments void, has been held by the courts to have been passed for the protection of the United States only, and not to prevent the assignment being good as between the parties themselves.

York v. Conde, 147 N. Y. 486, 42 N. E. 193; 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234; Re Hone, 153 N. Y. 522, 47 N. E. 798; Dulaney v. Scudder, 36 C. C. A. 52, 94 Fed. 6; Lopez v. United States, 2 L.R.A. 571, 24 Ct. Cl. 84.

Mr. **James B. Murphy**, argued the cause, and, with Messrs. Harold Preston, Carroll B. Graves, and Edward B. Palmer, filed a brief for appellees:

The assignment made by Henningsen to Spencer is void under U. S. Rev. Stat. §§ 3477 and 3737, U. S. Comp. Stat. 1901, pp. 2320, 2507, as against the rights of third persons.

Greenville Sav. Bank v. Lawrence, 22 C. C. A. 646, 42 U. S. App. 179, 76 Fed. 545; United States v. Gillis, 95 U. S. 407, 24 L. ed. 503; Spofford v. Kirk, 97 U. S. 484, 24 L. ed. 1032; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142.

The appellant bank occupies no better position than a general creditor. It was under no obligation to lend this money, and there is no proof that any part of it was used on the contract in question. The money was passed to the credit of Henningsen, and checked out to whom and for what no one seems to know; and, as far as this fund is concerned, the bank is a stranger and a mere volunteer.

Emmert v. Thompson, supra; Sheldon, Subrogation, § 240; Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 265.

The doctrine of subrogation does not depend on a lien.

Ætna L. Ins. Co. v. Middleport, supra; Matthews v. Fidelity Title & T. Co. 52 Fed. 687; Memphis & L. R. R. Co. v. Dow, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482.

The right of subrogation is not founded on a contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of contractual relations between the parties.

Emmert v. Thompson, supra.

This appellee is entitled to assert the doctrine of subrogation.

Prairie State Nat. Bank v. United States, supra; First Nat. Bank v. City Trust, S. D. & Surety Co. 52 C. C. A. 313, 114 Fed. 529; Finney v. Condon, 86 Ill. 78.

Appellant concedes the point that, if the contractor defaulted as to the construction of the building, the appellee's position would be secure. By the same reasoning and the same equitable principles, the default being as to the laborers and materialmen, appellee is subrogated to the rights of the creditors in this fund.

Greenville Sav. Bank v. Lawrence, 22 C. C. A. 646, 42 U. S. App. 179, 76 Fed. 545; Lawrence v. United States, 71 Fed. 228; Reid v. Pauly, 58 C. C. A. 152, 121 Fed. 652.

This principle should be the rule applied in this case, and under it the appellee would have an equitable lien upon this fund, which is superior to that of general creditors, of which the bank must be regarded as one.

Prairie State Nat. Bank v. United States and Finney v. Condon, supra; Alfred Richards Brick Co. v. Rothwell, 18 App. D. C. 516; United States use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 519.

As between the surety and his principal, and likewise, as between the surety and any assignee of his principal, we urge the true rule to be that, upon paying any part of the principal debt, the surety is entitled to be subrogated to all the securities, funds, liens, and equities of the creditor.

Fisher v. Columbia Bldg. & L. Asso. 59 Mo. App. 430; Gedye v. Matson, 25 Beav. 310; Motley v. Harris, 1 Lea, 577; Sheldon, Subrogation. § 510; Mechanics' Sav. Bank & T. Co. v. Scoggin (Tenn. Ch. App.) 52 S. W. 718; Nettleton v. Ramsey County Land & Loan Co. 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. 128.

This action does not arise under the Constitution or laws of the United States.

Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Florida C. & P. R. Co. v. Bell, 176 U. S. 326, 44 L. ed. 489, 20 Sup. Ct. Rep. 399; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

Mr. Justice **Brewer** delivered the opinion of the court:

A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the circuit court of appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals, and were necessary elements. Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Warner v. Searle & H. Co. 191 U. S. 195, 205, 48 L. ed. 145, 147, 24 Sup. Ct. Rep. 79.

Passing to the merits of the case, the question turns upon the respective equities of the parties. Appellants concede that the bank was not, by the making of the loans to Henningsen, entitled to subrogation to the rights, if any, of the United *States or [410] the laborers or materialmen, and also that, if the guaranty company is entitled to subrogation to any right of the United States government arising through the building contract, the bank can make no claim by reason of the assignment.

Henningsen (for we may leave Clive out of consideration) entered into a contract with the United States to construct buildings. The guaranty company was surety on that contract. Its stipulation was not merely that the contractor should construct the buildings, but that he should pay promptly and in full all persons supplying labor and material in the prosecution of the work contracted for. He did not make this payment, and the guaranty company, as surety, was compelled to and did make the payment. Is its equity superior to that of one who simply loaned money to the contractor, to be by him used as he saw fit, either in the performance of his building contract or in any other way? We think it is. It paid the laborers and materialmen, and thus released the contractor from his obligations to them, and to the same extent released the government from all equitable obligations to see that the laborers and supplymen were paid. It did this not as a volunteer, but by reason of contract obligations entered into before the commencement of the work. Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142, is in point. In that case Sundberg & Company, in 1888, contracted with the government to build a customhouse at Galveston. Hitchcock was surety on that contract. On February 3, 1890, in consideration of advances made and to be made by the Prairie Bank, Sundberg & Company gave a power of attorney to a representative of the bank to receive from the United States the final payment under the contract. In May, 1890, Sundberg & Company defaulted in the performance of this contract and Hitchcock, as surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract and disbursed therein about $15,000 in excess of the current payments from the government. In a contest between Hitchcock and the Prairie Bank it was held that Hitchcock had the superior equity, and the judgment of the court of claims in his favor *for the amount [411] still due from the government was affirmed. The bank loaned to Sundberg & Company about $6,000 prior to the time that they defaulted in the performance of their contract, and prior to any action by Hitchcock in completing the contract or in paying out money, so that the bank actually parted with $6,000 of its money before Hitchcock parted with any of his. It was held that Hitchcock's equity commenced with his obligation in 1888 to see that Sundberg & Company duly performed their contract with the government. Mr. Justice White, delivering the opinion of the court, reviewed the authorities at length and discussed the question fully. He said (p. 232):

"Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation, the bank was not. The former, in making his payments, discharged an obligation due by Sundberg, for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien which the bank claims it has without reference to the question of its subrogation is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him."

It seems unnecessary to again review the authorities. It is sufficient to say that we agree with the views of the circuit court of appeals, expressed in its opinion, in the present case:

"Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. Prairie State Nat. [412]Bank v. *United States, supra; Ætna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; Sheldon, Subrogation, § 240." See also United States Fidelity & G. Co. v. United States, 204 U. S. 349, 356, 357, 51 L. ed. 516, 519, 520, 27 Sup. Ct. Rep. 381.

The decree of the Circuit Court of Appeals is affirmed.

CURT MÜLLER, Plff. in Err.,
v.
STATE OF OREGON.

(See S. C. Reporter's ed. 412–423.)

Constitutional law — regulating hours of women employees.

Rights under the 14th Amendment to the Federal Constitution are not infringed by the limitation of the hours of labor of women employed in laundries to ten hours daily which is made by Oregon Laws 1903, p. 148, although like legislation affecting male employees may be invalid.

[No. 107.]

Argued January 15, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a conviction in the Circuit Court for the County of Multnomah in that state for requiring a woman employed in a loundry to work more than ten hours daily. Affirmed.

See same case below, 48 Or. 252, 85 Pac. 855.

The facts are stated in the opinion.

Mr. **William D. Fenton** argued the cause, and, with Mr. Henry H. Gilfry, filed a brief for plaintiff in error:

Women, within the meaning of both the state and Federal Constitutions, are persons and citizens, and as such are entitled to all the privileges and immunities therein provided, and are as competent to contract with reference to their labor as are men.

Re Leach, 134 Ind. 665, 21 L.R.A. 701, 34 N. E. 641; Minor v. Happersett. 21 Wall. 163, 22 L. ed. 627; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; First Nat. Bank v. Leonard, 36 Or. 390, 59 Pac. 873.

The right to labor or employ labor, and to make contracts in respect thereto, upon such terms as may be agreed upon, is both a liberty and a property right, included in the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law.

Cooley, Const. Lim. 7th ed. p. 889; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Seattle v. Smyth, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120; Low v. Reese Printing Co. 41 Neb. 146, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Ritchie v. People, 155 Ill. 104, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 219, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; Frorer v. People, 141 Ill. 181, 16 L.R.A. 492, 31 N. E. 395; Braceville Coal Co. v. People, 147 Ill. 71, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; State v. Good-

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NOTE.—As to validity of legislation regulating hours of labor—see notes to Atkin v. Kansas, 48 L. ed. U. S. 148, and People v. Orange County Road Constr. Co. 65 L.R.A. 38; and case note to People v. Williams, 12 L.R.A.(N.S.) 1130.

will, 33 W. Va. 183, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; State v. Loomis, 115 Mo. 316, 21 L.R.A. 789, 22 S. W. 350; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539; State v. Buchanan, 29 Wash. 603, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; State v. Muller, 48 Or. 252, 85 Pac. 855.

The law operates unequally and unjustly, and does not affect equally and impartially all persons similarly situated, and is therefore class legislation.

Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; Gulf, C. & S. F. R.Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Ritchie v. People, 155 Ill. 107, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; State v. Goodwill, 33 W. Va. 180, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Frorer v. People, 141 Ill. 186, 16 L.R.A. 492, 31 N. E. 395; Braceville Coal Co. v. People, 147 Ill. 67, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Ex parte Northrup, 41 Or. 493, 69 Pac. 445; Re Morgan, supra; Re House Bill No. 203, 21 Colo. 27, 39 Pac. 431; Re Eight Hour Law, 21 Colo. 29, 39 Pac. 328.

It deprives the plaintiff in error and his employees of the right to contract and be contracted with, and deprives them of the right of private judgment in matters of individual concern, and in a matter in no wise affecting the general welfare, health, and morals of the persons immediately concerned, or of the general public.

State v. Loomis, 115 Mo. 315, 21 L.R.A. 789, 22 S. W. 350; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Godcharles v. Wigeman, 113 Pa. St. 437, 6 Atl. 354; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; Frorer v. People, 141 Ill. 180, 16 L.R.A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Ritchie v. People, 155 Ill. 108, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Morgan, supra.

Conceding that the right to contract is subject to certain limitations growing out of the duty which the individual owes to society, the public, or to government, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised.

Ritchie v. People, 155 Ill. 106, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 218, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; State v. Goodwill, 33 W. Va. 182, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Lochner v. New York, 198 U. S. 48, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539.

The police power, no matter how broad and extensive, is limited and controlled by the provisions of organic law.

Re Jacobs, 98 N. Y. 108, 50 Am. Rep. 636; People v. Gillson, supra; Civil Rights Cases, 109 U. S. 11, 27 L. ed. 839, 3 Sup. Ct. Rep. 18; Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; Tiedeman, Pol. Power, §§ 3-86; Ritchie v. People, 155 Ill. 110, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

Women, equally with men, are endowed with the fundamental and inalienable rights of liberty and property, and these rights cannot be impaired or destroyed by legislative action under the pretense of exercising the police power of the state. Difference in sex alone does not justify the destruction or impairment of these rights. Where, under the exercise of the police power, such rights are sought to be restricted, impaired, or denied, it must clearly appear that the public health, safety, or welfare is involved. This statute is not declared to be a health measure. The employments forbidden and restricted are not in fact or declared to be, dangerous to health or morals.

Wenham v. State, 65 Neb. 405, 58 L.R.A. 825, 91 N. W. 421; Ritchie v. People, 155 Ill. 111, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Frorer v. People, 141 Ill. 179, 16 L.R.A. 492, 31 N. E. 395; Braceville Coal Co. v. People, 147 Ill. 72, 22 L. R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; State v. Goodwill, 33 W. Va. 185, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Re Morgan, supra; Tiedeman, Pol. Power, § 86, Tiedeman, State & Federal Control of Persons & Property, pp. 335-337; Colon v. Lisk, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302; Re Jacobs, 98 N. Y. 115, 50 Am. Rep. 636; Lochner v. New York, 198 U. S. 48, 57, 58, 60, 49 L. ed. 937, 941-943, 25 Sup. Ct. Rep. 539; People v. Williams, 51 Misc. 383, 100 N. Y. Supp. 337, 116 App. Div. 379, 101 N. Y. Supp. 562.

Mr. **Louis D. Brandeis** argued the cause and filed a brief for defendant in error:

The right to purchase or sell labor is a part of the "liberty" protected by the 14th Amendment of the Federal Constitution.

Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539.

This right to "liberty" is, however, subject to such reasonable restraint of action as the state may impose in the exercise of the police power, for the protection of health, safety, morals, and the general welfare.

Lochner v. New York, 198 U. S. 45, 53, 67, 49 L. ed. 937, 940, 945, 25 Sup. Ct. Rep. 539.

The mere assertion that a statute restricting "liberty" relates, though in a remote degree, to the public health, safety, or welfare, does not render it valid. The act must have a "real or substantial relation to the protection of the public health and the public safety."

Jacobson v. Massachusetts, 197 U. S. 11, 31, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358.

It must have "a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate."

Lochner v. New York, 198 U. S. 45, 56, 57, 61, 49 L. ed. 937, 941, 943, 25 Sup. Ct. Rep. 539.

Such a law will not be sustained if the court can see that it has no real or substantial relation to public health, safety, or welfare, or that it is "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."

But, "if the end which the legislature seeks to acomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those" who assail it.

Lochner v. New York, 198 U. S. 45–68, 49 L. ed. 937–946, 25 Sup. Ct. Rep. 539.

The validity of the Oregon statute must therefore be sustained unless the court can find that there is no "fair ground, reasonable in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) of the employees (or to the general welfare), if the hours of labor are not curtailed."

Lochner v. New York, 198 U. S. 45, 61, 49 L. ed. 937, 943, 25 Sup. Ct. Rep. 539.

The facts of common knowledge of which the court may take judicial notice (see Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; Lochner v. New York, 198 U. S. 48, 49 L. ed. 937, 25 Sup. Ct. Rep. 539) establish, we submit, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a "mechanical establishment, or factory, or laundry" more than ten hours in one day is dangerous to the public health, safety, morals, or welfare.

Mr. **H. B. Adams** also argued the cause for defendant in error.

Messrs. John Manning, A. M. Crawford, B. E. Haney, and Louis D. Brandeis also filed a brief for defendant in error:

This act is a reasonable and legal exercise of the police power of the state.

Wenham v. State, 65 Neb. 400, 58 L.R.A. 825, 91 N. W. 421; State v. Buchanan, 29 Wash. 603, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; Com. v. Hamilton Mfg. Co. 120 Mass. 383; State v. Muller, 48 Or. 252, 85 Pac. 855; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; People v. Williams, 51 Misc. 383, 100 N. Y. Supp. 337, 116 App. Div. 379, 101 N. Y. Supp. 562; Black, Const. Law, p. 354; Com. v. Beatty, 15 Pa. Super. Ct. 17; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Cooley, Const. Law, 7th ed. p. 889.

This is not class legislation.

Ex parte Northrup, 41 Or. 489, 69 Pac. 445; Re Oberg, 21 Or. 406, 14 L.R.A. 577, 28 Pac. 130; Soon Hing v. Crowley, 113 U. S. 708, 709, 28 L. ed. 1146, 1147, 5 Sup. Ct. Rep. 730; Wenham v. State and State v. Muller, supra.

Acts to be declared unconstitutional must be clearly prohibited.

Cline v. Greenwood, 10 Or. 230; Cook v. Portland, 20 Or. 580, 13 L.R.A. 533, 27 Pac. 263; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124; M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

Mr. Justice **Brewer** delivered the opinion of the court:

On February 19, 1903, the legislature of the state of Oregon passed an act (Session

Laws 1903, p. 148) the first section of which is in these words:

"Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit [417] the employment of females *at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

Sec. 3 made a violation of the provisions of the prior sections a misdemeanor subject to a fine of not less than $10 nor more than $25. On September 18, 1905, an information was filed in the circuit court of the state for the county of Multnomah, charging that the defendant "on the 4th day of September, A. D. 1905, in the county of Multnomah and state of Oregon, then and there being the owner of a laundry, known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent, and agent of said Curt Muller, in the said Grand Laundry, to require a female, to wit, one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon."

A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The supreme court of the state affirmed the conviction (48 Or. 252, 85 Pac. 855), whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. That it does not conflict with any provisions of the state Constitution is settled by the decision of the supreme court of the state. The contentions of the defendant, now plaintiff in error, are thus stated in his brief:

"(1) Because the statute attempts to prevent persons *sui juris* from making their own contracts, and thus violates the provisions of the 14th Amendment, as follows:

" 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

[418] *"2. Because the statute does not apply equally to all persons similarly situated, and is class legislation.

"(3) The statute is not a valid exercise of the police power. The kinds of work prescribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety, or welfare."

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. As said by Chief Justice Wolverton, in First Nat. Bank v. Leonard, 36 Or. 390, 396, 59 Pac. 873, 874, after a review of the various statutes of the state upon the subject:

"We may therefore say with perfect confidence that, with these three sections upon the statute book, the wife can deal, not only with her separate property, acquired from whatever source, in the same manner as her husband can with property belonging to him, but that she may make contracts and incur liabilities, and the same may be enforced against her, the same as if she were a *feme sole*. There is now no residuum of civil disability resting upon her which is not recognized as existing against the husband. The current runs steadily and strongly in the direction of the emancipation of the wife, and the policy, as disclosed by all recent legislation upon the subject in this state, is to place her upon the same footing as if she were a *feme sole*, not only with respect to her separate property, but as it affects her right to make binding contracts; and the most natural corollary to the situation is that the remedies for the enforcement of liabilities incurred are made coextensive and coequal with such enlarged conditions."

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, that *a law providing that no [419] laborer shall be required or permitted to work in bakeries more than sixty hours in a week or ten hours in a day was not, as to men, a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.†

[420] *While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: Com. v. Hamilton Mfg. Co. 120 Mass. 383; Wenham v. State, 65 Neb. 394, 400, 406, 58 L.R.A. 825, 91 N. W. 421; State v. Buchanan, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; Com. v. Beatty, 15 Pa. Super. Ct. 5, 17; against them is the case of Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to *which a special constitutional limitation [421] goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the 14th Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a state may act in this respect, we refer to the following cases in which the question has been considered: Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Holden v.

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†The following legislation of the states imposes restriction in some form or another upon the hours of labor that may be required of women: Massachusetts: 1874, Rev. Laws 1902, chap. 106, § 24; Rhode Island: 1885, Acts and Resolves 1902, chap. 994, p. 73; Louisiana: 1886, Rev. Laws 1904, vol. 1, § 4, p. 989; Connecticut: 1887, Gen. Stat. Revision 1902, § 4691; Maine: 1887, Rev. Stat. 1903, chap. 40, § 48; New Hampshire: 1887, Laws 1907, chap. 94, p. 95; Maryland: 1888, Pub. Gen. Laws 1903, art. 100, § 1; Virginia: 1890, Code 1904, title 51A, chap. 178A, § 3657*b*; Pennsylvania: 1897, Laws 1905, No. 226, p. 352; New York: 1899, Laws 1907, chap. 507, § 77, subdiv. 3, p. 1078; Nebraska: 1899, Comp. Stat. 1905, § 7955, p. 1986; Washington: Stat. 1901, chap. 68, § 1, p. 118; Colorado: Acts 1903, chap. 138, § 3, p. 310; New Jersey: 1892, Gen. Stat. 1895, p. 2350, §§ 66, 67; Oklahoma: 1890, Rev. Stat. 1903, chap. 25, art. 58, § 729; North Dakota: 1877, Rev. Code 1905, § 9440; South Dakota: 1877, Rev. Code (Penal Code, § 764), p. 1185; Wisconsin: 1867, Code 1898, § 1728; South Carolina: Acts 1907, No. 233.

In foreign legislation Mr. Brandeis calls attention to these statutes: Great Britain, 1844: Law 1901, 1 Edw. VII. chap. 22. France, 1848: Act Nov. 2, 1892, and March 30, 1900. Switzerland, Canton of Glarus, 1848: Federal Law 1877, art. 2, § 1. Austria, 1855; Acts 1897, art. 96*a*, §§ 1–3. Holland, 1889; art. 5, § 1. Italy, June 19, 1902, art. 7. Germany, Laws 1891.

Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would, of course, take too much space to give these reports in detail. Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. In many of these reports individual instances are given tending to support the general conclusion. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: "The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home—are all so important and so far-reaching that the need for such reduction need hardly be discussed."

Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lochner v. New York, supra.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, [422]yet even with that and the *consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection: that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference *justifies a difference in legisla-[423] tion, and upholds that which is designed to compensate for some of the burdens which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

For these reasons, and without questioning in any respect the decision in Lochner v. New York, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed.

FRANKLIN BIEN, Plff. in Err.,
v.
BEVERLY R. ROBINSON, Receiver of the Property and Assets of the Haight & Freese Company.

(See S. C. Reporter's ed. 423-428.)

Error to circuit court — when jurisdiction is in issue.

1. A writ of error from the Federal Supreme Court to a circuit court, authorized by the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, when the jurisdiction of the lower court is in issue, cannot be maintained because of a question as to the jurisdiction of that court in respect to its general au-

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NOTE.—As to direct review in Federal Supreme Court of judgments of district and circuit courts, see note to Gwin v. United States, 46 L. ed. U. S. 741.

thority as a judicial tribunal, or its power as a court of equity.

Error to circuit court — frivolousness of Federal questions.

2. The contention that constitutional rights to trial by jury and to due process of law are infringed by the action of a Federal circuit court, after appointing receivers of the assets and property of a corporation, and enjoining any interference with such property, in compelling repayment by summary process, after due notice and opportunity for hearing, from one who, with knowledge of the injunction, collects a check drawn in his favor by the corporation to satisfy a debt, and in denying his application to compel the bringing of an action at law for the recovery of the proceeds of the check, is too frivolous to serve as the foundation of a writ of error from the Supreme Court.

[No. 135.]

Submitted January 27, 1908. Decided February 24, 1908.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review an order requiring the repayment to the receivers of a corporation of the proceeds of a check drawn by such corporation, which was collected with knowledge of an injunction restraining interference with the corporate assets or property. Dismissed for want of jurisdiction.

See same case below, 146 Fed. 257.

The facts are stated in the opinion.

Mr. **Albert I. Sire** submitted the cause for plaintiff in error.

Messrs. **Roger Foster** and **G. Thomas Dunlop** submitted the cause for defendant in error. Mr. Frederick J. Moses was on the brief.

Mr. Justice **White** delivered the opinion of the court:

By a decree of the circuit court of the United States for the district of Massachusetts, James D. Colt was appointed receiver of the property and assets of the Haight & Freese Company, a New York corporation, then ostensibly engaged in business as stock brokers in New York, Boston, Philadelphia, and other cities. Subsequently, and on May 9, 1905, in the circuit court of the United States for the southern district of New York, upon a bill filed on behalf of one Ridgway Bowker against the said Haight & Freese Company and others, Colt and one Edmonds were appointed temporary receivers of the same corporation, "both original and as ancillary to said decree of the circuit court of the United States for the district of Massachusetts." The order appointing receivers also contained a clause enjoining the defendants, various other named persons and corporations, and all persons and corporations generally, from paying over or transferring any of the money, property, effects, or assets of the corporation to any person other than the receivers. On the same day that the receivers were appointed, but before the filing of the bill of complaint, an officer of the Haight & Freese Company gave to Franklin Bien, an attorney at law, a check drawn on the Colonial Bank of the city *of New York, in which were on deposit [425] funds of the company, and later in the day Mr. Bien learned of the appointment of the receivers and the terms of the order. The check was certified on the following day, was then indorsed by Bien, and collected through a third party. In June following, upon the petition of the receivers, a rule was issued requiring Mr. Bien to show cause why an order should not be made requiring him to pay to the receivers the money thus collected on the check, with interest. The application was heard upon affidavits, and an order was issued by the circuit judge requiring Mr. Bien to pay the money to the receivers, with interest, within ten days after the service of the order. Bien thereupon sued out this writ of error. In addition to allowing the writ of error the circuit judge certified that the application was made "upon the ground that this [circuit] court had no jurisdiction to make the order, as in said petition for appeal and assignment of errors appears," and it was further certified "that the question of jurisdiction was involved in making the order of May 29, 1906."

The alleged errors assigned are, in substance, that the court below had not jurisdiction over the plaintiff in error or the subject-matter of the proceedings (1) because the plaintiff in error was not an officer of the Haight & Freese Company; (2) because the check was received prior to the filing of the bill of complaint and the appointment of receivers; and (3) because the right of the receivers to the fund could not be determined in a summary proceeding, but could only be adjudged in an action at law to recover the proceeds of the check.

It was also assigned as error that the plaintiff in error was deprived of a jury trial, contrary to his rights under the Constitution of the United States, and that the circuit court had refused and denied his application "to compel the defendant in error to bring any action he may be advised for the recovery of the said sum of $2,000," which denial operated to "deprive the plaintiff in error of his property without due process of law as provided for by the Constitution and laws of the United States."

*In the brief of counsel it is further urged [426] that the circuit court was without jurisdiction to appoint the receivers, the contention being that the case presented by the bill was not one cognizable in a court of equity, but that the remedy of the complainant was in an action at law.

The case will be disposed of by our ruling upon a motion which has been made to dismiss the writ of error for want of jurisdiction in this court over the same.

The writ of error was applied for and allowed upon the question of the jurisdiction of the circuit court. By the first clause of § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], it is provided that appeals or writ of error may be taken from the district courts or from the existing circuit courts direct to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The scope and meaning of this clause has not infrequently been the subject of consideration, and the prior authorities are reviewed in Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740, where the court said (p. 432):

"It has been definitely settled that it [the section] must be limited to cases where the jurisdiction of the Federal court as a Federal court is put in issue, and that questions of jurisdiction applicable to the state courts, as well as to the Federal courts, are not within its scope."

In Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15, we declared that an issue as to the authority of the court, arising in a summary proceeding in bankruptcy, to compel repayment of money, part of the assets of the bankrupt's estate, was not embraced in the first of the classes of cases enumerated in § 5 of the judiciary act of 1891, as that class only includes cases where the question is as to the jurisdiction of courts of the United States as such. And in Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, it was held that the question whether the remedy was at law or in equity did not involve the jurisdiction of a Federal court as such, and the case was dismissed. Obviously, therefore, in the case
[427] at bar *the jurisdiction of the circuit court in respect to its power *as a court of the United States* was not assailed, either in the assignment of errors or in the argument at bar. The jurisdiction of the court was questioned merely in respect to its general authority as a judicial tribunal, to entertain the summary proceeding against Bien, initiated by the rule to show cause, or its power as a court of equity to entertain the suit of Bowker and afford him equitable relief, and we cannot, therefore, under the clause of the judiciary act above referred to, pass upon the questions asserting a want of jurisdiction in the circuit court.

As the writ of error was allowed upon assignments claimed to present questions as to the jurisdiction of the circuit court, and the circuit judge certified the question of jurisdiction, the writ might well be treated as bringing up only jurisdictional questions. Inasmuch, however, as the right to bring a case direct to this court exists when constitutional questions are raised and decided in the circuit court, we will briefly notice the assignments not stated as jurisdictional, *viz.*, that the denial of a jury trial was an invasion of rights under the Constitution of the United States, and that the refusal to compel the receiver to bring an action at law for the recovery of the $2,000 paid by the bank was a deprivation of property without due process of law. The record does not contain the bill of complaint upon which the court made its order appointing receivers of, and enjoining interference by third parties with the assets of, the Haight & Freese Company. It is shown, however, that that company, represented by Mr. Bien as its solicitor, moved to set aside the order as having been "inadvertently granted, and, among other grounds, that the court was without jurisdiction." This motion was denied, "with leave to renew should the order in the Massachusetts district be vacated," and such action by the court appears to have been acquiesced in by the Haight & Freese Company. Even if it be assumed that the objection was available to Bien, no sufficient reason has been stated warranting us in deciding that the circuit court acted without jurisdiction, *and we must assume that the [428] appointment of the receivers and the making of the injunction order was rightful. As to the money collected on the check, the argument at bar on behalf of the plaintiff in error proceeded upon the manifestly incorrect hypothesis that the delivery to Bien of the check was the equivalent of the payment of the money ordered by the check to be paid.

Reduced to its last analysis, the contention of this branch of the case is that a court of equity, which, in the due exercise of jurisdiction, had appointed receivers of the assets and property of a corporation, and enjoined interference by others with such property, was without power, by summary process, after due notice and opportunity to be heard, to compel a repayment by one who, with knowledge of the order of injunction, and in violation of its terms, took in satisfaction of an indebtedness from a debtor to the corporation, property forming part of the assets of such corporation. We think the contention and the assignments of error based thereon are so manifestly frivolous as to be utterly insufficient to serve as the foundation for a writ of error.

It is unnecessary to pass upon various other objections to our jurisdiction over the writ, made on behalf of the defendant in error, as it plainly results that the motion to dismiss must be granted, and our order therefore is, writ of error dismissed.

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[429]*WILLIAM NOTLEY, Charles Notley, and Maria Hughes, Plffs. in Err.,

v.

CECIL BROWN and Anthony Lidgate, Proponents of the Will of Charles Notley, Deceased, et al.

(See S. C. Reporter's ed. 429–443.)

Error to Hawaiian supreme court.

1. A writ of error directed, on its face, to the supposed judgment of the supreme court of the territory of Hawaii, disposing of exceptions on non-Federal grounds, prior to the act of March 3, 1905 (33 Stat. at L. 1035, chap. 1465), enlarging the appellate jurisdiction of the Federal Supreme Court over the territorial court, cannot be sustained on the theory that a final judgment in the case was not rendered until after the passage of that act, when judgment on the verdict was entered in the trial court in connection with a *nunc pro tunc* entry, since such judgment must necessarily have been entered after the judgment which the writ seeks to review.

Error to Hawaiian supreme court.

2. Jurisdiction of a writ of error directed, on its face, to a supposed judgment of the supreme court of the territory of Hawaii, disposing of exceptions on non-Federal grounds prior to the act of March 3, 1905, enlarging the appellate jurisdiction of the Federal Supreme Court over the territorial court, cannot be taken by treating the writ as addressed to a later judgment of that court, quashing a writ of error to the trial court, which judgment was not formally entered until long after the writ of error from the Federal Supreme Court was sued out, where to regard the entry as relating back to the time when the opinion of the court was announced would, if the same rule be applied to the *nunc pro tunc* entry of the judgment of the trial court, require an affirmance of the judgment of the territorial supreme court on the ground that the writ of error to the trial court was not sued out in time.

[No. 68.]

Argued January 24, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment overruling exceptions from the Circuit Court of the Fourth Circuit, in that territory, in a contest over the probate of a will. Dismissed for want of jurisdiction.

See same case below, 15 Haw. 435; on motions for rehearing, 15 Haw. 700, 16 Haw. 66; on motion to quash writ of error, 17 Haw. 455.

The facts are stated in the opinion.

Mr. **Robert M. Morse** argued the cause, and, with Mr. William M. Richardson, filed a brief for plaintiffs in error:

For purposes of right of appeal to this court, date of entry of judgment is to be regarded.

Borer v. Chapman, 119 U. S. 587, 602, 30 L. ed. 532, 538, 7 Sup. Ct. Rep. 342. See also, Miller v. Wolf, 63 Iowa, 233, 18 N. W. 889; McNamara v. New York, L. E. & W. R. Co. 56 N. J. L. 56, 28 Atl. 313; Black, Judgm. § 133.

The decision of the supreme court of Hawaii of April 13, 1906, was, in effect, an affirmance of the judgment of the circuit court.

Gregory v. McVeigh, 23 Wall. 294, 23 L. ed. 156.

In Fisher v. Perkins (Fisher v. Carrico) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227, it was held that a review of a final judgment of a lower court could not be entertained until it appeared that application for such review had first been made to the appellate court and refused.

The test as to what constitutes a final judgment to which a writ of error can be taken is whether, in entering such judgment, the court was affirming or rejecting a claim which the plaintiff in error sought to enforce as a matter of right, or whether it was one which the court, in the exercise of its discretion, might allow or not.

Walden ex dem. Denn v. Craig, 9 Wheat. 576, 6 L. ed. 164; Pickett v. Legerwood, 7 Pet. 144, 8 L. ed. 638; Shreve v. Cheesman, 16 C. C. A. 413, 32 U. S. App. 676, 69 Fed. 785; Whitworth v. United States, 52 C. C. A. 214, 114 Fed. 302.

Messrs. Sidney M. Ballou and J. J. Dunne also filed a brief for plaintiffs in error on the motion to dismiss.

Messrs. **Aldis B. Browne** and **W. L. Stanley** argued the cause, and, with Messrs. Alex. Britton and Henry Holmes, filed a brief for defendants in error:

The court below, in quashing the writ, has done it upon the distinct ground that it would not lie to thus review questions theretofore heard and decided by it in the cause. The judgment of the circuit court, following the verdict in affirming the judgment of the probate court and admitting the will to probate, was in no sense interlocutory. Indeed, the jurisdiction to review upon the original appeal would have been wholly lacking in the supreme court of Hawaii, except upon such final judgment.

Provisional Government v. Ah Un, 9 Haw. 164; Queen v. Poor, 9 Haw. 218; Brown v. Carvalho, 9 Haw. 180; Provisional Government v. Smith, 9 Haw. 178; Re Banning, 9 Haw. 357; Barthrop v. Kona Coffee Co. 10 Haw. 398; Hartshorne v. Sleight, 3 Johns. 554; Pollock v. Cohen, 32 Ohio St. 519; Hill v. Chicago & E. R. Co. 140 U. S. 52, 54, 35 L. ed. 331, 332, 11 Sup. Ct. Rep. 690.

The supreme court of Hawaii had both power and jurisdiction to hear and determine the question whether its former judgment and mandate had been correctly administered below.

Oriemon v. Territory, 13 Haw. 418; Rose v. Smith, 5 Haw. 377; Kukea v. Keahi, 10 Haw. 506.

Messrs. Aldis B. Browne and Alex. Britton also filed a brief in support of the motion to dismiss:

No retroactive effect can be given to the act of March 3, 1905, without violating the settled rule of construction in respect of retroactive legislation.

White v. United States, 191 U. S. 545, 552, 48 L. ed. 295, 298, 24 Sup. Ct. Rep. 171; United States v. American Sugar Ref. Co. 202 U. S. 563, 576, 50 L. ed. 1149, 1151, 26 Sup. Ct. Rep. 717; Sutherland, Stat. Constr. § 480, p. 628; Hooker v. Hooker, 10 Smedes & M. 601; Stewart v. Davidson, 10 Smedes & M. 358.

No such effect could be given the statute without violating fundamental law.

Jensen v. Fricke, 133 Ill. 175, 24 N. E. 515; Willoughby v. George, 5 Colo. 82; Davis v. Menasha, 21 Wis. 494; Lancaster v. Barr, 25 Wis. 560; Sydnor v. Palmer, 32 Wis. 410; Merrill v. Sherburne, 1 N. H. 214, 8 Am. Dec. 52; Bates v. Kimball, 2 D. Chip. (Vt.) 88; Staniford v. Barry, 1 Aik. (Vt.) 314, 15 Am. Dec. 691; Lewis v. Webb, 3 Me. 331; Gilman v. Tucker, 128 N. Y. 204, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Greenwood v. Butler, 52 Kan. 426, 22 L.R.A. 465, 34 Pac. 967; Lewis v. Webb, 3 Me. 326; Weaver v. Lapsley, 43 Ala. 231; McCabe v. Emerson, 18 Pa. 111; People v. Carnal, 6 N. Y. 463; Taylor v. Place, 4 R. I. 324.

Mr. Justice **White** delivered the opinion of the court:

In a contest in a Hawaiian court of probate certain documents were held not to have been executed under undue influence, and were admitted to probate as the last will and testament and codicils thereto of Charles Notley. On appeal to the circuit court, in term, upon motion of the contestants a jury was impaneled to try issues of fact embodied in two questions, which substantially required the jury to say whether undue influence had been exerted upon the testator. On the trial various exceptions were taken to rulings on the admission and rejection of evidence, and at the close of the evidence the trial judge granted a motion to instruct the jury to find a verdict sustaining the will.

The verdict was rendered January 28, 1903. On the same day the trial judge signed the following order, which was duly filed on the following day:

"Order for Entering up Judgment.

"Upon the entering up of the verdict on the appeal in this matter,

"It is hereby ordered that the clerk of this court do sign and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to probate is hereby affirmed.

"Done in open court at Hilo this 28th day of January, 1903."

On January 29, 1903, the clerk indorsed and filed a formal judgment. It would seem, however, that he did not then sign *the face [434] of the judgment, and perhaps did not enter it, as following the date of the judgment is this recital:

"A. S. Le Baron Gurney, clerk fourth circuit court.

"Judgment entered this 28th day of January, 1903.

"(Seal) This 8th day of June, A. D. 1905, as of the 28th day of January, 1903."

The following indorsement is also on the back of the judgment, under the indorsement of the filing on January 29, 1903: "Filed June 8, 1905. A. S. Le Baron Gurney, clerk." The record is silent as to how these additions to the judgment came to be made.

A motion to set aside the verdict and for a new trial having been overruled, the cause was taken on exceptions to the supreme court of Hawaii. In that court the action of the trial court in instructing a verdict was sustained and two motions for a rehearing were overruled, the last on August 2, 1904. 15 Haw. 435, 700, 16 Haw. 66. It will be observed that the last action of the court on the application for a rehearing was had nearly a year prior to the clerk's signature affixed to the face of the judgment on June 8, 1905, as of January 28, 1903, and the additional file mark on the back of the judgment made on June 8, 1905.

More than a year after the final action of the supreme court of the territory on the exceptions, that is, on November 24, 1905, a petition for a writ of error to the circuit court, with assignments of error, was filed in the supreme court of the territory on behalf of the contestants, praying that court to reverse a judgment entered in the circuit court. The petition for the writ recited the order admitting the will and codicils to probate, the appeal to the circuit court, the trial upon specified issues of fact, the motion to direct a verdict, the instruction to sign a certain form of verdict, the verdict, the taking of various exceptions, and the overruling of motions for a new trial. No reference was made in the petition for a writ of error to the fact that the exceptions reserved at the trial had been previously taken to the supreme court of the *[435] territory and had been there decided adversely to the contestants. The petition then proceeded to recite that on June 8, 1905,—which, it will be observed, was after the final action of the supreme court on the exceptions,—the contestants had in the circuit court filed a motion to set aside the "order for entering judgment," filed January 29, 1903, upon the ground that the order was obtained *ex parte* and without notice to or knowledge of contestants, and said motion was heard upon affidavit and oral evidence and was overruled, to which exception was duly taken, etc. It was further recited that on the same day, while this motion was pending, counsel for proponents moved that the clerk of the court be instructed to sign the judgment which had been previously made out on January 28, 1903, and filed on the next day, in conformity to the order of the court rendered on January 28, 1903, and that, on this motion being granted by the court, the judgment was entered and signed by the clerk, and the following exception was taken:

"Contestants except to the allowance of proponents' motion that the clerk of court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null, and void, and not justified by the law or evidence or record herein, and to the judgment on the ground that said judgment is contrary to the law and evidence and weight of evidence, and without authority of law, and is illegal, null, and void.

"Dated Hilo, June 8th, 1905."

The first five of the grounds set forth in the assignment of errors made for the purpose of the writ of error prayed from the supreme court of the territory, as above stated, were but a reiteration of alleged errors asserted to have been previously committed by the trial court in instructing a verdict in favor of the will, and which had already been taken to the supreme court of the territory on the exceptions, and had been adversely passed upon by that court. The remaining assigned errors were as follows:

[436] *"Sixth. That the court erred in making the *ex parte* order of January 29, 1903, confirming the decree of Judge Little admitting the alleged will of Charles Notley to probate.

"Seventh. That the court erred in denying contestants' motion to set aside order of Judge Robinson filed January 29, 1903, confirming decree of Judge Little, admitting will to probate.

"Eighth. That the court erred in ordering the clerk to sign the form of judgment submitted by proponents.

"Ninth. That the court erred in entering judgment for the proponents in said matter of the estate of Charles Notley, deceased, being petition for probate of will."

It may be observed that Judge Little was the judge by whom the will was originally admitted to probate, while Judge Robinson was the judge who presided at the trial in the circuit court and whose action in instructing a verdict had been approved by the supreme court of the territory. The writ of error from the supreme court, prayed under the circumstances just stated, was allowed on November 24, 1905, and on December 14, 1905, a motion to quash the writ was filed upon the following grounds:

"(1) That it is apparent upon the record that this honorable court has heretofore, to wit, on the 8th day of March, 1904, on the 3d day of June, 1904, and on the 2d day of August, 1904, decided the questions now sought to be reviewed and embraced in the assignment of errors filed herein; and

"(2) That the petition for writ of error was not filed nor the writ issued within six months from the rendition of judgment in said cause, the same having been rendered and filed on, to wit, the 29th day of January, 1903."

After argument, for reasons stated in an opinion filed April 13, 1906 (17 Haw. 455), the supreme court of Hawaii granted the motion and dismissed the writ.

Although the court, in its opinion, declared that there was considerable force in the contention of the defendants in error that the writ should be dismissed because the only judgment rendered below was that of January 28, 1903, and therefore *that the [437] writ of error had not been sued out within the statutory limit, *viz.*, six months from the rendering of the judgment, it did not rest its conclusion to dismiss upon that ground. The court, reviewing the controversy, held that every substantial question in the case had been already disposed of when the case was previously before it on exceptions. Without specifically analyzing the assignment of errors based on the action of the trial court on June 8, 1905, in directing the clerk to sign the judgment which had been made out in pursuance to the order of the court on January 28, 1903, those assignments were, in fact, treated as irrelevant or without merit, since it was held that, as a necessary result of the previous action of the court in finally disposing of the exceptions, judgment was required to be entered upon the verdict by operation of law on notice to the trial court of the overruling of the exceptions.

Although, as we have seen, the opinion of the supreme court of the territory just referred to was announced on April 13, 1906, no formal order or judgment in conformity to the opinion delivered by the court, quashing the writ, was entered until September 27, 1907. A few days after the delivery by the supreme court of the territory of the opinion referred to, that is, on April 18, 1906, three of the contestants served a formal notice on the fourth one, calling upon him to elect whether he would join them in a writ of error to be prosecuted from this court to the supreme court of the territory of Hawaii, to obtain a reversal of the judgment of the territorial court "rendered against you and us . . . on the 8th day of March, 1904, a motion for rehearing having been heard and considered, and having been denied on the 3d day of June, 1904." The contestant thus notified formally replied that he would not join the other contestants in prosecuting a writ of error to reverse the judgment rendered on March 8, 1904. Thereupon an application for the allowance of a writ of error from this court was made to the chief justice of the supreme court of the territory. In a petition for the [438]writ the only *judgment referred to was that claimed to have been rendered by the supreme court of the territory on March 8, 1904, when the case was before that court on the exceptions. In the assignment of errors accompanying the petition it was recited that the final judgment, for the reversal of which the writ of error was prayed, was that rendered on March 8, 1904, and the first three grounds therein assigned exclusively related to the action of the supreme court of the territory when the case was before that court on exceptions in sustaining the ruling of the trial court, in instructing a verdict. The fourth and last error assigned was as follows:

Fourth. That the said supreme court of the territory of Hawaii erred in that the said cause having been remanded to the circuit court of the fourth circuit of the territory of Hawaii after the aforesaid judgment of the supreme court, and further proceedings having been taken in said cause in said circuit court and a writ of error dated November 25, 1905, in said cause, having been thereafter sued out by the present plaintiffs in error from the supreme court of the territory of Hawaii to the said circuit court, the said supreme court quashed said writ of error."

The chief justice of the supreme court of the territory, having refused to allow the writ on the petition therefor and assignment of errors heretofore referred to, the writ was allowed by a justice of this court. The transcript of the record was filed in this court on July 20, 1906.

On November 28, 1906, a motion was made to dismiss the writ of error for want of jurisdiction. In the brief filed on behalf of the defendants in error it was insisted that, prior to the act of March 3, 1905 (33 Stat. at L. 1035, chap. 1465), the power of this court to review the judgments and decrees of courts of the territory of Hawaii was governed by the rules relating to the right to review judgments and decrees of state courts, and that, as the cause presented no question which would justify a review if the judgment had been rendered in a state court, there was therefore no jurisdiction. It was conceded that a broader and *different right[439] as to the courts of the territory of Hawaii had been conferred by the act of March 3, 1905, but it was urged that that act did not confer jurisdiction because the judgment of the supreme court of the territory to which the writ of error was addressed had been rendered prior to the passage of the act of 1905, and, as that act had no retroactive effect, there was no jurisdiction. Whilst admitting that the controversy involved no question giving the right to review if the judgment had been rendered in a state court, and therefore there could be no review under the prior act, plaintiffs in error insisted that there was power to review under the act of March 3, 1905, because that act operated retroactively. The motion was not passed upon, but was postponed to the hearing of the merits.

At the same term (October term, 1906), however, and some months after the motion to dismiss had been postponed to the hearing upon the merits, the question involved in that motion arose in another case, and it was decided that the act of March 3, 1905, did not operate retroactively, and therefore that this court had no authority to review a judgment or decree of a court of the territory of Hawaii rendered before the passage of the act, which could not be reviewed under the previous act. Harrison v. Magoon, 205 U. S. 501, 51 L. ed. 900, 27 Sup. Ct. Rep. 577.

Five months after the decision just referred to in the Magoon Case, what is styled a judgment was entered by the supreme court of Hawaii, concerning the action of that court in quashing the writ of error from that court to the lower circuit court, previously referred to. Omitting the title of the cause and the signature of the clerk, the so-called judgment is copied in the margin.†

[440] *At the present term, on October 14, 1907, a stipulation of counsel was filed, adding to the record as omitted matter the petition for a writ of error from the supreme court of the territory, the assignment of errors, the writ of error, the motion to quash the said writ of error, and the so-called judgment of September 27, 1907, quashing the same, to which we have previously referred.

With these facts in mind, we come to consider the controversy. At the outset we must dispose of the motion to dismiss, which we have previously said was made at the October term, 1906, and was postponed to the hearing on the merits.

As on its face the writ of error in terms is directed to the supposed judgment of the supreme court of Hawaii, rendered March 8, 1904, disposing of the case on exceptions, and there is no pretense of the existence of a Federal question among the issues arising on the exceptions, it is obvious that, as a result of the decision in Harrison v. Magoon, supra, we are without jurisdiction to review by writ of error the judgment to which the writ runs. But, although the writ of error is specifically addressed to the judgment of March 8, 1904, and all the grounds previously urged to maintain jurisdiction have been determined to be untenable, it is now pressed that there is jurisdiction upon other and different grounds which are, in fact, wholly incompatible with those previously taken. Let us consider these grounds.

It is urged that the supreme court of Hawaii did not render a judgment in 1904, and, indeed, it is asserted that that court had no power to render a judgment in passing on a case *taken up on exceptions. [441] The claim, therefore, really is that although the judgment to which the writ of error is in terms addressed was no judgment, yet the writ should be sustained. Aside from the contradiction, this contention must rest upon one of two assumptions: 1st. That there was no final judgment susceptible of being reviewed by a writ of error until June 8, 1905, when, it is asserted, a judgment arose for the first time by the making of an order by the trial court, directing the clerk to sign *nunc pro tunc* the judgment which had been previously prepared by the clerk in pursuance of the express order of the court, in consequence of the verdict of the jury. Although this judgment was not only written up in 1903, but was indorsed filed on January 29, 1903, the argument is that, as it was not signed on its face by the clerk when it was so filed, it could not take effect as a judgment until the date of the actual signing on its face by that officer as a consequence of the *nunc pro tunc* order. 2d. That this writ of error must be treated, despite its terms, as if it were addressed to the action of the supreme court of Hawaii in quashing the writ of error on August 13, 1906.

In considering the first proposition, it is to be observed that there is nothing in the record disclosing any ruling by the trial court concerning the order for the signature *nunc pro tunc* of the judgment, or any exception taken to such a ruling. We say this because, leaving out of view some allusions made to the subject in the opinion of the supreme court of the territory, quashing the writ, the only reference to these matters is found in recitals contained in the application to the supreme court of Hawaii for a writ of error, which was stipulated into the record long after the writ in this case was allowed and the record filed here. But waiving any infirmity, and assuming that we may look at mere recitals in the petition for the writ of error from the supreme court of the territory, the situation, if the contentions be well founded, is then this,—that the only judgment susceptible of being reviewed was one which, it was claimed, was entered in the trial court in connection with the *nunc pro* **tunc* entry, after the action of [442] the supreme court of the territory overruling the exceptions, and therefore after the judgment of that court which the writ seeks to review. And a consideration of the second proposition leads to a like result. Conceding that the writ of error, although it is in terms addressed to the action of the court on the exceptions, may now be treated as being addressed to its action in 1906 in quashing the writ of error, and further conceding, for the sake of argument only, that the judgment of the territorial court in refusing to consider the case on its merits and quashing the writ of error could, under any circumstances, be treated as a final judgment, susceptible of being reviewed here by writ of error, nevertheless there is no judgment before us which we can review. This follows because, as shown by the statement which we have previously made, at the time when this writ of error was taken no judgment whatever had been entered in the supreme court of Hawaii giving formal expression to its decision quashing the writ. Indeed the judgment so doing was only entered in that court, as we have seen, September 27, 1907, long after the record in this case had been filed here and the motion to dismiss the writ had been made and submitted on briefs of counsel and had been postponed to the hearing on the merits. In fact, no such judgment was entered until after the decision of this court in the Magoon Case. The argument which seeks to have the writ of error from this court which is directed to one judgment applied to another, rendered, long after the writ of error was sued out, can only rest upon the assumption that the entry of the judgment below in 1907, after the writ of error was sued out, must be treated as relating back to the time in 1906, when the opinion of the court, quashing the writ, was announced. But, if we apply this rule to the judgment in question, we would have to apply it also to the judgment of the Hawaiian circuit court rendered January 28, 1903, and therefore we should be obliged to say, irrespective of the reason assigned by the supreme court of the territory, that that court had rightly quashed the writ of error for want of jurisdiction, [443] *since it is conceded that, under the statutes of Hawaii, a writ of error must be sued out within six months from the rendition of judgment.

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†Defendants in error above named, having made a motion to quash the writ of error issued herein on the 25th day of November, A. D. 1905, upon grounds therein set forth, to wit:

(1) That said writ was not issued within six months from the rendition of judgment; and

(2) That all errors assigned have been heretofore decided by this court in 15 Haw. 435, 700, 16 Haw. 66; and said motion coming on to be heard, now, after reading and filing said motion to quash said writ of error, and after hearing W. L. Stanley, Esq., of counsel for defendants in error, in support of said motion, and S. M. Ballou, Esq., of counsel for plaintiffs in error, in opposition thereto, and due deliberation having been had, it is

Ordered, adjudged, and decreed that said motion to quash the writ of error issued herein on the 25th day of November, 1905, be and the same is hereby granted, and that said writ be and it hereby is dismissed.

Dated Honolulu, September 27th, A. D. 1907, as of April 13, 1906.

The considerations just stated make it inevitable that this writ of error should be dismissed. Of course, it may be that the reasons which we have given do not necessarily foreclose the right within the statutory time to prosecute a new writ of error to the judgment of the supreme court of the territory of Hawaii, quashing the writ, entered September 27, 1907. On that subject, however, we observe, to the end that this litigation may not be unnecessarily prolonged, that because we do not decide the question not before us, as to whether such right to a new writ of error exists, we must not be considered as, in the slightest degree, intimating an affirmative view as to the existence of such a right.

Writ of error dismissed for want of jurisdiction.

CONCEPCION CALVO, Appt.,

v.

ANGELES O. DE GUTIERREZ and Eduardo Gutierrez, her Husband; Gabriel Olives, Paz O. de Martinez, and Manuel Martinez, her Husband.

(See S. C. Reporter's ed. 443–451.)

Compromise — construction of family settlement.

One half the net proceeds of the sale of real property in which a testator owned an undivided half interest, and not the entire net proceeds of the sale, is meant by the word "remainder," as used in an agreement for the division of the inheritance between the widow as usufructuary heiress and the heirs, who were also the owners of the other undivided half interest of the property, by which such property was to be sold, certain admitted debts or liabilities were to be deducted from the proceeds, and the remainder was to be turned over to the widow, to be used by her as usufructuary heiress.

[No. 80.]

Argued December 17, 1907. Decided January 24, 1908.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which, reversing a decree of the Court of First Instance of the City of Manila, construing a family settlement, confined the usufructuary right of a widow in the proceeds of property sold in pursuance of such settlement to the net proceeds of the interest in such property which had belonged to her husband. Affirmed.

See same case below, 6 Philippine, 91.

The facts are stated in the opinion.

Mr. **Howard Thayer Kingsbury** argued the cause, and, with Mr. Frederic R. Coudert, filed a brief for appellant.

No appearance for appellees.

Mr. Justice **White** delivered the opinion of the court:

At the time of the death of Francisco Gonzalez de la Fuente he was the owner of an undivided half interest in a piece of real estate known as No. 69 on the Escolta, Manila, of an individed half interest in a house known as No. 97 Calle Palacio, province of

Mamarines, Philippine Islands, and likewise of an undivided half interest in a certain hacienda. Besides this, there stood in the name of the deceased two houses in Ermita, Manila, which were, however, encumbered with a debt of $12,000, payable in Mexican money, which debt was due to one Julian de la O, and the deceased moreover owned certain furniture and jewelry.

The remaining undivided half interest not owned by Fuente in the three first-described pieces of property were jointly owned by his nephew, Gabriel Olives y Gonzalez de la Fuente, and two nieces, who were both married,—Angeles Olives y Gonzalez de la Fuente, wife of Eduardo Gutierrez y Repide, and Paz Olives y Gonzalez de la Fuente, wife of Manuel Martinez.

By the will of Fuente all his property was given to his nephew, Gabriel, and his two nieces, Angeles and Paz, subject, however, to a right or usufruct during her life in his wife, Concepción Calvo. It would seem that [446]some controversy arose *between the widow as usufructuary and the nephews and nieces as heirs of Fuente and as co-owners in their own right, as to the partition of the property. The result was a written agreement between the parties,—the nephews and nieces and the wife,—the whole of which is in the margin,† and the parts which we think are pertinent to this controversy we quote:

"The undersigned. Angeles and Paz Olives, in the presence of their respective husbands, [447]and Gabriel Olives, as heirs of *certain property of Francisco Gonzalez de la Fuente, and Concepción Calvo, as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows:

"First. The property No. — on the Escolta, half of which belonged to the testator, shall be sold at the price not less than $90,000.

"Second. From the proceeds of the sale there shall be paid the amount owing to pious works, the amount owing Mr. Roensch, that owing Julian la O, and the unpaid legacies made by José Gonzalez de la Fuente.

"Third. The remainder shall be turned over to Concepción Calvo, to be used by her as usufructuary heiress, after she has given a mortgage bond (fianza hipotecaria)."

This suit in the form of a bill in equity was commenced by the appellant, the widow, against the defendants, the nephew and nieces, asserting rights under the agreement and asking the appointment of a receiver to take charge of the fund arising from the sale of the property on the Escolta and money derived from other sources, as well as a balance coming from the Ermita property after paying the debt with which that property was encumbered. Without going into detail or considering irrelevant questions, it suffices to say that the principal right which the widow asserted was that she was entitled under the agreement to hold as usufructuary the whole proceeds of the property on the Escolta after making the payments specified in the agreement. That is, her principal claim was that her usufructuary right under the will, in virtue of the agreement, attached not only to the proceeds of the share of the property on the

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†Translation of Exhibit "A."

The undersigned, Angeles and Paz Olives, in the presence of their respective husbands, and Gabriel Olives, as heirs of certain property of Francisco Gonzalez de le Fuente, and Concepción Calvo, as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows:

First. The property No. — on the Escolta, half of which belonged to the testator, shall be sold at the price not less than $90,000.

Second. From the proceeds of the sale there shall be paid the amount owing to pious works, the amount owing Mr. Roensch, that owing Julian la O, and the unpaid legacies made by José Gonzalez de la Fuente.

Third. The remainder shall be turned over to Concepción Calvo, to be used by her as usufructuary heiress, after she has given a mortgage bond (fianza hipotecaria).

Fourth. Concepción Calvo relinquishes her right to reimbursement of the amounts expended by her on account of the last illness and burial of the testator. But in compensation for this she shall have all the movable property of the testator with the exception of a set of buttons, etc., belonging to testator's father, which shall go to Gabriel Olives as the only male grandson.

Fifth. With regard to the pieces of property purchased by the testator from Pantaleona Rivera, which were paid for by money, half of which belonged to the testator and the other half to the heirs of Paz Gonzales, Concepción Calvo recognizes the said heirs as absolute owners of the half of the interest of the testator in and to the said property.

Sixth. Angeles, Paz, and Gabriel Olives respect the legacy of the testator to Concepción Calvo, and acknowledge her right to enjoy the usufruct of half of the house No. 97 Calle Palacio, and half of the estate of Pasacao, and half of the interest of the Ermita houses.

Seventh. Gabriel, Angeles, and Paz Olives renounce all rights that they may have as wards of the testator to require a rendering of accounts of any kind.

Eighth. Concepción Calvo shall be entitled to claim from Pantaleona Rivera whatever taxes she may have paid for the Ermita houses after the death of the testator.

In witness whereof, we sign the present document in Manila, this 4th day of May, 1903.

Escolta owned by her husband at his death, but also to the share of the proceeds representing the undivided interest owned by the nephew and nieces. This case was put at issue and much testimony was taken in the trial court which that court deemed to be admissible upon the theory that it tended to throw light upon the meaning of the written agreement. There was judgment in favor [448] of the widow, *practically maintaining all her claims, including her asserted right to a usufructuary interest in the whole sum of the Escolta property, and that portion of the decree was in effect the real subject of controversy in the supreme court of the Philippine Islands, to which the case was appealed. That court, whilst recognizing the rights of the widow in other particulars, reversed the judgment in so far as it decreed her to be entitled to a usufructuary interest in the whole of the proceeds of the Escolta property, and confined her usufructuary right to the proceeds of half of the Escolta property which had belonged to her husband.

Two substantial grounds of error are here assigned: First, that the supreme court of the Philippine Islands erred in its conclusion concerning the Escolta property, because in doing so it disregarded the unambiguous letter of the agreement; and, second, because it differed with the trial court as to the result of the evidence, and therefore departed from the findings of fact made by the trial court, which, it is asserted, the court had not the power to do, because there had been no motion for a new trial in the lower court, on the ground that the findings of fact were plainly and manifestly against the weight of evidence. Philippine Code Civ. Proc. § 497. We put this latter consideration at once out of view as being totally devoid of merit. This is said because we do not think there were findings below concerning the evidence throwing light upon the contract in the sense which the proposition assumes, and, even if there were, we find nothing in the record justifying the conclusion that such findings were disregarded by the supreme court, or that its conclusion on the controverted question was based upon them. True it is that, after interpreting the contract, and stating the legal rules by which it deemed that interpretation was sustained, the opinion of the supreme court made reference to what it believed to be the persuasive force of the testimony concerning the relations and dealings of the parties leading up to the contract. When the opinion, however, is considered as a whole, [449] we think it is clear that the *references made to the testimony may be put out of view, since the action of the court was really based alone upon its construction of the contract and the law applicable to it, and we shall therefore confine ourselves exclusively to that subject.

It will be observed that the first paragraph of the contract provided for the sale of the house in the Escolta, "half of which belonged to the testator," and fixed the price at which the sale should be made. The second clause provided for the deduction from the proceeds of sale of certain admitted debts or liabilities. The third clause provided that the remainder should be turned over to Concepción Calvo, to be used by her as usufructuary heiress, after the giving by her of a mortgage bond. The whole controversy hinges on the word "remainder." The appellant insists because of this word that the plain letter of the contract exacted that the wife should take as usufructuary not only the proceeds of the sale of the portion of the property which the husband owned, and upon which alone, prior to the contract, her usufructuary right attached, but also the proceeds of the half of the property which belonged to the other parties, and which, prior to the contract, she had no right or interest in as usufructuary.

The argument is thus stated: "To say that the remainder means one half of the remainder is to make a new contract for the parties, in direct contravention of article 1281 of the Spanish and Philippine Civil Code." The article referred to provides that where the terms of a contract are clear, and there can be no doubt about the intention of the contracting parties, the legal stipulations of the contract shall be enforced. We do not follow the reference in the argument to authorities under the Spanish and Roman law enforcing the legal proposition. It is elementary. The difficulty is in its application to the cause before us; since the real question under the contract is whether the word "remainder" as used does not, in view of the subject with which the contract is concerned, relate, and relate only, to the remainder of the proceeds as to which, under the *will of the deceased, [450] the usufructuary interest of the widow attached. Considering this subject, and looking at the contract, we think there can be no doubt that the word "remainder," as used in the contract, must, in the very nature of things, in the absence of an express stipulation to the contrary, be held not to have transferred to the widow a usufructuary interest in property which her deceased husband did not own, and which the very terms of the contract show was owned by other parties. The reasoning of the court below, in our opinion, so adequately disposes of the contention that the word "remainder" should be considered as having transferred to the widow a usufructuary interest in property to which that interest did not attach, that we excerpt a portion thereof, as follows:

"The court below was of opinion that the language of the third article of the foregoing agreement leaves no room for interpretation or construction, and that the word 'remainder,' as used therein, refers necessarily to the balance remaining after deducting from the whole amount received from the Escolta property the amount of the debts and legacies mentioned in the second article. We are of opinion, however, that the court erred in its construction of this section of the agreement, and we think that the word 'remainder' must be limited to the inheritance which it was the intention and object of the parties to divide, for the preamble expressly states that the parties, as heirs of Francisco Gonzalez de la Fuente, agree upon a division of the inheritance, and it is admitted that one half of the property on the Escolta was the property of the defendants, and formed no part whatever of said inheritance.

"Article 1283 of the Civil Code provides that 'however general may be the terms of a contract, there shall not be understood as included therein [other subjects or] things and cases different from those regarding which the interested parties proposed to contract;' and we are of opinion that although the word 'remainder,' as used in the third article of the said agreement, might, in the broadest acceptation of the term, refer to the total balance resulting [451] from the sale of the Escolta *property, nevertheless, under the provisions of the foregoing article, it should be limited to the subject-matter of the agreement, and, thus limited, it must be taken to refer to the remainder of the share of the inheritance in which [Doña] Concepción Calvo had a usufructuary life interest." [6 Philippine, 91.]

There is a conflicting contention in the argument for the appellant that, if there be doubt as to the meaning of the word "remainder," that doubt should be resolved in favor of the right of the widow to a usufruct in the portion of the property not belonging to her husband, and as to which, therefore, she was not his usufructuary heir. We do not stop to analyze the matters thus relied upon, as we think it suffices to say that, after an examination of the whole contract, we find nothing in it which would justify the construction of the word "remainder" which is asserted. In other words, we can discover nothing in any part of the agreement which would authorize, without express language to that effect, the transferring to one party to the contract of valuable property belonging to the other, especially when the contract itself was concerned only, as aptly pointed out by the lower court, with settling the rights of the parties to the property left by the deceased.

Affirmed.

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*GREAT NORTHERN RAILWAY COMPANY, Petitioner, [452]
v.
UNITED STATES.

(See S. C. Reporter's ed. 452-472.)

Statutes — repeal — saving clause.

1. Effect must be given, in construing a repealing act, to the general saving clause in U. S. Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6, prescribing the effect of repealing acts on existing penalties, forfeitures, and liabilities, unless, either by express declaration or necessary implication arising from the terms of the repealing law as a whole, it results that the legislative mind will be set at naught by giving effect to such saving clause.

Statutes — repeal — effect on prior offense.

2. The exception from the operation of the provision repealing conflicting laws, which is made by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), § 10, in favor of causes pending in the Federal courts, which "shall be prosecuted to conclusion in the manner heretofore provided by law," was addressed solely to the procedure to be followed in pending cases, and such section, therefore, does not supersede the general provision of U. S. Rev. Stat. § 13, saving existing forfeitures, penalties, or liabilities from repeal, so as to prevent future criminal prosecutions for offenses against the Elkins act of Feb. 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), committed prior to the adoption of the later statute.

Certiorari — questions reviewed.

3. An objection to the sufficiency of an indictment will not be considered by the Federal Supreme Court on certiorari, although the grounds of the demurrer and the general language of the exceptions taken on the trial are broad enough to embrace such objection, where the conduct of counsel for the accused in the courts below is wholly inconsistent with any intention to rely upon such objection, and the point was not referred to in the petition for writ of certiorari, or in the brief submitted in support of that petition.

[No. 491.]

Argued January 7, 1908. Decided February 24, 1908.

NOTE. — As to certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a conviction in the District Court for the District of Minnesota, for giving rebates in violation of the Elkins act. Affirmed.

See same case below, 155 Fed. 945.

The facts are stated in the opinion.

Mr. **William R. Begg** argued the cause and filed a brief for petitioner:

The Hepburn act changed the character of the crime and the nature of the punishment, and hence operated as a repeal.

Norris v. Crocker, 13 How. 429, 439, 14 L. ed. 210, 214; United States v. Tynen, 11 Wall. 88, 92, 20 L. ed. 153, 154; United States v. Claflin, 97 U. S. 546, 550, 552, 24 L. ed. 1082, 1084, 1085; United States v. Fisher, 109 U. S. 143, 145, 27 L. ed. 885, 886, 3 Sup. Ct. Rep. 154; Cook County Nat. Bank v. United States, 107 U. S. 445, 27 L. ed. 537, 2 Sup. Ct. Rep. 561; District of Columbia v. Hutton, 143 U. S. 18, 26, 36 L. ed. 60, 62, 12 Sup. Ct. Rep. 369; People v. Tisdale, 57 Cal. 106; Western U. Teleg. Co. v. Brown, 108 Ind. 538, 8 N. E. 172; Lindzey v. State, 65 Miss. 542, 7 Am. St. Rep. 674, 5 So. 100; State v. Allen, 14 Wash. 103, 44 Pac. 122; State v. Ingersoll, 17 Wis. 635; Mullen v. People, 31 Ill. 445; Mongeon v. People, 55 N. Y. 615; State v. Massey, 103 N. C. 356, 4 L.R.A. 311, 9 S. E. 632; Wharton v. State, 5 Coldw. 1, 94 Am. Dec. 214; State v. Smith, 62 Minn. 540, 64 N. W. 1022; 2 Lewis's Sutherland, Stat. Constr. 482.

The rule that the repeal and simultaneous re-enactment, literally or substantially, of a statute, continues it, has no application to the case at bar.

(1) This court, as well as others, has rejected the rule where the re-enactment is a complete revision of, and substitute for, the earlier statute.

Murdock v. Memphis, 20 Wall. 590, 616, 22 L. ed. 429, 437; Pana v. Bowler, 107 U. S. 529, 538, 27 L. ed. 424, 428, 2 Sup. Ct. Rep. 704; Murphy v. Utter, 186 U. S. 95, 104, 105, 46 L. ed. 1070, 1076, 1077, 22 Sup. Ct. Rep. 776; Tracy v. Tuffly, 134 U. S. 206, 223, 33 L. ed. 879, 884, 10 Sup. Ct. Rep. 527; Cook County Nat. Bank v. United States, supra; Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; The Habana, 175 U. S. 677, 685, 44 L. ed. 320, 323, 20 Sup. Ct. Rep. 290; State v. King, 12 La. Ann. 594; Coffin v. Rich, 45 Me. 513, 71 Am. Dec. 559; Goodno v. Oshkosh, 31 Wis. 129; Wilson v. California C. R. Co. 94 Cal. 166, 17 L.R.A. 685, 29 Pac. 861.

(2) The rule cannot apply to the case at bar because there is no substantial re-enactment of the earlier law.

The repeal of the part of the Elkins law quoted was complete.

Goodno v. Oshkosh, 31 Wis. 130.

Congress, in § 10 of the Hepburn act, spoke to the subject of saving penalties and forfeitures incurred under the laws repealed.

(1) Congress is presumed to have enacted the section with knowledge of the law as to the effect of repeals.

State v. Showers, 34 Kan. 271, 8 Pac. 474; Benton v. Willis, 76 Ark. 443; 88 S. W. 1000; Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469; O'Neill v. Hoboken, 73 N. J. L. 189, 63 Atl. 986; McCann v. New York, 52 App. Div. 358, 65 N. Y. Supp. 308.

(a) By the common law, in the absence of any saving statute, the repeal of a criminal statute remits all penalties previously incurred for which final judgment of conviction had not been had at the date of the repeal.

United States v. Tynen, 11 Wall. 88, 95, 20 L. ed. 153, 155; Norris v. Crocker, supra; Maryland use of Washington County v. Baltimore & O. R. Co. 3 How. 534, 11 L. ed. 714; Gregory v. German Bank, 3 Colo. 332, 25 Am. Rep. 760; Wharton v. State, supra; Woodburn v. Western U. Teleg. Co. 95 Ga. 808, 23 S. E. 116; Mason & F. Co. v. Com. 18 Ky. L. Rep. 371, 36 S. W. 570; Hartung v. People, 22 N. Y. 95; State v. Oliver, 12 Wash. 547, 41 Pac. 895; State v. Ingersoll, supra.

(b) By § 13, Revised Statutes, in the absence of a special saving clause in the repealing act, all penalties previously incurred under the act repealed are saved.

United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; Lang v. United States, 66 C. C. A. 255, 133 Fed. 204; People v. England, 91 Hun, 152, 36 N. Y. Supp. 534; State v. Smith, 62 Minn. 543, 64 N. W. 1022; Kleckner v. Turk, supra.

(c) In the absence of a statute to the contrary, where the repealing act saves rights accrued and penalties incurred under the previous law, and, at the same time, modifies the procedure by which the right is to be enforced or the penalty recovered, the procedure, in an action or prosecution to enforce the right or recover the penalty, must be in accordance with the later act.

Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; Pittsburgh, C. C. & St. L. R. Co. v. Oglesby, 165 Ind. 542, 76 N. E. 166; Taylor v. Strayer, 167 Ind. 23, 119 Am. St. Rep. 469, 78 N. E. 238; Palmer v. Danville, 166 Ill. 42, 46 N. E. 629; Holcomb v. Boynton, 151 Ill. 294, 37 N. E. 1031.

(2) The language of the section is peculiarly apt for the saving of pending causes and the procedure therein.

(3) The word "causes" as used in the section includes criminal cases.

Blyew v. United States, 13 Wall. 581. 591, 20 L. ed. 638. 641; Erwin v. United States, 2 L.R.A. 229, 37 Fed. 479; Taylor v. United States, 45 Fed. 539; State v. Hancock, 54 N. J. L. 393, 24 Atl. 728; United States v. Reisinger, 128 U. S. 398, 403, 32 L. ed. 480, 482, 9 Sup. Ct. Rep. 99; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594.

(4) The fact that what is now § 10 was part of the Hepburn bill from the time of its introduction, while the amendment of § 1 of the Elkins law was inserted at a later stage, does not make against petitioner's contention.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Aldridge v. Williams, 3 How. 9, 24. 11 L. ed. 469, 475.

Under the settled rules for the interpretation of statutes, § 10 will bear no construction other than that claimed by petitioner.

(1) Where the language of the statute is clear, there is no room for construction.

Northern Securities Co. v. United States, 193 U. S. 197, 358, 48 L. ed. 679, 709, 24 Sup. Ct. Rep. 436; United States v. Fisher, 2 Cranch, 358, 399, 2 L. ed. 304, 317; United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; Wilkinson v. Leland, 2 Pet. 627, 662, 7 L. ed. 542, 554; Pennington v. Coxe, 2 Cranch, 33, 52, 2 L. ed. 199, 204; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; Thornley v. United States, 113 U. S. 310. 313, 28 L. ed. 999, 1000, 5 Sup. Ct. Rep. 491; Doe ex dem. Poor v. Considine, 6 Wall. 458, 479, 18 L. ed. 869, 876; United States v. Fisher, 109 U. S. 143, 145, 27 L. ed. 885, 886, 3 Sup. Ct. Rep. 154; Doggett v. Florida R. Co. 99 U. S. 72, 78, 25 L. ed. 301, 303; Lewis v. United States, 92 U. S. 618, 621, 23 L. ed. 513, 514; Gibbons v. Ogden, 9 Wheat. 1, 186, 6 L. ed. 23, 67; Beardstown v. Virginia, 76 Ill. 40; Hills v. Chicago, 60 Ill. 91.

(2) A statute must be so construed as to give effect to every word and clause of it.

Platt v. Union P. R. Co. 99 U. S. 48, 58, 25 L. ed. 424, 427; Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; Crozer v. People, 206 Ill. 464, 69 N. E. 491; Perteet v. People, 65 Ill. 233; Hartford F. Ins. Co. v. State, 76 Ark. 303, 89 S. W. 45; Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. 56 W. Va. 18, 48 S. E. 746; Old Dominion Bldg. & L. Asso. v. Sohn, 54 W. Va. 101, 46 S. E. 222; State v. Fontenot, 112 La. 628, 36 So. 630; Newell v. People, 7 N. Y. 98.

(3) Congress is presumed to have intended to save only the causes it specifically mentioned.

M'Iver v. Ragan, 2 Wheat. 25, 29, 4 L. ed. 175, 176; Denn ex dem. Scott v. Reid, 10 Pet. 524, 527, 9 L. ed. 519, 520; Bank of Alabama v. Dalton, 9 How. 522, 529, 13 L. ed. 242, 245; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 403, 25 L. ed. 231, 233; Troup v. Smith, 20 Johns. 33; Coffin v. Rich, 45 Me. 511, 71 Am. Dec. 559; Beardstown v. Virginia, 76 Ill. 39; Perkins v. Thornburgh, 10 Cal. 192; Lewis's Sutherland, Stat. Constr. § 493.

(4) The enumeration in a statute of certain things to be unaffected, by implication excludes all others.

Durousseau v. United States, 6 Cranch, 307, 314, 3 L. ed. 232, 234; United States v. Arredondo, 6 Pet. 691, 725, 8 L. ed. 547, 560; Ex parte McCardle, 7 Wall. 506, 19 L. ed. 264; McHenry v. Alford, 168 U. S. 651, 672, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242; State v. Showers, 34 Kan. 271, 8 Pac. 474; Lewis's Sutherland, Stat. Constr. § 493.

Causes are matters of the substantive law, which creates rights, duties, and obligations.

United States v. Rhodes, 1 Abb. (U. S.) 28, Fed. Cas. No. 16,151; People v. Dodge, 104 Cal. 487, 38 Pac. 204.

Procedure is a matter of the adjective law, which prescribes the forms by which matters of substantive law may be enforced or vindicated.

Holland, Jurisprudence, 1st Am. ed. *78.

Congress has, by implication, enacted that the amendments and repeal wrought by the Hepburn act shall affect causes not pending at the date of the passage of the act; and, of necessity, that the previous law should not apply to and govern such causes. Clearly, the increased punishment provided by the Hepburn act cannot be imposed for offenses committed prior to its passage. Such construction would make it *ex post facto*, in violation of the Constitution of the United States.

Kring v. Missouri, 107 U. S. 221, 235, 27 L. ed. 506, 511, 2 Sup. Ct. Rep. 443; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; Com. v. McDonough, 13 Allen, 581; State v. Smith, 62 Minn. 540, 64 N. W. 1022; State v. Ingersoll, 17 Wis. 632; State v. Showers, 34 Kan. 274, 8 Pac. 474.

Congress cannot have intended the amendments and repeal wrought by the Hepburn act to have any effect on causes arising under the Elkins law, but not pending at the date of the repeal, other than to remit the causes of action or prosecution, and the penalties and liabilities involved in them. Congress must have intended that § 10 should have be valid and effective.

Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469.

The Hepburn act made no important changes in the procedure applicable to any civil cause which could have been pending at the date of its passage.

Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350.

Fairness and good faith justified the remission of penalties for previous offenses not in prosecution.

Red Rock v. Henry. 106 U. S. 596, 604, 27 L. ed. 251. 254. 1 Sup. Ct. Rep. 434; Broughton v. Pensacola. 93 U. S. 266, 269, 23 L. ed. 896, 897; United States v. Central P. R. Co. 118 U. S. 235, 240, 30 L. ed. 173, 175. 6 Sup. Ct. Rep. 1038; Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Frost v. Wenie, 157 U. S. 46, 59, 39 L. ed. 614. 619, 15 Sup. Ct. Rep. 532.

The manifest intent of Congress is not to be disregarded because of any supposed policy of the government to the contrary, nor because prosecutions instituted must fail.

Northern Securities Co. v. United States, 193 U. S. 197, 350, 351, 48 L. ed. 679. 705, 706, 24 Sup. Ct. Rep. 436; Goodno v. Oshkosh, 31 Wis. 130; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 58, 8 N. W. 833.

There can be no policy of the government contrary to the enactment of Congress on a subject within its sphere.

St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 536, 34 L. ed. 767, 769, 11 Sup. Ct. Rep. 168; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 111, 18 L. ed. 518. 519; United States v. Lee, 106 U. S. 196, 220, 27 L. ed. 171, 181, 1 Sup. Ct. Rep. 240; Northern Securities Co. v. United States, 193 U. S. 197, 350, 48 L. ed. 679, 705, 24 Sup. Ct. Rep. 436; Webster v. Luther, 163 U. S. 331, 342, 41 L. ed. 179, 183, 16 Sup. Ct. Rep. 963; Coffin v. Rich, and Goodno v. Oshkosh, supra; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

The legislative intent of the 59th Congress, as manifested in § 10 of the Hepburn act, is not defeated by U. S. Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6.

(1) The 41st Congress, in § 13, did not attempt, by the use of the words "so expressly provide," to fetter future Congresses.

Magone v. Heller, 150 U. S. 70, 74, 75, 37 L. ed. 1001-1003, 14 Sup. Ct. Rep. 18; Webster's Dict. "expressly."

(2) One Congress cannot limit a subsequent Congress to the use of any fixed formula to manifest its legislative intent.

Brown v. Barry, 3 Dall. 365, 367, 1 L. ed. 638, 639; Brightman v. Kirner, 22 Wis. 54; Mongeon v. People. 55 N. Y. 619; McCann v. New York, 52 App. Div. 362, 65 N. Y. Supp. 308; People v. England, 91 Hun, 155, 36 N. Y. Supp. 534; State v. Smith, 62 Minn. 542, 64 N. W. 1022; Friend v. Levy, 76 Ohio St. 26, 80 N. E. 1036; Files v. Fuller, 44 Ark. 280.

(3) Section 13 is not a constitutional provision. It cannot save itself from repeal.

Manigault v. Springs, 199 U. S. 473, 487, 50 L. ed. 274, 281, 26 Sup. Ct. Rep. 127; Brown v. Barry and Files v. Fuller, supra; Cortelyou v. Anderson, 73 N. J. L. 427. 63 Atl. 1097; Kleckner v. Turk, supra; Mix v. Illinois C. R. Co. 116 Ill. 502, 6 N. E. 42.

(4) Section 10 takes the repeal effected by the Hepburn act out from the operation of § 13, and itself prescribes the only rule applicable to that repeal.

Tracy v. Tuffy, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. Rep. 527; Cook County Nat. Bank v. United States. 107 U. S. 445, 450, 27 L. ed. 537, 539, 2 Sup. Ct. Rep. 561; United States v. Chase, 135 U. S. 255, 260, 34 L. ed. 117, 119, 10 Sup. Ct. Rep. 756; Felt v. Felt. 19 Wis. 194; Clark v. Baxter. 98 Minn. 256, 108 N. W. 838; State v. Showers. 34 Kan. 271. 8 Pac. 474; Kleckner v. Turk; Files v. Fuller; and Friend v. Levy,—supra; State v. Smith, 62 Minn. 540. 64 N. W. 1022; People v. England, 91 Hun, 155, 36 N. Y. Supp. 534; Lang v. United States, 66 C. C. A. 255, 133 Fed. 204.

(5) Section 13 can have no application where Congress, in a repealing statute, enacts a special saving provision.

State v. Showers, supra; State v. Smith, 62 Minn. 543, 64 N. W. 1022; People v. England and McCann v. New York, supra; Wirt v. Allegany County, 90 Hun, 211, 35 N. Y. Supp. 887; Files v. Fuller and Friend v. Levy, supra.

(6) The rule that an earlier statute, covering a particular subject-matter, is not overthrown by a later statute, including in its general terms the particular subject, has no application to the case at bar.

(7) The question here involved was not

decided in United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99.

Section 13 is ineffectual to prevent the courts from giving effect by their decrees to the intent of a subsequent Congress, as that intent may be discovered from the subsequent enactment.

Ableman v. Booth, 21 How. 506, 520, 16 L. ed. 169, 175; Gordon v. United States, 117 U. S. 697, Appx.; United States v. Klein, 13 Wall. 128, 147, 20 L. ed. 519, 525; Marbury v. Madison, 1 Cranch, 137, 176. 2 L. ed. 60, 73; District of Columbia v. Hutton, 143 U. S. 18, 27, 36 L. ed. 60, 62, 12 Sup. Ct. Rep. 369; United States v. Claflin, 97 U. S. 546, 548, 24 L. ed. 1082, 1083; Powell v. Pennsylvania, 127 U. S. 678, 697, 32 L. ed. 253, 261, 8 Sup. Ct. Rep. 992, 1257; Brown v. Barry; Files v. Fuller; Brightman v. Kirner; State v. Showers; People v. England; and McCann v. New York,—supra.

Messrs. John S. Miller and H. S. Priest, as *amici curiæ*, also filed a brief for petitioner:

When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

United States v. Tynen, 11 Wall. 88, 92-95. 20 L. ed. 153, 154.

Such acts are clearly repugnant where, as here, the later act so changes the punishment for an offense as is done by the Hepburn act in question.

Tynen Case, supra; Com. v. Kimball, 21 Pick. 373.

This rule applies as well where the later criminal statute is in the form of an amendment. "so as to read as follows."

Nash v. White's Bank, 105 N. Y. 243, 11 N. E. 946.

A "cause now pending" is synonymous with a "case" now pending.

Blyew v. United States, 13 Wall. 581, 595, 20 L. ed. 638, 642.

It is a "suit or action;" "any question, civil or criminal, contested before a court of justice."

Bouvier's Law Dict. title, "Cause;" Taylor v. United States, 45 Fed. 539.

A "liability" is defined to be the state of being bound or obliged in law or justice to do, pay, or make good something which may be enforced by action; legal responsibility.

Bouvier's Law Dict. title, "Liability;" Black's Law Dict. title, "Liability;" White v. Green, 105 Iowa, 181, 74 N. W. 928; Benge v. Bowling, 106 Ky. 575, 51 S. W. 151.

There is no serious difficulty presented by this case when the purpose of a general saving clause in the general statutes of a state is considered,—that it simply reverses the presumption as to the legislative intent in case of silence, indulged by the common law.

Files v. Fuller, 44 Ark. 280. See also People v. England, 91 Hun, 152, 36 N. Y. Supp. 534; Lewis's Sutherland, Stat. Constr. § 355.

The natural as well as the legal presumption is that, if the legislature has spoken on the subject at all, it has expressed its full purpose, and has not left that to be gathered in part from what it has said, and in part from presumptions which arise only out of silence.

Lewis's Sutherland, Stat. Constr. § 493; Perkins v. Thornburgh, 10 Cal. 190; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462.

It is a well-settled rule of construction, that where there are two provisions, one of which is general and designed to apply to cases generally, and the other is particular and relating to one subject, the particular provision must prevail, and must be treated as an exception to the general provision.

People ex rel. Akin v. Kipley, 171 Ill. 84, 41 L.R.A. 775, 49 N. E. 229; United States v. Chase, 135 U. S. 260, 34 L. ed. 119, 10 Sup. Ct. Rep. 756.

The applicability of this rule is even more obvious where the general provisions are contained in other laws, previously passed by a preceding legislature.

Felt v. Felt, 19 Wis. 196; Raleigh & G. R. Co. v. Reid, 13 Wall. 270, 20 L. ed. 570; United States v. Tynen, 11 Wall. 92, 93, 20 L. ed. 154, 155.

This principle is expressed in the maxim, *Expressio unius est exclusio alterius;* and this, said the Supreme Court, in United States v. Arredondo, 6 Pet. 725, 8 L. ed. 560, is a universal maxim in the construction of statutes; and, as the court, in Coast-Line R. Co. v. Savannah, 30 Fed. 649, said, is never more applicable than when applied to the interpretation of a statute.

The action of Congress in releasing and extinguishing the penalties and liabilities under the Elkins act which were not saved by § 10 of the Hepburn act was positive, direct, and express, and not by inference.

Ex parte McCardle, 7 Wall. 506, 513, 514, 19 L. ed. 264, 265; Durousseau v. United States, 6 Cranch, 307, 3 L. ed. 232.

The general savings statute is, of course, itself subject to repeal, and therefore cannot impose a construction upon any act thereafter passed which is contrary to the clear language of the later act.

Cortelyou v. Anderson, 73 N. J. L. 427, 63 Atl. 1095.

A case meeting and matching every phase of this case is State v. Showers, 34 Kan. 269, 8 Pac. 474.

Unless Congress intended, by § 10 of the Hepburn act, to limit the saving of offenses under the Elkins act to those then pending in the United States courts, then the saving clause of § 10 is useless, because everything that it does would have been done by § 13. It could not have been intended merely to save procedure, because the procedure would have been saved without the expressed words.

Endlich, Interpretation of Statutes, § 487.

Saving clauses, saving penalties from the effect of repeal, are to receive the same strict construction which a penal statute receives. Aaron v. State, 40 Ala. 312. On the other hand, provisions of law which amount to an amnesty, or a wiping out of penalties for alleged offenses, are favored and to be construed liberally. State v. Shelton, 65 N. C. 297. To exclude, by implication, the words "causes now pending," in the saving clause of § 10, prosecutions of indictments under the Elkins act, which are plainly included in the express language used, would infringe the rule that a criminal statute is not to be extended by intendment. Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

Attorney General **Bonaparte** and Assistant Attorney General **Purdy** argued the cause and filed a brief for respondent:

U. S. Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6, forbids the implication sought to be made in this case.

United States v. Barr, 4 Sawy. 254, Fed. Cas. No. 14,527; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594; United States v. 4 Cases of Lastings, 10 Ben. 371, Fed. Cas. No. 15,145; Sims v. United States, 58 C. C. A. 92, 121 Fed. 515.

During the last thirty-six years it has been the general policy of Congress, as declared by this statute, to save accrued penalties, forfeitures, and liabilities from release and extinguishment, unless the intention to the contrary clearly appears.

United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; United States v. Barr, supra.

This language should be construed as laying down a rule of construction for the guidance of the courts, instead of an attempt upon the part of the legislature to bind succeeding legislatures as to the manner in which they might effect the repeal of a particular statute.

Lang v. United States, 66 C. C. A. 255, 133 Fed. 206; People v. Madill, 91 Hun, 152, 36 N. Y. Supp. 537.

A perpetual statute is to be considered in force as to the particulars of the subject-matter legislated upon until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act; and this, too, notwithstanding an implication to the contrary which may be raised by a general law embracing the subject-matter.

Wood v. United States, 16 Pet. 342, 362, 10 L. ed. 987, 995; United States v. Gear, 3 How. 120, 131, 11 L. ed. 523, 528; Frost v. Wenie, 157 U. S. 46, 58, 39 L. ed. 614, 619, 15 Sup. Ct. Rep. 532; United States v. Healey, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; Rosencrans v. United States, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302; United States v. Greathouse, 166 U. S. 601, 41 L. ed. 1130, 17 Sup. Ct. Rep. 701; McChord v. Louisville & N. R. Co. 183 U. S. 483, 500, 46 L. ed. 289, 297, 22 Sup. Ct. Rep. 165; Great Northern R. Co. v. United States, 155 Fed. 960.

The Federal courts, without exception, in passing upon the question here presented, have decided that no penalty which had accrued under the Elkins act prior to the 29th day of June, 1906, was released or extinguished by any of the provisions contained in the new rate law.

United States v. Standard Oil Co. 148 Fed. 719; United States v. Chicago, St. P. M. & O. R. Co. 151 Fed. 84; United States v. Delaware, L. & W. R. Co. 152 Fed. 269; United States v. New York C. & H. R. R. Co. 153 Fed. 630; United States v. Atchison, T. & S. F. R. Co. (Apr. 8, 1907; C. C. S. D. Cal.); United States v. Standard Oil Co. (Oct. 28, 1907; C. C. W. D. Tenn.); Great Northern R. Co. v. United States, 155 Fed. 945.

Mr. Justice **White** delivered the opinion of the court:

The act of Congress commonly referred to as the Hepburn law was enacted June 29, 1906. 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892. In November, 1906, in the district court of the United States for Minnesota, the Great Northern Railway Company and several of its officials were indicted for violations of the act of 1903, commonly known as the Elkins act. 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880. There were fifteen counts, all relating to acts done in May, June, July, and August, 1905. Except as to varying dates of shipment and the sum of the concessions, the counts were alike. A reference to the first count will therefore make clear all the charges which the indictment embraced. After alleging the corporate existence of the railway company, the capacity of its named officials and agents, and the fixing and publishing of rates, there was set out the carriage of certain grain by the railway company from Minneapolis, Minnesota, to Seattle, Washington, for account of the W. P. Devereux Company, a corporation. It was then alleged that by the tariff and schedule of rates as established, published, and filed in conformity to the act to regulate commerce the legal charge was 50 cents for each 100 pounds of grain carried from Minneapolis to Seattle, "but the grand jurors aforesaid, on their oath aforesaid, do present and charge that . . . within the jurisdiction of this court, ... the said Great Northern Railway" (and the officers and agents named) "did unlawfully grant and give to the said W. P. Devereux Company . . . a concession of twenty cents (20c.) of the said rate as aforesaid upon every 100 pounds of the property so transported . . . as aforesaid, whereby the said property was, by said corporation common carrier, transported in said interstate commerce . . . at a less compensation and rate than that named therefor in said tariff and schedules [460] so as aforesaid *published and filed by the said common carrier and in force at the time upon its said route."

The indictment was demurred to by all the accused upon the following grounds:

"1. That neither the said indictment nor any count in the said indictment stated sufficient facts or grounds to constitute against the said defendants, or either of them, an offense against the laws of the United States, nor any offense.

"2. That the statute of the United States creating the offense or offenses pretended to be charged in the said indictment, and under which said indictment was found, was duly repealed and was not in force at the time when the said indictment was found."

The demurrer in this case was evidently heard along with demurrers in cases against others presumed to present like questions. The demurrer was overruled for reasons stated in an opinion, deemed controlling not only of this, but also of the other cases. 151 Fed. 84. By consent there was a severance between the railway company and the individual defendants. On the trial, after the jury had been sworn and when the taking of testimony was about to begin, the bill of exceptions states that the counsel for the company declared that he desired, on behalf of the defendant, "in order to save our rights under the law questions involved, to make objection to the introduction of any evidence. And I desire to have it understood and agreed between the government and the defendant that I may now enter this objection with the same force and effect as if a witness had been already called and sworn to testify on behalf of the government." On this being assented to by the government, objection was made to the introduction of any evidence based upon the two grounds which had been previously urged to support the demurrer. The following occurred:

The Court: I understand that last ground. Let us see the first ground.

*Mr. Brown: The first ground is the gen- [461] eral ground of the insufficiency of the indictment. The second is the same thing, only more specific.

I think the objection will be sufficient if confined to the first one.

The Court: The point that you wish to make is that there can be no prosecution here, no matter what the evidence is, because of the repeal of this Elkins act by the Hepburn act.

Mr. Brown: That is right.

The Court: The objection will be overruled.

Mr. Brown: I would ask an exception to the ruling of the court.

The Court: An exception is allowed.

Thereupon the counsel for the company stated that there was an agreement with the government that the company should make an admission as to the facts alleged in the indictment, subject to the right of the company to make "such objections and motions and to take such action, either in this court or upon appeal, as shall be deemed necessary and proper to have determined the question of the sufficiency of the indictment to state an offense, and the sufficiency of the facts admitted to state an offense; and it is further agreed that neither such admissions, nor the fact that they had been made in this trial, shall be used as evidence or otherwise upon any other trial of this case, or upon the trial of any case." To this the prosecution assented. The establishment and publication of the tariff rates, the shipments of grain as alleged in the indictment, etc., were then admitted by the accused, and it was further admitted as follows:

"That in case of the several shipments

specified in the several counts of the indictment herein the concessions stated in the several counts respectively in the said indictment were given to W. P. Devereux Company by the direction and with the consent of the said defendant, the Great Northern Railroad Company."

Both parties then rested. The company [462]requested an instruction *in its favor, based on the grounds upon which it had demurred, for which it had objected to any evidence, and upon the additional ground "that the facts shown by the evidence are not sufficient to constitute against the defendant any offense against the laws of the United States, nor any offense." Upon this request the following colloquy between the court and the counsel occurred:

The Court: You admit all the material facts alleged in the indictment?

Mr. Brown: We do.

The Court: And practically admit that they are proved?

Mr. Brown: We can't say that. We admit the facts that are stated here—the government has gone over—and I understand they are the facts of the indictment.

The Court: For the purposes of this case, we will say that you admit those facts.

The motion will be denied, and an exception allowed the defendant.

The court then instructed the jury, as follows:

"The defendant has admitted by its counsel, that all the material allegations of the several counts are true, and if you do not believe these allegations are proven you are obliged to find the defendant not guilty. I suppose it is proper for the court to say that it can hardly see how you can find any other verdict than that of guilty, but that is for you to say. If you do not believe these allegations are proven you can find the defendant not guilty."

An exception was allowed the defendant to that part of the charge instructing that if the facts stated in the indictment were believed to be true, that the defendant should be found guilty. The following then occurred:

The Court: That is equivalent to saying that the indictment itself is insufficient.

Mr. Brown: Might I have that exception?

The Court: You may.

Mr. Brown: May I have it appear on the [463]record that the *grounds of my exception are the same three grounds named as the basis of my motion to instruct a verdict, to wit:

That neither the indictment on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense.

2. That the statute or statutes, of the United States, creating the offense or offenses pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found.

3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

The Court: You may.

There was a verdict of guilty, and the grounds upon which the exceptions previously taken had been rested were made the basis for a motion in arrest, which was overruled and excepted to. From the verdict and sentence thereon the case was taken to the circuit court of appeals for the eighth circuit, where the judgment was affirmed (155 Fed. 945), and the case is here because of the allowance of a writ of certiorari.

There is a contention in the brief of counsel for the petitioner, that the demurrer to the indictment should have been sustained and that the motion to arrest as well as the exceptions to the charge should have prevailed, because the indictment in all its counts was insufficient to state an offense under the Elkins act, even if that act had not been repealed or modified by the Hepburn law.

We postpone presently determining whether this contention is open on the record, or, if open, is meritorious, in order to come at once to the important question for decision, which is:

*1. Did the Hepburn law repeal the Elkins[464] act so as to deprive the government of the right to prosecute for violations of the Elkins act committed before the Hepburn law was passed? The conflicting contentions on these subjects are these: It is insisted on behalf of the railway company that the Elkins act was amended and re-enacted by § 2 of the Hepburn law, and that thereby a repeal of the Elkins act was accomplished, and that the express terms of the Hepburn law manifest the intention of Congress that no offense theretofore committed against the Elkins act should be prosecuted, unless a prosecution was then pending. The government, whilst not challenging the doctrine that where a criminal statute is repealed and a right to prosecute for a prior offense is not saved, such right is extinguished, yet insists that the principle has no application to this case, because the re-enactment of the Elkins act by § 2 of the Hepburn law did not amount to a repeal of the Elkins act to the extent of preventing prosecutions for offenses against that act committed prior to the adoption of the Hepburn law. And it is urged that this result is demonstrated not only by the clause of the Hepburn law re-enacting the Elkins act, but also by other provisions of the Hepburn law interpreted in the light of the principles of construction which are made applicable by operation of the general law,—that is, Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6.

In considering these contentions in their ultimate aspect it is clear that to dispose of them requires us, in any event, to interpret the Hepburn law and to determine how far the re-enactment by that law of the provisions of the Elkins act operates to prevent prosecutions for offenses committed prior to the date when the Hepburn law was enacted. We come therefore at once to that question. In doing so, to disembarrass the analysis from what may be an irrelevant and certainly a confusing consideration, we concede, for the sake of argument only, that the effect of the amendment and re-enactment of the Elkins act by § 2 of the Hepburn law was to repeal the Elkins act, [465] and, in the light of this concession, we *propose to determine whether the right to prosecute for any prior offense committed before the going into effect of the Hepburn law was lost by reason of the adoption of that law.

We must read the Hepburn law in the light of § 13 of the Revised Statutes, which provides as follows:

"Sec. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute. unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This provision but embodies § 4 of the act approved February 25, 1871 (16 Stat. at L. 431, chap. 71, U. S. Comp. Stat. 1901, p. 6), which was entitled, "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction Thereof." As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment. But, while this is true, the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort dealing with the operation of general state statutes like unto § 13, Rev. Stat., because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section. United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99.

The Hepburn law is entitled, "An Act to Amend an Act Entitled 'An Act to Regulate Commerce,' Approved February *Fourth, [466] Eighteen Hundred and Eighty-seven [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], and All Acts Amendatory Thereof, and to Enlarge the Powers of the Interstate Commerce Commission." The law is comprehensive. It undoubtedly, as we have said, in the 2d section, amends and re-enacts the Elkins act, and enlarges in important particulars the powers of the Interstate Commerce Commission, and changes the procedure in various ways essential to the conduct of controversies before the Commission. Besides, the act in some respects modifies the means of enforcing the orders of the Commission in the courts of the United States, the right of appeal, the judgment as to costs, attorneys' fees, etc. The crucial portion of the act, for the purposes of the present inquiry, is § 10, which provides: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Clearly, the mere repeal of conflicting laws is in no way repugnant to the provisions of § 13 of the Revised Statutes, and, therefore, standing alone, leaves no room for contending that the enactment of the Hepburn law destroyed the effect of § 13. The difficulty of construction, if any, arises from the words following the general repealing clause: "But the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." These words, we think, do not, expressly or by fair implication, conflict with the general rule established by § 13, Rev. Stat., since, by their very terms, they are concerned with the application to proceedings pending in the courts of the United States of the new methods of procedure created by the Hepburn law. Any other construction would necessitate expunging the words "shall be prosecuted to a conclusion in the manner heretofore provided by law." This follows, because if it were to be held that the intent and object of the [467]*lawmaker in dealing with cases "pending in the courts of the United States" was solely to depart as to all but such pending cases from the general rule of Rev. Stat. § 13, then the provision as to future proceedings would be unnecessary, because the old and unrepealed as well as the newly enacted remedies would be applicable, as far as pertinent, to such pending causes. The provision commanding that the new remedies should not be applicable to causes then pending in the courts of the United States gives significance to the whole clause, and serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts, and demonstrates therefore that this subject, and this subject alone, was the matter with which the provision in question was intended to deal. In other words, when the object contemplated by the provision is accurately fixed, the subject is freed from difficulty, and not only the letter but the spirit of the provision becomes clear; that is to say, it but manifests the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts. And all the arguments relied upon to sustain the theory that the power to prosecute for past offenses not then pending in the courts was abrogated by the Hepburn law rest in substance upon the disregard of the true significance of the provision of § 10. Thus the argument that, by the application of the elementary rule by which the inclusion of one must be considered as the exclusion of the other, it follows that the power to further prosecute all but cases then pending in the courts was destroyed by the Hepburn law, because pending causes are enumerated in § 10, and are hence not saved by Rev. Stat. § 13, simply assumes that the provision of § 10 was intended to save the right to further prosecute the cases then pending in the courts, and disregards the fact that the provision as to pending causes was solely addressed to the remedies to *be applied in [468] the future carrying on of such cases. Again, the contention that unless the provision as to pending causes in § 10 be construed as relating to the further right to prosecute such cases it becomes meaningless, but overlooks the fact that the purpose of the provision was, by express enactment, to prevent the application of the new remedies to the causes then pending in the courts of the United States,—a result which would not necessarily have followed without the direction in question.

The purpose of Congress in enacting § 10 is aptly illustrated by previous legislation concerning the re-enactment of the interstate commerce law, and may well have been deemed to be advisable in consequence of the decision of this court in Missouri P. R. Co. v. United States, 189 U. S. 274, 47 L. ed. 811, 23 Sup. Ct. Rep. 507. The construction which we have given § 10, resulting from its plain language, is fortified by a consideration of the context of the Hepburn law. Thus, conceding, for the sake of argument, that the words, "pending cases," as used in § 10, embrace criminal prosecutions, they clearly also relate to civil controversies. Now, § 16 of the prior act to regulate commerce, as amended and re-enacted by § 5 of the Hepburn law, prescribes a limitation of two years "from the time the cause of action accrues" as to "all complaints for the recovery of damages" before the Commission, and establishes a limitation of one year for the filing of a petition in the circuit court for the enforcement of an order of the Commission for the payment of money. But the section contains a proviso saving the right to present claims accrued prior to the passage of the act, provided the petition be filed within one year. If it were true that § 10 abrogated, as asserted, the right to prosecute all claims not pending in the courts at the time of the passage of the Hepburn law, it would follow that that law destroyed the very rights which it specifically provides should be saved if prosecuted within a year. Moreover, as the clause of § 10 which is relied upon in terms embraces only cases pending in the courts of the United States, it would follow, if the contention here made were true, that the *Hepburn law, while saving [469] pending cases in the courts, yet destroyed all claims pending at the time of the passage of that act before the Commission. As no reason is suggested why, if the purpose of § 10 was to save pending causes, that section should have destroyed the right to

further prosecute all causes pending before the Commission, it would seem that the inclusion in § 10, only of causes pending in courts of the United States, could only have been the result of a purpose on the part of Congress not to distinguish without reason between pending causes by saving one class and destroying the other, but was solely based on the desire of Congress not to interfere with proceedings then pending in the courts, but to leave such proceedings to be carried to a finality, in accordance with the remedies existing at the time of their initiation. There are various other provisions of the Hepburn law which we think additionally irresistibly demonstrate the correctness of the construction which we affix to § 10, but we do not, for the sake of brevity, refer to them, as we think the reasoning hitherto stated adequately shows the unsoundness of the proposition that that section manifests in any respect the intention of Congress to depart from the general principle expressed in the Revised Statutes, § 13. We say, however, that the view we have taken has in various forms of statement been upheld by a line of decisions in the lower Federal courts. United States v. Standard Oil Co. 148 Fed. 719; United States v. Chicago, St. P. M. & O. R. Co. 151 Fed. 84; United States v. Delaware, L. & W. R. Co. 152 Fed. 269; United States v. New York C. & H. R. R. Co. 153 Fed. 630. In citing the cases in question we do not wish to be considered as implying that we express any opinion as to the doctrines which they may announce upon other subjects than the one now before us. We say this, because it may be that some of the other subjects with which some of the cited cases deal may hereafter come before us for decision, and therefore we prefer not prematurely, even by indirection, to leave room
[470] *for the slightest implication that we express an opinion as to such other issues.

2. This brings us to the contention which we at the outset passed over, which is that the indictment was insufficient to state an offense under the Elkins act, although that act was not repealed. The proposition is, that as the indictment only charged that the concessions on the established rate were unlawfully given, it was insufficient, because, in order to cause a concession to be a crime under the Elkins act, as it stood before the Hepburn law, such concession must have been "either knowingly or wilfully granted. If a criminal intent is necessary to the crime, it must be charged in the indictment." It is undoubted that the first ground of the demurrer filed to the indictment was broad enough to embrace this contention if it had been urged. That it was not urged on the hearing of the demurrer persuasively results from the fact that it was not noticed in the elaborate opinion filed by the court in disposing of the demurrer. It moreover results from the proceedings had at the trial after the jury was sworn. The judge who presided at that trial was the same judge before whom the demurrer was heard. When, in stating the objection to the admissibility of any evidence on the part of the government, the counsel for the accused restated both grounds, as expressed in the demurrer, the only contention which the court understood to be urged was the repeal of the Elkins act, since the court said: "I understand that last ground" (the one referring to the repeal of the Elkins act). "Let us see the first ground." It is clear that the counsel did not then consider that the first ground embraced the proposition now made, since, in answer to the question of the court, he said: "The first ground is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific." That the court understood this declaration as indicating that the only question raised was the repeal of the Elkins act, beyond controversy appears from the statement then made by the court: "The point you wish to make is that there can be no prosecution *here, no [471]
matter what the evidence is, because of the repeal of the Elkins act by the Hepburn act." To which counsel answered: "That is right." True also is it that the general language of the exceptions subsequently taken is also broad enough to embrace the point now made, but consistently with that candor and directness of conduct which we should attribute to counsel, and which we do attribute, we cannot consider that the subsequent exceptions were intended by counsel, without notice to the court, to embrace a contention which had been expressly disclaimed and which could not be in the case consistently with the previous statement of counsel as to the one and sole point which they desired to raise. And this conclusion is, moreover, rendered necessary by the nature of the admission made, which expressly conceded that "the concessions stated in the several counts respectively in the said indictment were given . . . by the direction and with the consent of the said defendant, the Great Northern Railway Company." And, particularly is this so in view of the express declaration made by counsel to the court after his admission as to the facts of the case, *viz.:* "I understand that they [the admissions] are the facts of the indictment." In addition to this not a syllable in the elaborate opinion of the circuit court of appeals refers to the question now urged. On the contrary, that opinion contains affirmative statements by

the court concerning concessions made by counsel for both parties in argument which exclude the possibility that the contention we are considering was ever directly urged or even indirectly called to the attention of that court. Finally, in the petition filed for certiorari, counsel, after stating the bringing of the indictment, the demurrer, the admissions, and the exceptions made at the trial, summed up and precisely stated all the contentions which arose from the demurrer and the exceptions without a single reference to the point now relied upon, and that point was not referred to or noticed in the brief submitted in support of the petition for certiorari. Certain is it that the proposition now urged, in view of the admission made [472] below, is of a purely *technical character. Because we decline to consider the contention under the circumstances stated, we must not be understood as intimating any opinion whatever upon it. Into that question we have not deemed that we are called upon to enter.

Affirmed.

FERDINAND PHILLIPS, Plff. in Err.,
v.
CITY OF MOBILE.

(See S. C. Reporter's ed. 472–480.)

Commerce — in intoxicating liquors — municipal license — Wilson act.

A license tax imposed under municipal ordinance upon those engaged in selling beer in the city by the barrel, half barrel, or quarter barrel must be regarded, even when applied to interstate transactions in the original packages, as an exercise of the police power permitted by the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting intoxicating liquors arriving in a state to the laws of such state enacted in the exercise of its police powers, although the city may derive more or less revenue from the ordinance in question.

[No. 113.]

Argued January 17, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which reversed a judgment of the City Court of Mobile, in that state, in favor of defendant in an action to recover a fine imposed for selling beer without a municipal license. Affirmed.

See same case below, 146 Ala. 158, 40 So. 826.

Statement by Mr. Justice **Peckham**:

The plaintiff in error herein seeks to reverse a judgment of the supreme court of Alabama which reversed a judgment in his favor given by the city court of Mobile.

The action was brought in the city court by the city of Mobile, by a written complaint, wherein the city sought to recover from the plaintiff in error (defendant in that court) the sum of $15, the amount of the fine imposed upon him by the recorder for the violation of what is termed the license ordinance of the city, approved March 14, 1904, by failing to obtain and pay for a license under the 28th subdivision of the 2d section of that ordinance, relating to the selling of beer in that city. The defendant filed a plea, setting up what he alleged was a defense.

*Upon the trial in the city court the parties [473] agreed upon a statement of facts.

From such statement it appears that the city council, as authorized by the state legislature, had, prior to the complaint in question, adopted an ordinance, § 2 of which imposed a license tax for the fiscal year beginning March 15, 1904, "on each person, firm, corporation, or association doing business or trading or carrying on any business, trade, or profession, by agent or otherwise, within the limits of the city of Mobile, . . . and such licenses are hereby fixed for such business, trade, or profession . . as follows."

Subsection 28 of § 2 fixes the amount, upon the payment of which the license may be granted in such a case as this, as follows:

"28. Breweries.—Each person, firm, corporation, dealer, brewer, brewery, agent or handler for a brewery, selling beer by the barrel, half barrel, or quarter barrel (this clause is not to include license for wholesale or retail vinous or spirituous liquors), $200."

The statement of facts as agreed upon then continues as follows:

"That the defendant herein is an individual who resides in Mobile, Alabama, and that he is engaged in the business of being a retail beer dealer, for which, under the exhibit hereto, he has paid the amount of his license, as required by said ordinance for and during the fiscal year, beginning March

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NOTE.—As to validity of state regulation of sales of intoxicating liquors—see notes to Rhodes v. Iowa, 42 L. ed. U. S. 1089, and Foster v. Kansas, 28 L. ed. U. S. 696.

For state licenses or taxes as affecting interstate commerce generally—see notes to Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

15, 1904, and ending March 14, 1905; and that said payment having been made, a license therefor was duly issued by the proper authorities of the city of Mobile, authorizing the defendant to carry on the business of retail beer dealer during said time; that the defendant, in addition to his other liquor business, carried on under the authority of said paid license under said ordinance, has likewise, but at the same place, and with the same employees, before the institution of this prosecution in the recorder's court, and since March 15, 1904, been engaged in the business of buying and selling beer in [474]kegs, but only *under the following circumstances: That the defendant would, by letter or telegram sent from Mobile, Alabama, order from a brewery or breweries owned and conducted by residents and citizens of states other than Alabama, certain quantities of lager beer, which, pursuant to said orders, would be shipped by continuous interstate transportation by said nonresidents to the defendant at Mobile, Alabama, in kegs, which kegs were, without other packing, loaded into railroad freight box cars and transported by the railroad companies from said breweries in other states to the defendant at Mobile, Alabama. The said purchases by the defendant were outright, and that the defendant by and through said purchases became the owner of said lager beer, to do with as he pleased; that he paid for it usually after its arrival, but never until a bill of lading for each such shipment so paid for had been received by the defendant at Mobile; that the packages in which said beer came were invariably kegs of the ordinary, usual, and customary commercial sizes in which the same is packed for sale and shipment, and that in such usual commercial original packages the same was taken from the car upon arrival at Mobile, and stored in the storehouse or warehouse of the defendant in the city of Mobile until sold by the defendant; that the defendant made sales of said kegs in quantities of one or more to his various customers in and about the city of Mobile and the vicinity thereof, and that such sales were made in contemplation by defendant of deliveries by the defendant in said kegs as original packages, and that the deliveries were thereafter made by delivery wagons owned and operated by the defendant in the city of Mobile to such customers in such original packages. That from the time of the packing and shipment of said beer at the breweries in other states than Alabama, until after sale and delivery thereof by the defendant to his various customers in the city of Mobile and the vicinity thereof, none of said kegs as original packages ever became broken or open, but the deliveries by the defendant to his respective customers of said beer was always in the same, original, usual, commercial packages *in which[475] the same was packed and shipped from the breweries in said foreign states. That each and all of the kegs herein mentioned contained more than one quart of beer. That this mode of business has been conducted by the defendant since March 15, 1904, and still continues, and that, except as is herein above stipulated, the defendant, neither as a brewery, person, firm, corporation, dealer, brewer, brewery agent, or handler has ever sold beer by the barrel, half barrel, or quarter barrel in the city of Mobile, Alabama, since March 15, 1904. That nearly 50 per cent of all the offenses against the ordinances of the city of Mobile ordained to secure peace and order is brought about by the use of intoxicating liquors. Neither the license sued for nor the fine assessed by the recorder has been paid."

The case was submitted to the jury upon this agreed statement.

The plaintiff, the city of Mobile, asked the court to charge the jury that, if they believed the evidence, they must find for the plaintiff. The defendant also asked the court to charge the jury that, if they believed the evidence in this case, they ought to find for the defendant.

The court charged the jury in accordance with the request of the defendant, and a verdict was thereupon rendered in his favor.

On appeal from the judgment to the supreme court it was reversed, the court holding that the trial court should have refused the request of the defendant, and directed the jury to find a verdict for the plaintiff. The case was therefore remanded with such directions.

Mr. **Richard William Stoutz** argued the cause, and, with Mr. Walter A. White, filed a brief for plaintiff in error:

The business of buying and selling original packages of goods, traded in as commerce between the states, is not taxable by the states.

Lyng v. Michigan, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Austin v. Tennessee, 179 U. S. 363, 364, 45 L. ed. 234, 21 Sup. Ct. Rep. 132; Norfolk & W. R. Co. v. Sims, 191 U. S. 449, 450, 48 L. ed. 257, 258, 24 Sup. Ct. Rep. 151.

Beer in kegs is in the original packages.

Keith v. State, 91 Ala. 2, 10 L.R.A. 430, 8 So. 353; Lyng v. Michigan and Leisy v. Hardin, supra; Austin v. Tennessee, 179 U. S. 351, 45 L. ed. 229, 21 Sup. Ct. Rep. 132; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

The right to order beer from breweries in other states, and bring it here in kegs, constituted importing the same, and gave the interstate importers a right to sell the beer in the original package, free of any state or municipal taxation on such business not exacted under the police power; and until said sale had taken place after importation, and was an accomplished fact, the keg or kegs of beer forming the subject-matter of the sale did not become mingled with the mass of property in the state, so that the business of selling same could be taxable therein.

Keith v. State, 91 Ala. 6, 10 L.R.A. 430, 8 So. 853.

The test question is whether the property was sold in the original package.

Schollenberger v. Pennsylvania, 171 U. S. 22, 43 L. ed. 57, 18 Sup. Ct. Rep. 757.

The purpose of the Wilson act is purely to give to the state police power, and that alone, over liquors which come under the head of interstate commerce.

Reymann Brewing Co. v. Brister, 179 U. S. 455, 45 L. ed. 274, 21 Sup. Ct. Rep. 201; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Pabst Brewing Co. v. Terre Haute, 98 Fed. 330; State v. Bengsch, 170 Mo. 81, 70 S. W. 710; Fred Miller Brewing Co. v. Stevens, 102 Iowa, 60, 71 N. W. 186; Stevens v. State, 61 Ohio St. 597, 56 N. E. 478; Tinker v. State, 90 Ala. 640, 8 So. 814.

But the act gives no right to levy a tax on the business of dealing in such liquors while the same retains its interstate-import character, purely for purposes of revenue or taxation. The police power cannot be put forward as an excuse for oppressive and unjust legislation, not under the police power.

Austin v. Tennessee, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132; Holden v. Hardy, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; Pabst Brewing Co. v. Terre Haute, supra.

The ordinance of the city of Mobile is purely a revenue ordinance, and is not a police ordinance in any respect.

Stratford v. Montgomery, 110 Ala. 626, 20 So. 127; Mobile v. Leloup, 76 Ala. 403, Reversed in 127 U. S. 644, 32 L. ed. 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Pabst Brewing Co. v. Terre Haute, 98 Fed. 334; Brennan v. Titusville, 153 U. S. 289, 301, 302, 38 L. ed. 719, 722, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Swords v. Daigle, 107 La. 510, 32 So. 94.

The state may tax goods as property by a nondiscriminating property tax though it may not tax them as imports, distinctively and discriminatingly as such, and it may not tax the business of importing the goods from another state and selling them in original packages.

Leisy v. Hardin and Lyng v. Michigan, supra; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Vance v. W. A. Vandercook Co. and Reymann Brewing Co. v. Brister, supra; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Adams Exp. Co. v. Kentucky, 206 U. S. 137, 51 L. ed. 992, 27 Sup. Ct. Rep. 606; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

Mr. **Burwell Boykin Boone** argued the cause and filed a brief for defendant in error:

The decision of this court in the case of Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403, seems clearly against the contention of the plaintiff in error, that he was engaged in business protected from the imposition of a license by the commerce clause of the Federal Constitution.

In American Steel & Wire Co. v. Speed, 192 U. S. 519, 48 L. ed. 546, 24 Sup. Ct. Rep. 365, Mr. Justice White points out that, since the decision in Brown v. Maryland, 12 Wheat. 436, 6 L. ed. 684, it has not been an open question that the states had no power to tax imports from foreign countries while the goods remained in the original packages. And that, where the goods were brought from one state of the Union to another state, and delivered to the consignee, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination, and whilst held in the state for sale.

The manifest purpose of the Wilson act was to subject original packages to the regulations and restraints imposed by the state law.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 30, 49 L. ed. 930, 25 Sup. Ct. Rep. 552; Delamater v. South Dakota, 205 U. S. 98, 51 L. ed. 728, 27 Sup. Ct. Rep. 447.

The contention that the ordinance is a taxing law, and not a police regulation, is put at rest by the decisions of this court.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 27, 49 L. ed. 929, 25 Sup. Ct. Rep. 552; Delamater v. South Dakota, 205 U. S. 104, 51 L. ed. 731, 27 Sup. Ct. Rep. 447.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiff in error asserts that a license tax, such as is provided in this ordinance, is a tax upon the seller of the goods under the license, and therefore a tax upon the goods themselves (Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403), and, as they were brought into the state from another state, they cannot be taxed in their original packages, even under the Wilson act. 26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177. The ordinance, it is said, is in the nature of a revenue act, and was not enacted in the exercise of the police powers of the state through the city. The Wilson act provides that the liquors, upon arrival in a state or territory to which the liquor may be sent, shall be subject to the operation and effect of the laws of the state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

It is insisted that Congress, by the passage of the Wilson act, merely removed the impediment to the states reaching the interstate liquor through the police power, and that it intended to, and did, keep in existence any other impediment to state interference with interstate commerce in original packages.

But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the state, and, as such, authorized by the act of Congress. The fact that the city derives more or less revenue from the ordinance in question does not tend to prove that this section was not [479] adopted in *the exercise of the police power, even though it might also be an exercise of the power to tax. The police power is a very extensive one, and is frequently exercised where it also results in raising a revenue. The police powers of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which may be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for the regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. Gibbons v. Ogden, 9 Wheat. 1-203, 6 L. ed. 23-71; New York v. Miln, 11 Pet. 102, 139, 141, 9 L. ed. 648, 662, 663; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357.

The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it. We regard the question in this case as covered in substance by prior decisions of this court. See Vance v. W. A. Vandercook Co. 170 U. S. 438, 446, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25, 49 L. ed. 925, 928, 25 Sup. Ct. Rep. 552; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447. Even where the subject of transportation is not intoxicating liquor, this court has held that goods brought in the original packages from another state, having arrived at their destination, and being at rest there, may be taxed, without discrimination, like other property within the state, even while in the original packages in which they were brought from another state. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

*This license tax is exacted without refer- [480] ence to the question as to where the beer was manufactured, whether within or without the state, and hence there is no discrimination in the case.

It is unnecessary to continue the discussion. As we have said, the cases above cited are conclusive in favor of the correctness of the judgment of the supreme court of Alabama.

Judgment affirmed.

EDWARD E. RICHARD and Ralph G. Richard, Partners as S. Richard & Sons, Appts.,

v.

CITY OF MOBILE.

(See S. C. Reporter's ed. 480, 481.)

This case is governed by the decision in No. 113, ante, 578.

[No. 112.]

Argued January 17, 1908. Decided February 24, 1908.

PPEAL from the Circuit Court of the United States for the Southern District of Alabama to review a judgment sustaining a demurrer to, and dismissing, a bill which seeks to enjoin a municipality from collecting a municipal license tax upon persons selling beer by the barrel, half barrel, or quarter barrel. Affirmed.

Mr. **Richard William Stoutz** argued the cause, and, with Mr. Walter A. White, filed a brief for appellants.

Mr. **Burwell Boykin Boone** argued the cause and filed a brief for appellee.

For contentions of counsel, see their briefs as reported in Phillips v. Mobile, ante, 578.

Mr. Justice **Peckham** delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of the United States for the southern district of Alabama, sustaining the demurrer of the city of Mobile to a bill filed by the appellants, and dismissing the same. It appears that the appellants sought to obtain an injunction to restrain the city from collecting the amount of the license tax imposed under the ordinance of the city upon those who were engaged in selling beer in the city by the barrel, half barrel, or quarter barrel.

[481] *The question involved is, as counsel for appellants admits, identical with that which has just been decided in the foregoing case, No. 113 [208 U. S. 472, ante, 578, 28 Sup. Ct. Rep. 370], and for the reasons therein stated the judgment of the Circuit Court is affirmed.

CHARLES UGHBANKS, Plff. in Err.,
v.
A. N. ARMSTRONG, Warden of the State
Prison at Jackson, Michigan.

(See S. C. Reporter's ed. 481–488.)

Courts — following state court decisions — statutory construction.

1. A decision of the highest state court, that the Michigan indeterminate sentence act (Public Acts 1903, No. 136) was not repealed as to those sentenced under it by Public Acts 1905, No. 184, will be followed by the Federal Supreme Court on writ of error to the state court.

Constitutional law — due process of law — equal protection of the laws.

2. A person sentenced under the Michigan indeterminate sentence act (Public Acts 1903, No. 136) after having been twice before convicted of felony is not imprisoned without due process of law or denied the equal protection of the laws because he is deprived by that act of the privilege therein accorded to other convicts at the end of the minimum term of the sentence to make application for parole, although the statute gives no hearing upon the question of prior conviction.

[No. 435.]

Submitted January 20, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment denying an application for writ of habeas corpus. Affirmed.

Statement by Mr. Justice **Peckham**:

This writ of error brings up a judgment of the supreme court of Michigan, denying the application of the plaintiff in error for a writ of habeas corpus, to inquire into the cause of his detention in, and to obtain his discharge from, the state prison at Jackson.

It appears from the record that on the 17th of March, 1904, the plaintiff in error was proceeded against in the circuit court for the county of Washtenaw, in the state of Michigan, on an information filed by the prosecuting attorney for that county, charging the plaintiff in error with having committed the crime of burglary on the 15th of March, 1904. Upon being arraigned upon such information he pleaded guilty and was, on the day mentioned, sentenced under the indeterminate sentence act of the state to be confined in the state prison at Jackson at hard labor for a period not less than one year and not more than two years. Public Acts of Michigan, 1903, No. 136. His term of imprisonment, counting the maximum period for which he was sentenced, ended, as he asserts, on March 17, 1906, even without any deduction for good behavior.

In his petition for the writ, plaintiff in error stated that, by the record kept and retained by the warden of the Michigan state prison at Jackson, it appeared, as plaintiff in error was advised, that he had been twice before convicted of felony, and that he had served four years in Kingston, Canada, and four years in Jackson, Michigan, on account thereof, and that he was a resident of Canada, and had never resided in the state of Michigan or in the United States.

He made application at the end of the minimum term of his sentence to the advisory board, provided for by § 4 of the

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NOTE.—As to Federal courts following state laws and decisions—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 584; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Wilson v. Perrin, 11 C. C. A. 71; and Hall v. Hite, 29 C. C. A. 553.

As to reduction of prisoner's term by allowance for good behavior—see note to Howard v. United States, 34 L.R.A. 509; and case note to Fite v. State, 1 L.R.A.(N.S.) 520.

above act, for his discharge on parole, but he was notified that his application could not be heard or considered for the reason [483]*that it appeared that he had been twice before convicted of a felony, and the act provides that no person who has been twice previously convicted of a felony shall be eligible to parole.

After the expiration of the maximum term named in the sentence, being still detained in prison under the claim that the law provided a maximum term of imprisonment of five years in such a case as his, which term had not elapsed, the plaintiff in error applied to the supreme court of Michigan for a writ of habeas corpus to obtain his discharge, and, upon the denial of the application, brought the case here.

Mr. **John B. Chaddock** submitted the cause for plaintiff in error. Mr. George E. Nichols was on the brief.

Messrs. **John E. Bird** and **Henry E. Chase** submitted the cause for defendant in error.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

An act providing for an indeterminate sentence was first passed in Michigan in 1889, and was declared unconstitutional by the supreme court of that state. People v. Cummings, 88 Mich. 249, 14 L.R.A. 285, 50 N. W. 310. A constitutional amendment was subsequently adopted (1901), which authorized the legislature to provide for an indeterminate sentence law, as punishment for crime, on conviction thereof. Art. 4, § 47, Constitution of Michigan, as amended. Under the authority of this amendment the legislature, in 1903, passed act No. 136 of the Public Acts of that year. This act was held to be valid. Re Campbell, 138 Mich. 597, 101 N. W. 826; Re Duff, 141 Mich. 623, 105 N. W. 138. An act of a character very similar has been held to violate no provision of the Federal Constitution. Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28. While the act in question here was in force, the crime of plaintiff in error was committed, and on the 17th of March, 1904, he was sentenced as already stated. The sentence fixed the maximum as well as the minimum term of imprisonment, but the fixing of the maximum term in the sentence has been held to be void, as not intended or authorized by the law of 1903 in any case where the statute providing for the punishment of a crime itself fixes the maximum term of imprisonment at a certain number of years. Re Campbell and Re Duff, supra.

In this case, where the maximum term for burglary is fixed by the statute at five years, the sentence fixing that term at two years was simply void, and the maximum term of imprisonment fixed by the statute takes the place of the maximum term *fixed [486] in the sentence. Re Campbell and Re Duff, supra. Under this construction the term of imprisonment of the plaintiff in error has not yet expired.

He cannot, however, avail himself of the provisions of the statute in relation to applying for and obtaining his discharge on parole, after the expiration of the minimum term of the sentence, because he has been convicted of two previous felonies.

In 1905 (Public Acts of Michigan, No. 184) the legislature passed another act on the same subject and repealed the act of 1903. The plaintiff in error contends that the provisions of the act of 1905 are more unfavorable to him than that of the act of 1903, and that it is invalid as to him because it is an *ex post facto* law, and, as the act of 1903 has been repealed, there is no act in force by which he can be further imprisoned.

Without stopping to inquire whether the act of 1905 would be, in his case, an *ex post facto* law, it may be stated that the supreme court of Michigan has held that the act of 1903 is not repealed as to those who were sentenced under it, and that, as to them, it is in full force, and the statute of 1905 has no application. Re Manaca, 146 Mich. 697, 110 N. W. 75. In such a case as this we follow that construction of the Constitution and laws of the state which has been given them by the highest court thereof. There is, therefore, no force in the contention made on the part of the plaintiff in error that the act of 1905 applies in his case and is *ex post facto*.

It is also urged that the result of the holding of the state court is that plaintiff in error is imprisoned under the indeterminate sentence act of 1903 for the maximum period (five years) provided by the general statute for the crime of which he has been convicted, without any discretion on the part of the court as to the term of his sentence, while he is also refused the right to apply under the act for a discharge upon his parole after the expiration of the minimum term of the sentence, because, it is alleged, that as to him there can be no *minimum sentence, as he has been twice be- [487] fore convicted of a felony, although he has had no opportunity of being heard as to that allegation. He now urges that he is imprisoned in violation of the 6th and 8th and 14th Amendments of the Federal Constitution.

The claim rests upon an entire misapprehension of the rights of the plaintiff in error under these Amendments. The 6th and 8th Amendments do not limit the powers of the states, as has many times been decided. Spies v. Illinois (Ex parte Spies) 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Eilenbecker v. District Court, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Brown v. New Jersey, 175 U. S. 172–174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Maxwell v. Dow, 176 U. S. 581, 586, 44 L. ed. 597, 599, 20 Sup. Ct. Rep. 448, 494. The plaintiff in error says that, under the 14th Amendment, he is imprisoned without due process of law, and is denied the equal protection of the laws. The last-named Amendment was not intended to, and does not, limit the powers of a state in dealing with crime committed within its own borders or with the punishment thereof, although no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224. The act in question provides for the granting of a favor to persons convicted of crime who are confined in a state prison. People v. Cook, 147 Mich. 127–132, 110 N. W. 514. It gives to a criminal so confined, subsequent to the expiration of the minimum term of imprisonment stated in the sentence, the privilege to make application for parole to the warden or superintendent of the prison where he is confined, and the warden is directed to send such application to the governor. Upon its receipt the governor may order such investigation by the advisory board in the matter of pardons as he may deem advisable and necessary, but the authority to grant paroles, under such rules and regulations as the governor may adopt, is conferred by the statute exclusively upon that officer. He is not bound to grant a parole in any case, and § 4 provides "that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act." As the state is thus [488] providing *for the granting of a favor to a convicted criminal confined within one of its prisons, it may (unless under extraordinary circumstances) attach such conditions to the application for or to the granting of the favor as it may deem proper, or it may, in its discretion, exclude such classes of persons from participation in the favor as may to it seem fit. If the state choose to grant this privilege to make application to the governor for a discharge upon parole in the case of one class of criminals and deny it to others, such, for instance, as those who have been twice convicted of a felony, it is a question of state policy exclusively for the state to decide, as is also the procedure to ascertain the fact, as well as the kind or amount of evidence upon which to base its determination. It is not bound to give the convict a hearing upon the question of prior conviction, and a failure to give it violates no provision of the Federal Constitution. The application for parole is, in any event, addressed exclusively to the discretion of the governor. Even after the convict is at large by virtue of the parole granted, he is still deemed to be serving out the sentence imposed upon him, and he remains technically in the legal custody and under the control of the governor, "subject at any time to be taken back within the inclosure of the prison from which he was permitted to go at large, for any reason that shall be satisfactory to the governor, and at his sole discretion; and full power to retake and return any such paroled convict to the prison from which he was permitted to go at large is hereby expressly conferred upon the governor." Act of 1903, § 5, supra.

We find nothing in the record which shows any violation of the Federal Constitution, and the judgment of the Supreme Court of Michigan must, therefore, be affirmed.

Mr. Justice **Harlan** dissents.

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*JAMES R. JETTON, Revenue Agent of the State of Tennessee; David S. Osborne, Trustee of Franklin County, Tennessee; and the County of Franklin, Appts., [489]

v.

UNIVERSITY OF THE SOUTH.

(See S. C. Reporter's ed. 489–504.)

Courts — jurisdiction of circuit court — case arising under Federal Constitution.

1. A case arising under the Federal Constitution, of which a Federal circuit court has jurisdiction without diversity of citizenship, is presented by a bill which alleges a contract exemption from taxation which the state is, by subsequent legislation, attempting to destroy.

Constitutional law — impairing contract obligations — contract exemption from taxation.

2. The contract exemption from taxation granted to the University of the South by its charter of January 6, 1858, as amended January 19, 1858, to continue as long as the land so exempted belongs to that institution, is not impaired by taxing, under the authority of Tenn. act January 10, 1903, chap. 258, § 5, the interests of the lessees

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NOTE.—As to impairing obligation of contract for exemption from taxation—see note to Wicomico County v. Bancroft, 70 C. C. A. 294.

of such land under leases from the university for a term of years, which, *inter alia*, require the lessees to pay the rent specified and "all taxes and assessments upon said premises," and reserve the right of re-entry for covenant broken, although, when the exemption was granted, the state had not provided for taxation of the interest of a lessee in his own name.

Taxes — lien.

3. The lien of taxes upon the fee, given by Tenn. act January 10, 1903, chap. 258, § 32, applies only when the fee itself may be taxed, and does not give such lien for a tax upon the interest of a lessee where the fee itself is exempt from taxation.

[No. 488.]

Argued January 28, 1908. Decided February 24, 1908.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee to review a decree enjoining the taxation of the interests of lessees of certain lands from the University of the South, which are exempt from taxation while owned by that university. Reversed and remanded with directions to dismiss the bill.

See same case below on demurrer, 155 Fed. 182.

Statement by Mr. Justice **Peckham**:

This is a suit in equity brought in the United States circuit court for the middle district of Tennessee, by the University of the South, a corporation, and by the several individual complainants named in the bill, who are residents of the county of Franklin, in that state, and lessees of certain lands from the university, to obtain an injunction against the individual defendants, who are a state revenue agent and a trustee of Franklin county, and also against the county of Franklin, in the above-named state, to restrain them from taking any proceedings to collect taxes from the lessees of the university within the limits of the 1,000 acres mentioned in the complainants' bill.

The bill having been filed, a preliminary injunction was issued, restraining the collection of the taxes, as prayed for.

Thereafter, a demurrer to the bill was filed by the defendants on several grounds; among others, on the ground that, as to the individual complainants, the bill could not be maintained, and the court had no jurisdiction to hear and determine the cause on their behalf.

The defendants also answered.

The demurrer was sustained as to the individual complainants and the bill dismissed, but was overruled as to the university itself.

After a trial between the university and the defendants a final decree was entered in favor of the university, restraining the defendants from assessing, or attempting to assess, taxes *on the property and leasehold in-[491] terests described in the bill, and situated within the 1,000 acres already referred to.

From this final decree the defendants have taken an appeal directly to this court, under the 5th section of the act of 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), as involving the application of the Constitution of the United States.

The material facts are as follows:

The University of the South is a Tennessee corporation, under a charter granted by the legislature of that state, January 6, 1858, and amended January 19, 1858. The corporation was created for the purpose of establishing a seminary of learning, to be located at Sewanee, on the Cumberland mountain, in Tennessee.

The 10th section of the act, under which the question arises, is set forth in the margin.† That question is whether the assessments made against the lessees upon their interests in that portion of the 1,000 acres of the lands leased to them respectively are valid, or whether they are not a violation of the exemption from taxation granted by that section.

The Civil War coming on soon after the charter was granted, very little work was done under it; but after peace was restored the university authorities, aided by subscriptions from those interested in the work, went on with it, and in process of time the 1,000 acres were duly surveyed and marked out and many buildings were erected for the university. Leases were also granted by it of lots within the 1,000-acre limit to persons who, under such leases, built upon the lots severally leased to them. By this method a population of about 1,000 or 1,200 people had been gathered within the village called *Sewanee, situated within the limit [492] stated, and which was a barren wilderness when the charter was granted. In fact, the very existence of the village is the result of the efforts of the university.

In the summer of 1906 proceedings were taken to assess taxes upon the interests of the lessees occupying various lots under the leases mentioned, and a hearing was had before the trustee of Franklin county, within which the lots were situated, and he held that under the act of the legislature of Tennessee, passed January 10, 1903, chap. 258, being the general assessment act, the lessee of a leasehold interest of a lot in Sewanee was taxable on the value of such interest, and he thereafter assessed the tax in the case of an individual named, and announced his intention of doing the same with reference to all lessees similarly situated. This bill was then filed before any further assessments were made.

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†Sec. 10. Be it further enacted, That said university may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed 10,000 acres, 1,000 of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said university.

The several leases under which the various lessees of the university held their lots, among other things, provided that the lessees would pay the rent specified in the lease "and all taxes and assessments upon said premises." It was also provided in the leases that the premises should not be sublet or transferred without the consent of the commissioner of lands and buildings of the university, and that, for any violation of the restrictions and provisions made in the lease, the lessor might end and determine the lease and re-enter upon the premises. Each lease also contained the following, the blanks being filled up in accordance with the terms which might be agreed upon between the parties:

"And at the expiration of the present term, the University of the South shall have the option of taking the premises by paying for all such improvements made thereon, or may renew the lease for another term of ——— years, on such terms as may be agreed upon by the parties respectively, and may also give a second renewal for ——— years; and in case the parties cannot agree upon the value of the improvements or the rental to be paid for the new term, the same shall [493]be determined *by arbitration, one of the arbitrators to be selected by the commissioner of buildings and lands and the other by the lessee; and, in case they cannot agree, they shall call in an umpire . . . provided, however, that in fixing the rental for the new term, the value of the improvements shall not be taken into account as against the said party of the second part . . . heirs or assigns. And it is further agreed that the improvements to the value of ——— hundred dollars be made and kept on said premises by the party of the second part."

At the time of the passage of the act of 1858 (the charter of the university) there was no statute providing for the separate taxation of the interest of a lessee in real estate, but the whole value of the entire real estate was assessed against the owner of the fee. The act of 1903, already mentioned, provided in subdivision 5 of § 5 that the interest of a lessee should be assessed to the owner of such interest separately from other interests in the real estate.

Section 32 of the same act provided that all taxes should be a lien upon the fee in the property, and not merely upon the interest of the person to whom the property was, or ought to be, assessed, and it was provided that the whole proceeding for the collection of taxes, from the delinquency to the sale, should be a proceeding *in rem.*

It is also asserted by complainant as a further ground of invalidity that § 2, subdivision 2, of the act of 1903, providing a general exemption from taxation of religious, educational, and other named classes of institutions, as therein stated, does not provide as broad an exemption as the special exemption granted the university by its charter, and if it be held that the above general exemption does not reach the complainant, while at the same time it is claimed to repeal the special exemption provided by the charter, it impairs the contract between the state and the university, and is therefore void.

Mr. **Charles T. Cates, Jr.**, argued the cause, and, with Messrs. Frank L. Lynch, Felix D. Lynch, Isaac G. Phillips, and Thomas B. Lytle, filed a brief for appellants:

What the lessees have, in and upon their leasehold interests, by virtue of the improvements erected thereon, is property, and therefore taxable by the state of Tennessee, without in any way impairing, diminishing, or affecting appellee's charter exemption.

Cooley, Taxn. 3d ed. pp. 633, 634; People ex rel. Muller v. Board of Assessors, 93 N. Y. 308; Russell v. New Haven, 51 Conn. 259; Brainard v. Colchester, 31 Conn. 407; Lord v. Litchfield, 36 Conn. 116, 4 Am. Rep. 41; People ex rel. Van Nest v. Tax & A. Comrs. 80 N. Y. 573; Union Compress Co. v. State, 64 Ark. 136, 41 S. W. 52; Milligan v. Drury, 130 Mass. 426; Philadelphia, W. & B. R. Co. v. Appeal Tax Court, 50 Md. 397; Zumstein v. Consolidated Coal & Min. Co. 54 Ohio St. 264, 43 N. E. 329; Bentley v. Barton, 41 Ohio St. 410; Parker v. Redfield, 10 Conn. 490; People ex rel. Muller v. Board of Assessors, 93 N. Y. 311; Ex parte Gaines, 56 Ark. 227, 19 S. W. 602; San Francisco v. McGinn, 67 Cal. 110, 7 Pac. 187; People v. Shearer, 30 Cal. 657; State v. Moore, 12 Cal. 70; State ex rel. Sioux County v. Tucker, 38 Neb. 60, 56 N. W. 718; Luttrell v. Knox County, 89 Tenn. 257, 14 S. W. 802.

Appellee's charter exemption is personal to it.

Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct.

Rep. 640; Mercantile Bank v. Tennessee, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; Delaware Railroad Tax, 18 Wall. 226, 21 L. ed. 894; Providence Bank v. Billings, 4 Pet. 565, 7 L. ed. 957.

Mr. **Felix D. Lynch** also argued the cause, and, with Messrs. Frank L. Lynch and Isaac G. Phillips, filed a brief for appellants:

Assuming that this tax places a burden on the university, can this case be distinguished from the principles governing the Tennessee Bank Cases, wherein it was held that, under the charter, the shares of stock in the hands of the shareholders were exempt from taxation, but, nevertheless, the state had the right to tax the surplus of the bank?

Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; Shelby County v. Union & Planters' Bank, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

The principles governing the case at bar on the question of the alleged burden on the university by taxation of the lessee are discussed at length by Mr. Justice Shiras in Thomas v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.

Messrs. **James J. Lynch** and **Arthur Crownover** argued the cause, and, with Messrs. William D. Spears, Isaac W. Crabtree, John J. Vertrees, Albert T. McNeal, and William L. Myers, filed a brief for appellee:

The averments in the bill in the case at bar state a case giving the circuit court jurisdiction.

Pennsylvania Mut. L. Ins. Co. v. Austin, 168 U. S. 686. 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Louisville Trust Co. v. Stone, 46 C. C. A. 299. 107 Fed. 305; Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; City R. Co. v. Citizens' Street R. Co. 166 U. S. 558, 41 L. ed. 1115, 17 Sup. Ct. Rep. 653; Bank of Kentucky v. Stone, 88 Fed. 383; Union & Planters' Bank v. Memphis, 49 C. C. A. 455, 111 Fed. 561; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Citizens' Street R. Co. v. City R. Co. 56 Fed. 746.

At the time this charter was granted, and until the passage of the act of 1903, complained of, the common-law rule that taxes on leased property should be assessed to the lessor prevailed in Tennessee.

East Tennessee, V. & G. R. Co. v. Morristown (Tenn. Ch. App.) 35 S. W. 771; Taylor, Land. & T. § 341.

The property is exempt from taxation so long as the title remains in the University of the South.

University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 892.

The exemption attached to the property, and passed to the purchaser.

New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303.

A tax on the rent, or income, from land, is a direct tax on the property itself.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 427, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

Forbidding the taxation of the land forbids the taxation of an estate less than the fee.

Daugherty v. Thompson, 71 Tex. 202, 9 S. W. 99.

A bond, being exempt from taxation, the income derived therefrom is likewise exempt.

Mosely v. State, 115 Tenn. 52, 86 S. W. 714.

Under the law as it existed when this charter was granted, and until the passage, in 1903, of the act complained of, every interest in this property was exempt from taxation, and this complainant was protected against the burdens from either direct or indirect assessments. Under the law as it existed, all the taxes against the property, whether leased or not, must be assessed against the university. The charter contract undertook to protect the university against such an assessment so long as it owned the property. That rule of the common law entered into and became a part of the contract as fully as if written in it.

Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 535, 18 L. ed. 403.

One of the tests that a contract has been impaired is that its value has, by legislation, been diminished.

Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458.

If the state has a right to assess these leasehold interests, it has a right to sell them.

Cooley, Taxn. p. 858.

The sale vests the purchaser with a new and independent title, destroying the encumbrances and the equities in favor of all other persons.

Hadley v. Hadley, 114 Tenn. 156, 87 S. W. 250; Osterberg v. Union Trust Co. 93 U. S. 424, 23 L. ed. 964; Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337; Emery v. Boston Terminal Co. 178 Mass. 172. 86 Am. St. Rep. 473, 59 N. E. 763; 2 Cooley, Taxn. p. 866; Desty, Taxn. § 150, p. 966.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The appellants insist that the circuit court had no jurisdiction of this suit, because all the parties are citizens of Tennessee. We think, however, that jurisdiction existed, because the case is one arising under the Constitution of the United States, the complainant insisting that under such Constitution the law of the state of Tennessee, passed in 1903, is invalid, because it impairs the obligations of a contract protected by that instrument. Illinois C. R. Co. v. Adams, 180 U. S. 28, 35, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251. We therefore pass to the merits of the controversy.

As the complainant maintains that the exemption clause in the 10th section of its charter is broader than that contained in the 2d section of the act of 1903, we may [499] at once refer *to the charter exemption, and if the contention of complainant is not justified by that exemption, it is unnecessary to consider that which is given by the act of 1903. It is by the charter exemption that we are to judge the matter.

Upon the question of the proper construction of the exemption clause in the charter, the case of the University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 892, is cited, and it is urged that within that case no tax can be assessed against the lessees of this property within the 1,000 acres. While in such a case as this we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration, and it will, in general, be followed, unless it seems to be plainly erroneous.

Looking at the Skidmore Case, we find that it does not uphold the contention maintained by the complainant. In that case the university filed a bill against Skidmore, trustee of Franklin county, to enjoin him from assessing for taxation against the university the property belonging to it within the 1,000 acres. In answer to the bill the state contended that the 1,000 acres would be exempt from taxation so long only as they were substantially owned by the university, but that, when it gave a lease of the kind described in the case before us, it ceased, during the term of the lease, to be the real and substantial owner of the land so leased, which, by the lease, was taken out of the exemption granted by the statute, and was, from that time, taxable against the university. The supreme court, however, held that the assessment made was void because the property, the land owned by the university, was exempt from taxation so long as it belonged to that corporation, and the making of the leases did not permit the property to be taxed against the university.

This is a different proposition from the one asserted by the complainant, and is not authority for its contention that the assessment cannot be made against the lessee in his own name *for his particular interest in [500] the land while the university continues to own the fee.

It is plain that the state court has not construed the statute of 1858 as a contract that the interest of the lessee in the land granted to him for a term of years by the university cannot be assessed or taxed against him because of the exemption in question.

Counsel for appellee, placing the Skidmore Case aside for the moment, assert that, when this exemption was granted, leasehold interests were only assessable against the owner of the fee as part of the whole estate; and it was therefore a part of the estate exempted from taxation by the charter. We think this is not a correct construction of the contract of exemption.

As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other. The fact that, at the time when the exemption was granted to the owner of the fee, the state had not provided for taxation against the lessee in his own name, is not important. The different interests of an owner of the fee and an owner of an estate for years, as lessee, existed, and such existence was recognized. An exemption of one did not necessarily include the exemption of the other. The contract of exemption did not imply in the most remote degree that the state would not thereafter, through its legislature, so change its mode of assessment as to reach the interest of a lessee directly, and not through the owner of the fee. In so doing the state does not tax the owner of the land in fee nor the fee itself. It taxes what it had a right to tax,—a separate and distinct interest in the land, although the fee thereof be in the university, which cannot be taxed therefor. The doctrine that laws which are in force when a contract is made will generally enter into its obligations (Oshkosh *Waterworks Co. v. Oshkosh, 187 U. S. 437, [501] 47 L. ed. 249, 23 Sup. Ct. Rep. 234) is not denied, but it has no application. The laws existing when the contract was made have not been altered so as to impair the obligations of that contract by the passage of the act of 1903. Those obligations remain precisely as they were prior to its passage. The change wrought by the act affected third persons only (the lessees of real estate), and, instead of leaving them to be taxed in the name of their lessor for their interest in the land as such lessees, the act provided for their separate taxation. Such act impaired no obligation of contract between the state and the university.

Nor is such an assessment the same in substance as one against the owner in fee of the land. We cannot see that Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, touches the case. This is not a tax on the rents or income of real estate. The university receives the rents or income free from any tax. The tax is, in both form and substance, upon a separate interest in real estate granted by the lessor, and is assessed against the owner of such separate interest. If the university could lease its lands and could also effectually provide that the interest of the lessee in the land so leased should be exempt from taxation, it may readily be seen that the amount of rent which it would receive would be larger than if no such exemption could be obtained, but that is a matter which is wholly immaterial upon the question of the impairment of the contract of exemption that was really made. That contract cannot be extended simply because it would, as so construed, add value to the exemption. The language used does not include the exemption claimed.

The lessee also agreed in the lease to pay the taxes in any event, and the claim that the agreement was intended only to refer to municipal taxation which might be provided for by the university cannot prevail against the plain words of the agreement.

That part of § 32 of the act of 1903 which makes the tax a lien upon the fee, even if [502] void in that particular, does not make *the section void which provides for the separate assessment of the interest of the lessee. It is proper to mention that the appellants did not and do not claim that the 32d section gives a lien upon the fee for the tax against the lessee in cases where the fee is itself exempt from taxation, but they assert that the correct construction of that section is to apply the lien to the fee only in cases where the fee itself may be taxed; and in their answer they expressly aver that under that section neither the state nor county can have a lien upon any property which is exempt from taxation, and that no claim has ever been made, or was made in the proceedings instituted by the state revenue agent, that the interest of the university in the leased premises could be assessed for taxation or could in any way be affected by the proceedings so instituted, and the defendants disclaimed any intention of assessing or levying any tax whatsoever against the property of the complainant university, and they denied that the assessment of the interests of the several lessees of the complainant university in the buildings and improvements erected by them upon said property would in any manner affect the interest of the university. What is the proper construction of that section on this point is not a matter of importance as to future assessments, because the state, having these objections before it, and, as we may presume, in order to avoid any such objection, even though possibly not well founded, passed another assessment act in 1907, repealing the one of 1903, and recognizing as valid all charter exemptions, and also providing that the lien of the tax should not apply to or affect any fee in property where the same was exempt from taxation. The question, however, remains so far as the assessment here involved is concerned, and we are of opinion that the construction contended for by the defendants is the correct one. We cannot assume that the state would endeavor to create a lien upon property which it recognized as exempt from taxation, for the purpose of thereby attempting to obtain such a security for the payment of a tax due from another upon different property which is not exempt. *This never [503] could have been the intention of the framers of the act of 1903.

Again, it is urged that if the interest of the lessee can be taxed, it might be sold for the nonpayment of the tax, and thus someone might get into possession who would not be a proper person to be in such place, and the chief purpose of the charter in this respect would fail. If the interest of the lessee in the land could be sold for nonpayment of the tax assessed thereon, such result would arise from the act of the university in creating it. But the lessor might, under the terms of the lease, at once reenter for nonpayment of taxes.

What is the exact interest of the lessee in the land leased to him it is not necessary to here determine. It is plain that he has some interest in it, and that interest is distinct from the fee, and may be taxed when the fee is exempt from taxation. See cases to that effect in the margin.† In Elder v.

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†People ex rel. Muller v. Board of Assessors, 93 N. Y. 308; People ex rel. Van Nest v. Tax & A. Comrs. 80 N. Y. 573; Parker v. Redfield, 10 Conn. 490; Russell

Wood [208 U. S. 226, ante, 464, 28 Sup. Ct. Rep. 263], decided by this court January 27, 1908, it was held that a mere possessory right in a mining claim in land to which the United States had title was a right separate from the fee, and might be taxed under a state statute, although the fee could not, because it was in the government. New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303, is not in point. The exemption was assumed to be absolute, unconditional, and unlimited in time. It seems that there was an act (that of 1796) which authorized the lands to be leased, but that act was not brought to the attention of the court. See Given v. Wright (New Jersey, Given, Prosecutor, v. Wright) 117 U. S. 648, 655, 29 L. ed. 1021, 1024, 6 Sup. Ct. Rep. 907, where a more full history of the case is given. The act repealing the exemption, passed after the sale of the lands by the Indians, was held void because it impaired the obligations of a contract. In the case before us the exemption lasts only so long as the university owns the lands, and, when it conveys a certain interest in them [504] *to a third person, it no longer owns that interest, which at once becomes subject to the right of the state to tax it. When the state exercises that right, as it did under the act of 1903, and taxes the interest in the name of its owner, the state thereby violates no contract, and the tax is valid.

It is said that although the lessee is bound to make improvements, yet he does not own them, even though their value is not to be taken into consideration against him when his lease is renewed. Whether he is the owner of the improvements made by him until the same are paid for at some time is not material upon the question of the separate interests of the lessee and the owner of the fee, the ownership of the improvements being only material upon the question of the value of the interest of the lessee. Even if the university was entitled to become and was the owner of such improvements at the end of the second renewal, without paying for them, the question still remains as to the value of the separate interest of the lessee, which, even upon that assumption, might be greatly more than the rent to be paid. The value of whatever interest he has is to be assessed as real estate under the statute, and that value must be determined by the assessing officer. All we can say is that it is a separate and distinct interest from that of the owner of the fee, and the assessment of that interest for taxation is not an assessment upon the interest of the university, and is not a violation of the exemption granted to it by the statute of 1858.

The decree of the Circuit Court must be reversed and the case remanded to that court with directions to dismiss the bill.

Reversed.

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*A. W. BENNETT, Plff. in Err. and Appt. [505]
v.
SARAH GRACE BENNETT.

(See S. C. Reporter's ed. 505-514.)

Appeal — review of discretionary order — condition of opening default.

The discretion of the court, under Oklahoma Code Civ. Proc., § 3984, to permit a defaulting defendant to answer "upon such terms as may be just," is not abused by making it a condition of granting such permission in a suit for divorce that defendant comply with an order theretofore made, directing him to pay temporary alimony and attorney's fees, which was reasonable in itself, and reasonable in relation to the means and obligations of defendant to plaintiff.

[No. 98.]

Argued January 9, 10, 1908. Decided February 24, 1908.

IN ERROR to and APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Lincoln County, in that territory, awarding alimony and attorney's fees in a suit for divorce. Affirmed.

See same case below, 16 Okla. 164, 83 Pac. 550.

Statement by Mr. Justice **McKenna:**

The question in this case is whether, in a suit for divorce, the defendant being in default for not answering within the time allowed by statute, a court may make it a condition of permission to answer that he comply with the order of the court directing him to pay temporary alimony and attorney's fees.

It will avoid confusion to designate the parties as they were in the trial court, the appellee as plaintiff and the appellant as defendant.

The plaintiff brought suit for divorce against the defendant in the district court of Lincoln county, Oklahoma territory, on the 21st of May, 1903, alleging as the grounds thereof extreme cruelty. She alleged in her complaint that defendant was

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v. New Haven, 51 Conn. 259; Brainard v. Colchester, 31 Conn. 407; Lord v. Litchfield, 36 Conn. 116, 4 Am. Rep. 41; Philadelphia, W. & B. R. Co. v. Appeal Tax Court, 50 Md. 397; Zumstein v. Consolidated Coal & Min. Co. 54 Ohio St. 264, 43 N. E. 329; Bentley v. Barton, 41 Ohio St. 410.

the owner of certain personal property and certain real estate, and that defendant had, for the purpose of defrauding her, conveyed such real estate to Harry M. Bennett, a son by a former marriage. She prayed for a divorce, just division of the real and personal property, and the custody of a child which had been born to her and defendant. She also prayed for $1,000 temporary alimony and $1,000 attorney's fees.

Summons was issued requiring defendant [506] to answer by the 10th *day of June, or the petition would be taken as true and judgment rendered accordingly.

The return of the sheriff recites that he served it on May 22, 1903, at 8:55 A. M., by leaving for defendant, "at his usual place of residence" in the county, "a true and certified copy" of the summons "with all the indorsements thereon."

On the day plaintiff filed her petition she applied for an order restraining defendant from disposing of his property, and that he pay into court the sum of $1,000 temporary alimony, "to support her and carry on her suit," as she was "unable, on account of sickness and late confinement, to do work of any kind or character," and that he pay into court $500 for the support and maintenance of the child born to her and defendant, and also $500 for attorney's fees. Notice of the application was personally served on defendant. The application was heard by order of the court at chambers on the 23d of May. The defendant did not appear. A restraining order was granted and defendant ordered to pay into the office of the clerk of the court within ten days "the sum of $1,000, for the use and benefit of the plaintiff as temporary alimony and suit money," and the sum of $100, attorney's fees.

On the 21st of July, 1903, plaintiff filed an amended petition, in which she repeated the charges of cruelty, made fuller allegations as to the property of defendant and attempts at its disposition. In this petition Harry M. Bennett, a son of defendant by a former marriage, was made a party by his next friend and guardian. Service was made upon the defendants by publication and they were required to answer on or before the 4th day of September, 1903. It also appears from the record, under the head of "journal entry," that defendant "was duly and legally served, personally, with an alias summons" after the filing of the amended petition. By this summons defendant was required to answer by the 12th day of March, 1904. The record shows that on the 24th September, 1903, the following proceedings took place:

[507] *"Come now the plaintiff and defendant, A. W. Bennett, by their respective counsel, and said defendant submits a motion to set aside service of summons herein, and the court being fully advised: It is by the court ordered—be given leave to amend return on said summons."

On the same day Harry M. Bennett was given additional time to answer, and on the 30th of September did answer by his guardian *ad litem*, appointed by the court, denying each and every allegation of the petition.

The record contains an order which recites that plaintiff and defendant appeared by attorneys 6th April, 1904, being a regular court day, and also recites "this motion comes up for hearing, on the motion of Albert W. Bennett, who appears specially by his attorneys, for the purpose of this motion only, and for no other purpose, to set aside the summons in this case." The grounds of the motion are given. The court overruled the motion and defendant excepted. "Whereupon," the order recites, "the defendant Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of $1,000 as and for temporary alimony, and $100 as attorney's fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant Albert W. Bennett excepted at the time."

In the decree of the court the proceedings are stated as follows:

"The court further finds that on the 5th day of April, 1904, the defendant A. W. Bennett appeared by his attorneys and asked leave to file his answer herein out of time, which request was objected to by the plaintiff, for the reason that the said defendant had failed to comply with an order theretofore made *to pay to the clerk of the [508] court for the use of the plaintiff the sum of $1,000 as and for temporary alimony and the further sum of $100 as and for attorney fees for her attorneys, and the court being advised that the defendant had not complied with said order or offered any excuse for his failure so to do, his application for leave to answer is refused until he shall comply with said former order or show cause why he has not, and he is given five days to make said showing and in which to file his said answer."

And the decree further recites that on the 29th day of April, 1904, the cause came on for trial, and plaintiff appeared and Harry M. Bennett also appeared, "and the defendant A. W. Bennett having failed to comply with the former order of the court or make excuse for not complying, and having failed to answer the petition of plaintiff herein, the said defendant A. W. Bennett is now called three times in open court, but makes default and fails to plead or otherwise appear in said cause, and the said A. W. Bennett is by the court adjudged to be in default for an answer, and not entitled to answer or plead until he shall comply with the order heretofore made, wherein the said A. W. Bennett was ordered by the court to pay to the plaintiff $1,000 temporary alimony and $100 attorney fees for her attorneys."

The decree dissolved the marriage between plaintiff and defendant, awarded her the custody of their child, awarded her the homestead as her sole property and $6,000 permanent alimony and $500 attorney's fees. The decree vacated the order made for temporary alimony and the payment of $100 attorney's fees. The decree was affirmed by the supreme court of the territory. This appeal is from that part of the decree awarding alimony and attorney's fees.

Mr. **James R. Keaton** argued the cause, and, with Messrs. John W. Shartel and Frank Wells, filed a brief for plaintiff in error and appellant:

A party defendant has the right to challenge the jurisdiction of the court by motion to quash service of summons, and then file his answer and go to trial on the merits, without waiving the question of jurisdiction raised by such motion.

Chicago Bldg. & Mfg. Co. v. Pewthers, 10 Okla. 724, 63 Pac. 964; St. Louis & S. F. R. Co. v. Clark, 17 Okla. 562, 87 Pac. 430; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

Under the laws of Oklahoma territory, before any person can be legally adjudged guilty of contempt of court, by reason of his having refused to obey an order of the court or judge, he must be complained against in writing, cited to appear before the court and show cause why he should not be punished for such contempt, and given an opportunity to be heard.

Johnson v. Superior Court, 63 Cal. 578.

The court's power to enforce compliance with an order awarding temporary alimony is limited to the attachment of defendant, followed by fine and imprisonment if he is found guilty of wilfully disobeying such order.

Hutchison v. Canon, 6 Okla. 725, 55 Pac. 1077; Johnson v. Superior Court, supra; Hovey v. Elliott, 145 N. Y. 126, 39 L.R.A. 449, 39 N. E. 841.

Had any such attachment or citation been issued and served on defendant, he would, unquestionably, have been entitled to be heard before being finally adjudged in contempt.

McClatchy v. Superior Court, 119 Cal. 413, 39 L.R.A. 691, 51 Pac. 698; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167; Palmer v. Palmer, 36 Fla. 385, 18 So. 720.

Had defendant in the case at bar been legally adjudged guilty of contempt for his wilful failure to comply with said order to pay temporary alimony and counsel fees, still the trial court committed prejudicial error in denying him the right to file his answer and make his defense to said action.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

Because defendant (by first appearing specially and filing a motion to quash the service of said summons) failed to file or tender his answer within the time prescribed by statute, the trial court had no legal authority to impose upon him practically any burden it saw fit, as a condition precedent to the filing of such answer.

Windsor v. McVeigh, 93 U. S. 277, 23 L. ed. 915.

The discretion of the court to impose terms or refuse the answer is not an arbitrary one.

Thornton v. Borland, 12 Cal. 438; Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; Corson v. Neatheuy, 9 Colo. 212, 11 Pac. 82; Wyckoff, Seamans & Benedict v. Bishop, 98 Mich. 355, 57 N. W. 170.

It certainly is not such a discretion as to authorize the court to refuse defendant permission to answer out of time as a punishment for an alleged contempt.

Kruegel v. Nash, 31 Tex. Civ. App. 15, 70 S. W. 983; Wiggins v. Com. 102 Ky. 40, 42 S. W. 1106.

The principle we are contending for applies with even greater force to actions for divorce, or divorce and alimony, than to other classes of action.

Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193.

Parties are entitled to be heard before judgments are taken against them, and it is ever an abuse of discretion for courts to hamper this right by the imposition of unjust conditions.

6 Enc. Pl. & Pr. p. 819; Bachelor v. Bachelor, supra.

Mr. **L. T. Michener** argued the cause, and, with Messrs. John Embry and W. W. Dudley, filed a brief for defendant in error and appellee:

Matters resting entirely in discretion are not re-examinable in a court of errors, and there can be no departure from that rule in this court without overruling the settled practice from its organization.

Pomeroy v. State Bank, 1 Wall. 592, 598, 17 L. ed. 638, 640; Washington, A. & G. Steam Packet Co. v. Sickles, 19 Wall. 611, 615, 22 L. ed. 203; Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 134, 35 L. ed. 961, 963, 12 Sup. Ct. Rep. 181; Earnshaw v. United States, 146 U. S. 60, 68, 36 L. ed. 887, 889, 13 Sup. Ct. Rep. 14; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 200, 201, 37 L. ed. 699, 701, 702, 13 Sup. Ct. Rep. 859; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 146, 43 L. ed. 108, 112, 18 Sup. Ct. Rep. 808.

The Oklahoma trial court was justified in requiring A. W. Bennett to comply with its previous order within five days as a condition precedent to the filing of an answer.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

Mr. Justice **McKenna,** after stating the case as above, delivered the opinion of the court:

The assignment of errors attacks the decree of the supreme court because (1) the court decided or assumed that defendant was in contempt for not complying with the order for temporary alimony. (2) In so holding or deciding, though defendant had not been cited to show cause why he should not be adjudged in contempt for not complying with the order. (3) (4) In affirming the action of the trial court refusing permission to defendant to answer to or make defense against the amended petition except on condition that he should comply in five days with the order for temporary alimony. (5) In *affirming decree of the court awarding plaintiff $6,500 permanent alimony and attorney's fees and certain real property constituting the homestead of the parties. [511]

The assignments of error are based upon a misunderstanding of the action of the trial court and the opinion of the supreme court. They proceed upon the supposition that he was not in culpable default to the law and the orders of the court,—a default after amplest opportunity to be heard and to contest every charge and claim against him.

The summons issued upon the original petition was served upon him by leaving a copy of it at his usual place of residence, as under the law it could be served. Okla. Stat. 1903, § 3938. It contained the notification that unless he answered by the 16th of June, 1903, the petition would be taken as true, and judgment would be rendered accordingly. He paid no attention to it. Yet there is more than the legal presumption that he received it, for on the day preceding there had been served on him a notice of the application for the temporary alimony and attorney's fees, the order to pay which makes the pivot of this controversy. He does not seem to have been sensitive to the charges against him, and, it may be, he thought his property was secure from the demands of the plaintiff by the conveyance to his son on the day before. The order upon the application was made May 23, 1903. He did not obey it. On the 21st of July, 1903, the amended petition was filed. It was served by publication, he having changed his residence to Nevada. He was notified to answer on or before September 4, 1903. He did not answer, but, on September 24, he appeared by counsel and submitted a motion to set aside service of summons, upon which motion the record shows the court made the following order: "It is by the court ordered—be given leave to amend return on said summons." He was subsequently personally served with an alias summons.

It required an answer to the petition on or by the 12th of March, 1904. An answer was not filed. On the 6th of April following a special appearance was entered and a motion *made to set aside the summons and [512] the alias summons on various grounds, which motion was denied after hearing. The defendant then offered to file an answer "instanter," and the offer was refused on the ground that he was in contempt of court for not complying with the order for temporary alimony. It was, however, ordered that he should be permitted to file an answer "within five days on condition that he purge himself of said contempt by complying with said order within that time." From the decree of the court it appears that its order was not so absolute but that he was given an opportunity to show why he had not complied with the order for alimony. Had the court the power to impose the conditions? Could the court have imposed any conditions or terms at all, and what was the limit of its power? If the court had a discretion it cannot be reviewed unless it was unreasonably exercised. And the court certainly had a discretion. We have seen that § 3933 of the statutes of the territory prescribes the result to a defendant for default in not appearing to be that the petition against him will be taken as true and judgment shall be rendered accordingly. If there is any modification of this in a suit for divorce it gives no rights to a defaulting defendant. Section 3983 of the Code of Civil Procedure of the territory provides that a defendant must demur or answer within twenty days after the day on which the summons is returnable, and § 3984 is as follows:

"The court, or any judge thereof in vacation, may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or, by an order, enlarge such time."

The question, then, can only be whether the court abused the discretion given to it by that section. Were the terms which the court imposed just?

The record demonstrates that the order for alimony was reasonable in itself and reasonable in relation to the means and obligations of defendant to plaintiff. According to plaintiff's petition, and presum-[513]ably according to proof submitted *to the court upon the application for alimony, of which defendant had notice, plaintiff was compelled by his cruelty to leave him with her child, then only a month old. She had no means to support herself and child. She was sick and unable to seek work. She was without means to carry on her suit for divorce. This was her situation as presented to the court, and defendant did not appear to deny it. He did not appear to deny that he owned real estate in the county where he lived of the value of $20,000, and in other places of the value of $14,000; that he had bank deposits of $10,000, and other personal property of the value of $15,000. He did not appear to deny that his cruelty—a cruelty of a peculiar kind—had driven her with her infant from his house. To this he was not sensitive. He was, however, not without anxiety for some of the consequences of the charge, and immediately set about to dispose of his property. After this he seemed to feel secure, either in misunderstanding of his rights, or in some perverted notion that he could evade or defy the law. At any rate, he did not appear and he did not obey the order of the court. Whether it could have been directly and expeditiously enforced against him may be doubted. He had put his property in the name of others. An execution, therefore, would have encountered that obstacle, and personal coercion might not have been possible, for certainly as early as July, 1903, he had changed his residence to Virginia City, Nevada. Besides, under the circumstances, plaintiff cannot urge that compliance with the order of the court could have been enforced in some other way than that adopted. It may be that the poverty which made the order of the court a necessity to her prevented her from enforcing the order, and the defendant may have deliberately planned to that end. And it may have appeared to the court at the hearing of April 5, 1904, that he had done so. It may have appeared to the court that his contumacy was without just cause or reason, and it would be continued to defeat the order of the court, though he should receive from its discretion a remission of the consequences of his default. Take the order of *the court in its most absolute sense and, [514] we say again, it was reasonable. Take it as described in the final decree and it was indulgent. It added another opportunity to be heard in addition to those defendant had been given.

The plaintiff in error, without any discussion of the section of the Oklahoma statutes which we have quoted, attempts to avoid their effect by the contention that he had never been adjudged guilty of contempt, and, even if he had been, the power of the court to punish him was limited by a statute of the territory to imposition of a fine or a sentence of imprisonment. He hence seeks to invoke the doctrine of Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841. The contention is based, as we have said upon the argument, that the assignments of error are, upon a misconception of the action of the court. The principle of Hovey v. Elliott therefore is not applicable. Indeed, the point was reserved in that case whether one in contempt could be refused a right under a statute invoked by him as actor. But we need not stop to consider whether the reasoning, which we may say now we entirely approve, or the cases cited, carry the principle of the case to the point reserved, for we are of opinion that the pending case is not within the principle. The question here, we repeat, is the simple one whether, under the statute giving the power to a court to allow a defaulting defendant to answer "upon such terms as may be just," the order in controversy was within the power. And being of opinion that an affirmative answer is justified, the decree of the supreme court of the territory is affirmed.

Mr. Justice **Brewer** dissents.

[515] ***H. C. CRARY et al., Plffs. in Err.,**
v.
BENJAMIN H. DYE and William B. Childers.

(See S. C. Reporter's ed. 515–526.)

Courts — following territorial court decisions — statutory construction.

1. The view of a territorial supreme court, that an alias attachment is not authorized by the local statutes, is very persuasive upon the Federal Supreme Court in construing such statutes.

Alias attachments — must precede publication.

2. An alias attachment, even if authorized by the New Mexico statutes, cannot support a judgment, where such attachment did not precede publication, as is required by the scheme provided by those statutes for the commencement of actions by attachment.

Estoppel — acquiescence in judicial sale.

3. Declarations by the judgment debtor subsequent to a judicial sale of his interest in a mining claim, showing his acquiescence in such sale, will not estop him from thereafter asserting the invalidity of such sale as against persons who leased the property from the sheriff's vendee, with an option to purchase, who had equal means of information as to the invalidity of the sale, and whose action in closing their option was not induced by such declarations.

Abandonment — of mining claim — acquiescence in judicial sale.

4. The acquiescence by the judgment debtor in an invalid judicial sale of his interest in a mining claim cannot be regarded as an abandonment of the claim and an election to accept the sale as a disposition of his property.

[No. 103.]

Argued January 13, 14, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Socorro County, in that territory, in favor of plaintiffs in an action of ejectment. Affirmed.

See same case below (N. M.) 9 L.R.A. (N.S.) 1136, 85 Pac. 1038; on prior appeal, 12 N. M. 460, 78 Pac. 533.

The facts are stated in the opinion.

Mr. **H. B. Fergusson** argued the cause, and, with Mr. **Elfego Baca**, filed a brief for plaintiffs in error:

The rule of the common law and the practice of the district court of New Mexico is for the court to issue, in its discretion, alias and pluries writs of citation.

24 Am. & Eng. Enc. Law, p. 524, note 2.

Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction.

Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931.

Alias writs of attachment not being prohibited by statute, and our district courts (courts of record) having been given jurisdiction of attachment suits by our statute, we submit that our districts courts have inherent power to issue alias writs of attachment.

4 Cyc. Law & Proc. p. 553, note 27; Hamill v. Phenicie, 9 Iowa, 525; Elliott v. Stevens, 10 Iowa, 418.

A distinction exists between irregular or erroneous acquiring of jurisdiction, and not acquiring jurisdiction at all.

1 Freeman, Judgm. §§ 126, 130; 1 Black, Judgm. §§ 170, 272; 17 Am. & Eng. Enc. Law, pp. 1068, note 1, 1069, note 2.

Authorities controlling in direct attack are not in point in a collateral attack.

Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490; Huff v. Hutchinson, 14 How. 586, 14 L. ed. 553; Keybers v. Macomber, 67 Cal. 395, 7 Pac. 838; Burke v. Inter-State, Sav. & L. Asso. 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; Isaacs v. Price, 2 Dill. 347, Fed. Cas. No. 7,097.

In the attachment case the court decided that the property in controversy had been duly attached by the levy of the alias writ. Such decision of that jurisdictional question is conclusive in this collateral attack, and, if erroneous, could only have been corrected on direct motion in that court, or by appeal from such decision.

Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 316; Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Cornett v. Williams (Nash v. Williams) 20 Wall. 249, 22 L. ed. 258; Manson v. Duncanson, 166 U. S. 533, 41 L. ed. 1105, 17 Sup. Ct. Rep. 647; Graff v. Louis, 71 Fed. 591; Hatcher v. Hendrie & B. Mfg. Supply Co. 68 C. C. A. 19,

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NOTE.—As to binding effect on Federal court of state laws and decisions—see notes to Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 584; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Wilson v. Perrin, 11 C. C. A. 71; and Hill v. Hite, 29 C. C. A. 553.

As to estoppel by acquiescence—see note to Michigan v. Flint & P. M. R. Co. 38 L. ed. U. S. 478.

As to abandonment of mining claim—see note to Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

133 Fed. 267; Mellen v. Moline Malleable Iron Co. 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Skinner v. Moore, 19 N. C. (2 Dev. & B. L.) 138, 30 Am. Dec. 155; Hardy v. Beaty, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; Salisbury v. Sands, 2 Dill. 270, Fed. Cas. No. 12,251; 1 Freeman, Judgm. § 130; 1 Black, Judgm. § 274; Drake, Attachm. §§ 447, 448; Tilton v. Corfield, 93 U. S. 163, 23 L. ed. 858; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; McNitt v. Turner, 16 Wall. 366, 21 L. ed. 348; Paine v. Mooreland, 15 Ohio, 445, 45 Am. Dec. 585; Cochran v. Loring, 17 Ohio, 432; Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Smith v. Pomeroy, 2 Dill. 414, Fed. Cas. No. 13,092.

The presumptions indulged in support of the jurisdiction of a court of record whose judgment is collaterally attacked, if, as in the case now before this court, such judgment has been followed by a sale to an innocent purchaser, are conclusive of this case.

Sargent v. State Bank, 12 How. 385, 386, 13 L. ed. 1033, 1034; Voorhees v. Jackson, 10 Pet. 469, 473, 9 L. ed. 498, 499; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Applegate v. Lexington & C. County Min. Co. 117 U. S. 255, 29 L. ed. 892, 6 Sup. Ct. Rep. 742; White v. Crow, 110 U. S. 183, 28 L. ed. 113, 4 Sup. Ct. Rep. 71; Cornett v. Williams, supra; Thompson v. Tolmie, 2 Pet. 165, 7 L. ed. 384; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352, 80 S. W. 783; 1 Black, Judgm. §§ 270–277; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138; 1 Freeman, Judgm. §§ 1311–1314; Treat v. Maxwell, 82 Me. 76, 19 Atl. 98; Robinson v. Fair, 128 U. S. 53, 32 L. ed. 415, 9 Sup. Ct. Rep. 30; 17 Am. & Eng. Enc. Law, 2d ed. p. 1080; 12 Enc. Pl. & Pr. p. 205, note 2, p. 207, note 1, and p. 208, note 1; Hendrick v. Whittemore, 105 Mass. 23.

Attachment proceedings conducted by a court of general original jurisdiction are entitled to the same presumptions as other judgments of such courts.

Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac. 698.

Dye's negligence was so gross as to be fraudulent, and to subject him to the charge of laches in waiting for the result of the efforts of Heiniman and Crary to make a mine of the prospect.

Bigelow, Estoppel, 530, notes 1, 2; 2 Pom. Eq. Jur. §§ 809–811; Story, Eq. Jur. §§ 193, 585–588; Two Rivers Mfg. Co. v. Day, 102 Wis. 328, 78 N. W. 442; Sullivan v. Colby, 18 C. C. A. 193, 34 U. S. App. 432, 71 Fed. 465; Chase's Appeal, 57 Conn. 236, 18 Atl. 96; Payment v. Church, 38 Mich. 776; Dezell v. Odell, 3 Hill, 215, 38 Am. Dec. 628; Delaplaine v. Hitchcock, 6 Hill, 14; Patterson v. Hitchcock, 3 Colo. 533; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79.

An undivided interest in a mining claim may be abandoned.

Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101.

Dye's acquiescence in such sale amounted to abandonment.

Ibid.; Golden Terra Min. Co. v. Mahler, 4 Morrison Min. Rep. 390; 2 Pom. Eq. Jur. 965; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789.

A defendant who has notice that his property is about to be sold by the officers of the law for the payment of his debts, and makes no objection until an innocent purchaser has paid the purchase money, and received a deed, duly acknowledged, is estopped from objecting afterwards.

Maple v. Kussart, 53 Pac. 349, 91 Am. Dec. 214; Spragg v. Shriver, 25 Pa. 282, 64 Am. Dec. 698.

Parties and privies are estopped.

Bigelow, Estoppel, pp. 94 et seq., 517–519; Ratcliff v. Bellefonte Iron Works Co. 87 Ky. 559, 10 S. W. 365; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; 10 Cyc. Law & Proc. pp. 777 (note 29), 779 (note 35); 2 Pom. Eq. Jur. 813.

Ignorance of facts and ignorance of law distinguished. Ignorance of law does not excuse.

Bloch v. Sammons, 37 Or. 600, 55 Pac. 438, 62 Pac. 290; Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Storrs v. Barker, 10 Am. Dec. 316 and note, 6 Johns Ch. 166.

Holding under quit claim deed does not preclude purchaser from being held bona fide purchaser.

Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426.

When one of two innocent persons must suffer, he whose negligence caused the loss must bear the consequences.

McConnell v. Rowland, 48 W. Va. 276, 37 S. E. 586; Titus v. Morse, 40 Me. 348, 63 Am. Dec. 665.

Taking advice of an attorney by party claiming the estoppel does not show he did not rely on representations, especially if representations were made afterwards.

Robbins v. Moore, supra.

Mr. **W. B. Childers** argued the cause and filed a brief for defendants in error:

Proceeding by attachment is wholly statutory, in derogation of the common law, and its rules will be strictly construed; and a court which exercises such extraordinary jurisdiction is only justified in acting under its special powers, limited by that statute according to the forms of procedure it prescribes.

1 Shinn, Attachm. § 8; 1 Wade, Attachm. §§ 2–4, 24; Waples, Attachm. § 7; 3 Am. & Eng. Enc. Law, 2d ed. p. 184.

A second or alias writ is, in general, unauthorized, because the affidavit for the first does not necessarily show the existence of the same state of facts at the subsequent time of issuing the second.

1 Shinn, Attachm. § 198; Dennison v. Blumenthal, 37 Ill. App. 385; Pack, W. & Co. v. American Trust & Sav. Bank, 172 Ill. 192, 50 N. E. 327; Carr v. Kelley Brewing Co. 94 Ill. App. 225; American Hydraulic Dredging Co. v. O. S. Richardson Fueling Co. 90 Ill. App. 376; Buck v. Coy, 73 Ill. App. 160; Watson v. Noblett, 65 N. J. L. 506, 47 Atl. 438; Wilson v. Stricker, 66 Ga. 575; Harris v. Linnard, 9 N. J. L. 58; Cummins v. Blair, 18 N. J. L. 151; Brundred v. Del Hoyo, 20 N. J. L. 328.

In some states, second, or alias, attachments may be issued, but new bonds, affidavits, and notice of publication are conditions precedent to the second, or alias, writ, and a valid levy thereunder, and, unless they are complied with, the second, or alias, writ, is void.

It must be supported by new affidavits or new bond. In some states, plaintiff must commence *de novo.* So in Missouri.

Favrot v. Delle Piane, 4 La. Ann. 584.

In Iowa, when the statute authorizes an alias writ, the alias should refer to the preceding writ, showing its issue and the amount levied under it.

Hamill v. Phenicie, 9 Iowa, 525.

Nothing shows more clearly that there can be no alias writ under our statute, based on the first affidavit and bond, than the fact that when successive attachments are sued out in the same suit, on different grounds, the lien of attachment does not relate back to the first attachment.

Miller v. White, 46 W. Va. 67, 76 Am. St. Rep. 791, 33 S. E. 332.

All of the following elements must actually or presumably be present in order to an estoppel by conduct:

1. There must have been a false representation or concealment of material facts.

2. The representation must have been made with knowledge of the facts.

3. The party to whom it was made must have been ignorant of the truth of the matter.

4. It must have been made with the intention that the other party would act upon it.

5. The other party must have been induced to act upon it.

Bigelow, Estoppel, p. 484; 2 Pom. Eq. Jur. 3d ed. § 806, p. 1430.

The facts in this case furnish no basis for application of the doctrine of estoppel.

Brant v. Virginia Coal & I. Co. 93 U. S. 335, 23 L. ed. 929; Hobbs v. McLean, 117 U. S. 581, 29 L. ed. 945, 6 Sup. Ct. Rep. 870; Sturm v. Boker, 150 U. S. 336, 37 L. ed. 1102, 14 Sup. Ct. Rep. 99; Shaw v. Chambers, 48 Mich. 359, 12 N. W. 488; Kingman v. Graham, 51 Wis. 232, 8 N. W. 187; Mueller v. Kaessmann, 84 Mo. 329; Clark v. Parsons, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 900; First Nat. Bank v. Marshall & I. Bank, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 737; Simplot v. Chicago, M. & St. P. R. Co. 5 McCrary, 158, 16 Fed. 363; Wilkins v. McGehee, 86 Ga. 764, 13 S. E. 86.

This estoppel cannot be made to operate for the benefit of the plaintiffs in error, who purchased from Heiniman and Crary after the suit was brought, Heiniman and Crary having parted with all their interest, and the judgment is not against them.

Morgan v. Chicago & A. R. Co. 96 U. S. 716, 24 L. ed. 743; Ketchum v. Duncan, 96 U. S. 666, 24 L. ed. 871; John Shillito Co. v. McClung, 2 C. C. A. 526, 6 U. S. App. 128, 51 Fed. 876; Deery v. Cray, 5 Wall. 803, 18 L. ed. 655.

Parties making declarations must know that the party to whom they are made means to be guided by them.

Houser v. Austin, 2 Idaho, 204, 10 Pac. 44; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 906; Pierce v. Andrews, 6 Cush. 4, 52 Am. Dec. 748; Jameson v. Rixey, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 863; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 456, 27 L. ed. 229, 1 Sup. Ct. Rep. 389.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an action of ejectment for certain mining ground in the territory of New Mexico. Plaintiff in error claimed title by virtue of a sheriff sale in proceedings against Dye, one of the *defendants in error, [516] reinforced by certain declarations of the latter, which, it is contended, constitute an estoppel against him to assert the invalidity of the sale or claim of title thereunto. There have been two trials of the action. The first resulted in a verdict for plaintiff in error, which was reversed by the supreme court of the territory. 12 N. M. 460, 78 Pac. 533. The second trial resulted in a judgment for defendants in error, which was affirmed by the supreme court. This writ of error was then sued out.

The validity of the sale and an estoppel, based on the facts hereinafter referred to, were relied on by plaintiffs in error at the first trial, and they secured a verdict by the instructions of the court. The supreme court of the territory reversed it, adjudging the sale to be invalid on the ground that an alias attachment was not authorized by the laws of the territory. 12 N. M. 460, 78 Pac. 533. On the second appeal the court refused to review this decision, holding it to be the "law of the case," and not open to further review. It confined its consideration to the question of estoppel and decided the question adversely to the contention of plaintiffs in error, and affirmed the judgment against them. This writ of error brings up both questions, which we will consider in their order.

1. The statutes of the territory distinguish between original and ancillary attachments. Sections 2636 and 2721 of the Compiled Laws of New Mexico. There is no provision for an alias attachment, and it was hence concluded by the supreme court of the territory that alias attachment was not authorized, and that a judgment dependent thereon was void and could be attacked collaterally. The procedure in attachment is provided for in chapter 2 of the Compiled Laws of New Mexico, §§ 2686 to 2737, both inclusive. A summary of the applicable sections is inserted in the margin.†

[517] *There is no provision for an alias attachment, and we think the implication of the statute is against it; certainly against it except upon filing a new affidavit and bond [518] and a new publication *of notice. We have seen that an affidavit and bond are required and the proceedings are that when a defendant cannot be cited and his property shall be attached, if he did not appear within the first two days of the return term of the writ the court shall order publication to be made stating the amount of the demand, that his property has been attached, and that unless he appears at the next term judgment will be rendered against him and his property (property attached, § 2703) sold to satisfy the same. In other words, the attachment must precede the publication and constitutes the ground of publication. The summons to the defendant is through his property, and does not extend beyond it. The only consequence of his default is the sale of the property attached,—not some other property or property attached subsequently to publication. The publication cannot be ordered until the execution of the writ of attachment and its return. Section 2701. And to the same effect, as we have seen, in § 2702.

It is, however, contended by plaintiffs in error that subsection 24 of § 685 prescribed the procedure of publication of summons, not §§ 2701 and 2702, and that subsection 24 provides that, upon the filing a sworn pleading or affidavit showing cause for *publication [519] the clerk shall give notice of the pendency of the action in some newspaper published in the county where the action is pending, which notice shall contain the names of the parties to the cause, the court in which it is pending, and a statement of the general objects of the action, and shall notify the defendant that, unless he enters his appearance before the day named therein, judgment will be rendered against him by default. If this contention be true it is difficult to account for §§ 2701 and 2702,

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†Sec. 2686. Creditors whose demands amount to $100 or more may sue their debtors in the district court by attachment, when, among other cases, the debtor is not a resident of or does not reside in the territory, or has concealed himself, or absconded, or absented himself from his usual place of abode, "so that the ordinary process of law cannot be passed upon him."

Sec. 2690. A creditor wishing to sue his debtor by attachment may place in the clerk's office a petition or other "lawful statement" of his cause of action and file an affidavit and bond, and thereupon he "may sue out an original attachment" against the property of the debtor.

Sec. 2691. An affidavit must be made by the plaintiff, or by some person for him, stating that the defendant is indebted to plaintiff, and the amount of the indebtedness, and on what account, and the existence of one or more of the causes mentioned in § 2636.

Secs. 2692, 2694. A bond shall be executed by the plaintiff, the penalty of which and the sufficiency of the sureties shall be approved by the clerk, and shall be conditioned that the plaintiff shall prosecute the action without delay, and with effect, and, to quote from the statute, "refund all sums of money that may be adjudged to be refunded to the defendant . . . or garnishee by reason of *this attachment*, or any process of judgment thereon." The clerk is directed to indorse his approval on the bond "and the same, together with the affidavits and petition or other lawful statement of the cause of action, shall be filed before an attachment shall be issued."

Secs. 2696, 2697. Original writs of attachment shall be directed to the sheriff of the proper county, commanding him to execute the same, "with a clause of the nature and to the effect of an ordinary citation, to answer the action of the plaintiff." And shall be issued and returned in like manner as ordinary writs of citation, and when the defendant is cited to answer the action the like proceedings shall be had between him and the plaintiff as in ordinary actions or contracts, and a general judgment may be rendered for or against the defendant.

Sec. 2701. When the defendant cannot be

and the scheme provided for the commencement of actions by attachment. Nor do we think the contention is supported by the fact that by subsection 175 it is provided that the act "shall not affect actions of replevin or writs of attachment, except as to the form of the action," and the amendment subsequently made, excepting from the operation of § 2685, "proceedings by attachment." The amendment was made, no doubt, to put the meaning of subsection 175 beyond any controversy. Besides, subsection 179 provides that "the former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this code."

But even if plaintiffs in error be right about subsection 24, an alias attachment would not thereby be justified. The supreme court of the territory has expressly decided that an alias attachment is not authorized, and we have recently decided that the views of the local courts are very persuasive of the construction of the local statutes.

In the pending cause a petition in the attachment suit was filed in the district court of the county of Lincoln on the 5th of March, 1898, and on the same day an affidavit was filed, stating that the defendant could not be served "in the ordinary way or in any way except by publication." A writ of attachment was issued on the 8th of March. The sheriff made his return thereon on the 16th, certifying that he had levied upon and attached certain real estate, which was described, and "that the defendant, Benjamin H. Dye, is not in my county, and supposed to be in the state of Ohio."

*The record shows an alias attachment issued on the 11th of May, 1898. The return of the sheriff shows that the alias writ came to his hands on the 27th of May and that he levied the same on the 28th of May, on the mining claim now in controversy.

The first publication of the notice was on the 17th of March, 1898, and the last on the 14th of April, 1898. Pasted to the affidavit stating those facts is a paper headed "Notice of Suit," by which Benjamin H. Dye is notified "that a suit of assumpsit by attachment has been commenced against him," and that unless he enter his appearance on the 4th of June, 1898, judgment would be rendered against him in said cause by default. The record contains no other publication or notice, but it leaves no doubt that it was upon that publication the default of the defendant was based. This is established by the motion for judgment, filed by the attorney in the case, which alleges service by publication and that the appearance day was June 4, 1898. This motion was filed August 19, 1898, but proof of publication was not filed until December 31, the day judgment was taken. The judgment recites that, the cause coming on to be heard, "it is considered that the defendant is in default for failure to answer, and therefore the court hears the evidence of plaintiff, and assesses the damages on the two causes of action contained in the complaint at $143. And the court finds that the grounds of attachment are well taken and true in effect, and the defendant, having failed to deny same, it is ordered by the court, considered and adjudged, that the attachment herein be sustained."

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cited and his property and effects shall be attached, if he do not appear and answer to the action at the return term of the writ, within the first two days thereof, the court shall order a publication to be made, stating the amount of the plaintiff's demand, and notifying him that his property has been attached, and that unless he appear at the next term judgment will be rendered against him and his property sold to satisfy the same. Publication in a newspaper is directed.

Section 2702 enlarges § 2701, and provides that the law of the territory in regard to attachments is so amended that where the defendant cannot personally be served with the process, and shall have no place of residence in the territory, and the property of the defendant shall have been attached in time to make the necessary publication as now required by law, the officer executing the process, or the agent or attorney of the plaintiff in the case, is authorized to make publication of notice to the defendant in such attachment in the manner prescribed by law, which shall have the same force and effect to compel the appearance of the defendant as if such publication had been in conformity to an order of the court; and, upon proof of the publication being made to the court, plaintiff may proceed in the case as if the process had been served personally upon the defendant.

Sec. 2703. Judgment by default may be entered, but the judgment shall only bind the property attached.

Sec. 2707. A defendant may contest the truth of the affidavit, and if he succeeds the action is dismissed.

Secs. 2713, 2714, 2715. Where the debt exceeds the sum of $100 the creditor has an election of suing out the attachment, either from the district court or from the probate court of the county in which the suit is brought, by filing affidavit and bond with the clerk of such court. The form of the affidavit and bond is given, and it is required in its condition to recite "that, whereas the above-named A. B. has this day sued out an attachment," etc. Ancillary attachments are provided for in § 2721, and may be issued in a pending suit "when the summons against the defendant has been returned, executed.".

The record shows only one affidavit and bond, but it is contended by plaintiff in error that, even if it be considered necessary that another affidavit and bond should have been filed to justify the alias writ, it must be presumed that they were filed, in the absence of evidence to the contrary; that the mere silence of the record is sufficient. To support the contention Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490, and Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931, are [521]cited. But if a presumption may *be entertained as to another affidavit and bond, a presumption cannot be entertained that another publication succeeded the alias attachment. The record shows the reverse. The publication was complete before the alias attachment was issued, and, therefore, the attachment referred to in the notice was the first attachment, not the alias attachment. As we have said, the attachment must precede the publication. The attachment virtually commences the action, the publication is the summons to the defendant, giving the court jurisdiction to apply the property attached to the satisfaction of the plaintiff's demand. It follows, therefore, that the court had no jurisdiction to render the judgment relied on, and that the plaintiffs in error acquired no title through sale under it.

2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870. And in respect to the title of real property, the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Brant v. Virginia Coal & I. Co. supra. These principles are expressed and illustrated by cases in the various text-books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?

The property was sold by the sheriff February 18, 1899, to Jones Taliaferro. On June 5, 1900, he leased the property to H. C. Crary and E. Heiniman, giving them an option to purchase. They went into possession and discovered by their labor upon the property a vein of rich gold-bearing ore [522]in June *and later in August. They subsequently purchased the property under their contract, paying therefor the sum of $1,500. Dye returned to the territory in the latter part of April, 1899, but took no steps to ascertain the condition of the attachment proceedings,—indeed, assumed or believed them to be valid, for he declared to several persons that his interest in the property had gone to pay a debt and that he considered it well sold. One of the persons to whom he made the declarations communicated them to Crary and Heiniman. And on the 25th of October, Mr. Heiniman testified that Dye visited the mine, "and while there, in the presence of Mr. Alexander and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered there was. The Scranton claim on the west took off about 100 feet, and he said as to other claims there would be nobody but myself. And he says, 'I have allowed all my time to lapse and I have no claim whatever.' With that he wished me success, and hoped that it would prove to be a good mine. He says, 'If it does, it is bound to benefit me, because I own an interest in the Little Nell claim, just north of you, which is only 155 feet north of the Compromise shaft.'"

To these statements the witness said he expressed his gratification that all were working "in harmony in the camp," and that Dye remarked further: "I wish you the best. I hope you will make a million." And he testified that if Dye had told him not to make payment under his contract, or that he was going to try to recover the mine, the witness would not have made the payment. And, further, he first learned of Dye's intention to make a claim by the service in the suit of the papers by the sheriff, and that Dye had not in any of his visits intimated that he had a claim against the mine, or of his intention to assert a claim or give warning of any suit. "He always expressed himself, while visiting the mine, that it was one of the brightest prospects in the camp and that he was glad" that witness was one of the owners. Crary also testified *to conversations with Dye,[523] the first being a few days after ore was "struck" in the mine, although witness had seen Dye frequently and Dye knew witness was working the mine. This conversation need not be given at length. It took place while witness was showing Dye the mine and the work which had been done preceding the discovery of ore. Dye said that he had owned the property, knew of the ore in the mouth of an old tunnel, "and had taken ore out of it, but did not regard it of sufficient value to warrant working it; that he had allowed his time to expire," and hoped that witness and Heiniman would do well on it; "that he made no claim to it, as he owned the property on the other side of the gulch; and if they could get good ore there it would make his Little Nell property more valuable." And the witness said: "I felt elated over the discovery of this ore, and both of us talked a good deal and both of us felt good." In corroboration of Heiniman the witness testified:

"Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but, in substance, whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an overlap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, 'I hope you will do well with the property, and make lots of money out of it.'"

He further testified that he did not think he would have completed the payment for the property if he had learned at that time that Mr. Dye expected to assert any claim to it, and further: "We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it; and would not have touched the property in the first place had we known that he made a claim or had a claim." The conversation between Dye and Heiniman has some corroboration from one of the employees of the mine who was working near by.

[524] *It is manifest that Dye took for granted that the attachment proceedings were good and, indeed, declared it,—declared it before the discovery of gold on the claim,—declared it afterwards, when he knew that Crary and Heiniman were expending considerable sums of money upon the claim and had money yet to pay upon it. Such declarations were natural enough before the discovery of gold; they were not natural after the discovery of gold,—a discovery which apparently proclaimed the mine to be one of great richness. Let it be conceded, therefore, that his inattention to his rights was grossly negligent; that his admissions of their loss were grossly negligent, and so far might satisfy one of the conditions of estoppel. But another, and the consummating condition, is that Crary and Heiniman must have been without equal means of information. This, however, was not their situation. They had means of information equal to those of Dye, and nothing was purposely done or said to divert them from inquiry. The only source of information was the record, and that they had examined and took legal advice upon its sufficiency. They testify, however, that they also relied upon the declarations of Dye, as well as the advice received, and that they would not have expended what they had expended (four or five thousand dollars) or made the final payment ($1,500) but for those declarations. The letter of this testimony must be weighed against other considerations. The declarations of Dye were but the expression of an opinion of the legal effect of the attachment proceedings, made strong, perhaps, from the right he had to attack the proceedings directly, but it is hard to think Dye's declarations were as determinative as other considerations.

The lease and option to purchase the mine were not induced by anything done or said by Dye. In taking them Heiniman and Crary acted upon their own judgment, based upon the prospects or chance of value, and their judgment was luckily or skilfully exercised. Within a few days ore was discovered. In the latter part of August the "big strike" was made that demonstrated the mine to be of great value. This value must *be considered in estimating the rela- [525] tive strength of the inducements upon which Crary and Heiniman acted. When they took the lease and option to purchase the mine it was considered by Dye as worth no more than his debt to Taliaferro, to wit, $112 and the costs of the attachment suit. Taliaferro would have been glad to have taken $500 for it, Heiniman testified. At the time this suit was brought,—December, 1900,—six months after the lease, it was worth $100,000, according to Heiniman's testimony; $50,000 or $60,000, according to other estimates. This value they might acquire by the payment of $1,500. They would certainly lose it if they did not make such payment. The case, therefore, is very simple. It is a case of mine property bought upon speculation, and title to which came through a sheriff's sale, the validity of which sale was either assumed or risked; the development of the mine undertaken in like speculation, but continued in certainty of reward within three days by the discovery of what Heiniman calls in his testimony "the large ore—the pay ore chute." Whether this was the real discovery or that of August following which finally revealed the richness of the mine, matters not. Within a few days there was evidence of value and inducements to the expenditures testified to. Within four months a property which was sold for a few hundred dollars was estimated by mining experts to be worth $100,000. Such inducement existing for Heiniman and Crary to complete their contract, we are asked to believe that they were misled by the declarations of Dye to action detrimental to their interest. We are unable to yield to the contention. That they felt satisfaction at the declarations may be. That they labored an extra day or spent an extra dollar upon the faith of them the record fails to establish.

Another contention remains to be noticed. Dye owned five sixths of the mine; the other one sixth was owned by the Apex Gold Mining Company. Dye did not do the assessment work upon the mine for 1898, and the work was done by the mining company. There was an attempt at forfeiture of Dye's interest, but the notice of publication was [526] not given by the mining company, *but by one T. C. Johns, who described himself as co-owner with Dye. Johns was the manager of the company. Subsequently Taliaferro paid to one T. R. Walsh for Johns Dye's proportion of the expenditure for the work. Dye did not do or offer to do any assessment work for 1898.

Upon these facts plaintiff in error seemed to have contended in the supreme court of the territory that Dye had forfeited his rights to Johns, considered as co-owner with Dye, and that Taliaferro, by paying Johns, became substituted to his rights. To this contention the supreme court made answer that a forfeiture had not been effected, because Johns was not a co-owner with Dye, but that the Apex Mining Company was, and that the company had not given notice of forfeiture. Plaintiffs in error now change their contention or the form of it. They now contend that after Taliaferro purchased the property at sheriff's sale, and before the forfeiture occurred under the advertisement against Dye by his cotenant, Taliaferro paid to the co-owner or its agent the amount claimed, and thereby protected himself under § 3126† of the Compiled Laws of New Mexico, 1897, and ended also Dye's interest. But this contention involves again the validity of the sheriff's sale and the attitude of Dye to the sale. Besides, the liability for the assessment work had not taken the form of a lien.

It is further contended that an undivided interest in a mining claim can be abandoned, and that Dye's acquiescence in the sheriff's sale constituted an abandonment of the claim and an election to accept the sale as a disposition of his property. We do not concur in the view that Dye's acts constituted an abandonment of his claim.

Judgment affirmed.

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*ANTOINE G. STARR, an Infant, by his [527]
Guardian, A. Pearce Tomkins, Plff. in Err.,

v.

SAMUEL W. CAMPBELL.

(See S. C. Reporter's ed. 527–534.)

Indians — right to proceeds of sale of timber — Executive regulations.

1. The approval by the Commissioner of Indian Affairs of a contract for the sale of timber by an Indian allottee, which, under the rules and regulations established by the President on December 6, 1893, pursuant to the treaty with the Chippewa Indians of September 30, 1854 (10 Stat. at L. 1110), art. 3, was to "operate as specific consent of the Executive to the sale of the timber to which the contract relates," did not end the authority of the President, so as to prevent a modification of the contract by making it subject to an amendment of those rules, giving the Indian agent, subject to the approval of the Commissioner of Indian Affairs, authority to fix the sums which an allottee should be permitted to withdraw from the proceeds of the timber, deposited in a national bank.

Indians — restriction upon alienation — sale of timber.

2. Restrictions in a patent of timber land to an Indian upon the sale, lease, or alienation of the tract conveyed without the consent of the President extend to the sale of the timber on such tract.

[No. 132.]

Argued January 23, 24, 1908. Decided February 24, 1908.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment sustaining a demurrer to the complaint in an action by an Indian allottee to recover from an Indian agent the proceeds of the sale of timber. Affirmed.

The facts are stated in the opinion.

Mr. **W. M. Tomkins** argued the cause and filed a brief for plaintiff in error:

A patent in the usual form, except that it contains a restriction that the grantee shall not sell, lease, or in any manner alienate the tract of land without the consent of the President, conveys the title in fee simple to the grantee.

Libby v. Clark, 118 U. S. 250, 30 L. ed.

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†When any property shall be sold subject to liens and encumbrances, the purchaser may pay the liens and encumbrances and hold the property discharged from all claims of the defendant in execution; but the defendant may redeem the property within one year after the sale thereof, paying to the purchaser, his heirs or assigns, the purchase money with interest. When redeemed, the purchaser shall have the growing crops, and shall not be responsible for rents and profits, but he shall account for wastes.

133, 6 Sup. Ct. Rep. 1045; Schrimpscher v. Stockton, 183 U. S. 290, 46 L. ed. 203, 22 Sup. Ct. Rep. 107; Lykins v. McGrath, 184 U. S. 169, 46 L. ed. 485, 22 Sup. Ct. Rep. 450; United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697.

While it is true that, under the statute of frauds, the sale of standing timber must be in writing, it is equally true that a parol license is good until revoked, and one cutting under such license is not a trespasser, and gets good title to all timber cut and removed before the license is revoked.

Keystone Lumber Co. v. Kolman, 94 Wis. 465, 34 L.R.A. 821, 59 Am. St. Rep. 904, 69 N. W. 165; Giles v. Simonds, 77 Am. Dec. 373 and note, 15 Gray, 441.

When consent to alienation is given, the President's authority over the matter is ended. Permission once given cannot be revoked.

Doe ex dem. Godfrey v. Beardsley, 2 McLean, 412, Fed. Cas. No. 5,497.

Limitations and restrictions on the use of property are nct favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them.

Wakefield v. Van Tassell, 95 Am. St. Rep. 207, 214, note a, 202 Ill. 41, 65 L.R.A. 511. 66 N. E. 830; Klaer v. Ridgway, 86 Pa. 529; Dunbar v. Stickler, 45 Iowa, 384.

The consent of the President is no formal proceeding, it is a mere matter of permission.

Lomax v. Pickering, 173 U. S. 26, 43 L. ed. 601, 19 Sup. Ct. Rep. 416.

This court has repeatedly held that where the United States conveyed property to an Indian absolutely, that is, without any condition or restriction on its alienation, he could dispose of the same at his pleasure and give good title to his grantee.

United States v. Ritchie, 17 How. 525, 15 L. ed. 236; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Wilson v. Wall. 6 Wall. 83, 18 L. ed. 727; Pennock v. Franklin County, 103 U. S. 44, 26 L. ed. 367; Elwood v. Flannigan, 104 U. S. 563, 26 L. ed. 842; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

Indian allòttees are emancipated from Federal control as to their civil and political rights and status.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

Solicitor General **Hoyt** argued the cause and filed a brief for defendant in error:

Conferring citizenship upon an Indian does not necessarily free him from the guardianship of the United States in respect to property granted him by the general government.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Re Heff, 197 U. S. 488, 508, 509, 49 L. ed. 848, 856, 857, 25 Sup. Ct. Rep. 506; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 308, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; United States v. Thurston County, 74 C. C. A. 425, 143 Fed. 287; National Bank v. Anderson, 77 C. C. A. 259, 147 Fed. 87; Hitchcock v. United States, 22 App. D. C. 284.

The restriction on alienation embraces the sale of the standing timber.

Hitchcock v. United States, supra; United States v. Cook, 19 Wall. 591, 593, 22 L. ed. 210, 211; 2 Bl. Com. p. 18; Williams, Real Prop. pp. 78, 79.

The President, as a condition of his consent to a sale, may make any proper regulation with regard to the disposition of the proceeds thereof that the welfare of the allottee may appear to him to require.

United States v. Thurston County, and National Bank v. Anderson, supra.

Messrs. Charles Quarles and Francis H. De Groat filed a brief as *amici curiæ:*

In dealing with the Indians it has ever been the policy and manifest purpose of the Federal government to hold or reserve control of the instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians. The lands allotted or granted to Indians have been one of the principal instrumentalities of the Federal government in discharging its duty as guardian of the Indians.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; United States v. Thurston County, 74 C. C. A. 425, 143 Fed. 287.

And it has been its policy throughout, in negotiating treaties with Indian tribes and in enacting legislation for the benefit of the Indians, to provide restrictions on alienation of lands donated to them, of greater or less stringency, and sometimes in varying form and duration.

The purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors.

Goudy v. Meath, 203 U. S. 146, 51 L. ed. 130, 27 Sup. Ct. Rep. 48; United States v. Thurston County, supra.

The Indians have ever been the wards of the United States, and how the guardian's care and duty shall be exercised is a political question, and it is not the province of the courts to intrude upon the domain committed by the Constitution to the political department of the government, or in effect determine questions of mere governmental policy.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; New York Indians (Fellows v. Denniston) 5 Wall. 761, 18 L. ed. 708; Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; United States ex rel. West v. Hitchcock, 205 U. S. 80–85, 51 L. ed. 718–721, 27 Sup. Ct. Rep. 423.

To hold otherwise would produce great confusion, and would transfer from the Department of the Interior to the courts most of the controversies relating to Indian affairs, now properly disposed of by it.

United States v. Boyd, 27 C. C. A. 592, 42 U. S. App. 637, 83 Fed. 547; Bem-way-bin-ness v. Eshelby, 87 Minn. 108, 91 N. W. 291.

The Indians are the wards of the nation, and are not wards of the court. The power which now speaks for them is the legislative power of the United States.

Brown v. United States, 32 Ct. Cl. 432.

It is not left to the Indian to withdraw himself or his property from the guardianship and control of the United States. When a tribe of Indians is placed under the charge of an Indian agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of U. S. Rev. Stat. § 2139, and no member thereof can dissolve his tribal relation or escape such charge by absenting himself from such reservation, or otherwise, without the consent of the United States.

United States v. Earl, 9 Sawy. 79, 17 Fed. 75; Farrell v. United States, 49 C. C. A. 183, 110 Fed. 942; Regulations of Indian Office, 1904, § 107; United States v. Holliday and United States v. Boyd, supra; State v. Campbell, 53 Minn. 354, 21 L.R.A. 169, 55 N. W. 553; Lowe v. United States, 37 Ct. Cl. 413.

Up to the time of the passage of the Dawes act, 1887, 24 Stat. at L. 389, chap. 119, the Indians were certainly wards of the nation, both as to person and estate.

Lone Wolf v. Hitchcock and United States v. Kagama, supra.

This court has held, in Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, that the Dawes act operated as a renunciation of the function of tutor, or guardian of the person, on the part of the United States, to the extent that Indians in the classes described therein have been freed from police regulation on the part of the Federal government.

McKay v. Kalyton, 204 U. S. 458–467, 51 L. ed. 566–570, 27 Sup. Ct. Rep. 346.

But it has never been held, either by the Executive or judiciary, that the government has renounced its function of curator,—that is, guardianship of property circumstanced as is the property in controversy.

On the other hand, the Supreme Court of the United States has expressly held that Indians circumstanced as is plaintiff in error are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from the condition; and that, in spite of the Dawes act, lands allotted to the Indians, with power of alienation conditioned upon the consent of the President, in that case for twenty-five years and in this case indefinitely, are held by the United States for the period in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority.

United States v. Rickert and United States ex rel. West v. Hitchcock, supra.

And in the Heff Case a sharp distinction is drawn between civil and political rights, which are reached by the Dawes act, and mere property rights, which are not.

United States v. Rickert: Cherokee Nation v. Hitchcock; and McKay v. Kalyton,—supra.

Inasmuch as it must be conceded that the Federal government is still acting as curator of this Indian's property,—*i. e.*, guardian of his property,—and that its acts in relation thereto are subject to no limitation or control, it must follow that it was competent for the government to create a trust in itself, by transforming, or causing to be transformed, the property given the Indian into a fund to be held by it and its officers, for the benefit of that Indian.

Tomkins v. Campbell, 129 Wis. 93, 108 N. W. 216; Hitchcock v. United States, 22 App. D. C. 275; United States v. Thurston County, 74 C. C. A. 425, 143 Fed. 287.

What bearing has the citizenship of the Indian upon the question?

Hitchcock v. United States; United States v. Thurston County; and Re Heff,—supra; Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947; Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716.

Mr. Justice **McKenna** delivered the opinion of the court:

This writ of error is directed to a judgment sustaining a demurrer to a complaint

[530]in an action to recover certain moneys *collected by the defendant, who is an Indian agent, for timber cut off plaintiff's allotment. The case comes directly from the circuit court, as involving the construction of a treaty.

The plaintiff is an infant Indian of the Chippewa Indians of the Lake Superior, and Tomkins is his duly appointed guardian.

A summary of the complaint is as follows:

On the 1st of October, 1901, the plaintiff then residing on the Bad River Indian Reservation, the President of the United States, in accordance with the provisions of the 3d article of the treaty concluded September 30, 1854 [10 Stat. at L. 1110], with the Chippewa Indians of the Lake Superior, approved a selection of land made by plaintiff, and assigned to him the west half of the southeast quarter of section 4, township 46 north, of range 3, west of the 4th principal meridian in the state of Wisconsin.

Article 3 of the treaty is as follows:

"Article 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, 80 acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may, also at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run [531]through any *of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

By the act of Congress of February 11, 1901 [31 Stat. at L. 766, chap. 350], the right to allotments was extended to all Indians then residing on the La Pointe or Bad River Reservation, irrespective of age or condition. A patent was duly issued on the 29th June, 1905, to plaintiff, and the land conveyed, exclusive of the merchantable timber standing thereon, is of the value of $1,000. On the 8th January, 1902, the plaintiff made a contract with one Justus S. Stearns, by which he agreed to sell him the merchantable lumber under the rules and regulations approved by the President, December 6, 1893, standing or fallen, on said lands, and the said Stearns agreed to cut and remove the same, employing Indian labor therein, and pay to the United States Indian agent for the La Pointe agency, in trust for the plaintiff, certain designated sums, according to the kind of lumber cut. There were other details, which need not be mentioned. The agreement was subject to the approval of the Commissioner of Indian Affairs.

A copy of the regulations made in 1893 is attached to the contract, rule 7 of which is the only one material, and is as follows:

"7. After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank, subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe agency, unless otherwise stipulated in contracts with particular Indians."

In December, 1902, the President amended that rule by adding thereto the following:

*"If the Indian agent shall, in any case,[532] be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

The Commissioner of Indian Affairs modified the agreement so as to make it subject to the amendment, and approved it as modified.

Between January, 1902, and the 1st of October, 1905, Stearns cut and removed, under the contract, timber of the value at least of $15,000, and paid that amount to the defendant for the use and benefit of the plaintiff, and that of that sum defendant has paid plaintiff only the sum of $3,100. Demand was made upon the defendant for the payment of the balance, but he refused, and still refuses, to pay the same, and announces that he will only pay plaintiff the sum of $10 per month, and claims the right to hold the same and pay the same out as he may be directed by the Commissioner of Indian Affairs.

Prior to the amendment of rule 7 it had

been for many years the established custom of the agents of the La Pointe Indian agency to pay the allottees under timber contracts the amount payable as fast as demanded by such allottees, such payments being left entirely to the Indian agents, the Commissioner of Indian Affairs in no manner interfering or attempting to control such payments, and that the defendant was the first to adopt the rule and practice of limiting payments to $10 per month, as he, in his discretion, thought best, giving as a reason therefor instructions from the Commissioner of Indian Affairs.

Plaintiff alleges that it does not fall within the scope of the authority of the Commissioner to interfere with the disposition of the money by the Indian agent, and that the guardian of the plaintiff is the proper party to determine how much shall be paid to and expended for plaintiff.

Damages are alleged at $11,900, and judgment is prayed for that amount.

The argument of this case has taken a [533] somewhat wide range, *and counsel in other litigations for the Red Cliff Lumber Company have, by permission of this court, submitted a brief in support of the judgment of the circuit court. We think, however, the case is in narrow compass and depends for its decision upon the power reserved to the President by article 3 of the treaty, the patent, and the terms of the contract with Stearns. It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the government. The many exercises of the policy which have been sustained by this court we need not stop to comment on. This policy is exercised in article 3 in the power reserved to the President to put in the patent "such restrictions upon the power of alienation as he may see fit to impose." In the exercise of this power the patent to plaintiff contains the condition that he shall not "sell, lease, or in any manner alienate" the tract conveyed "without the consent of the President of the United States." There is a careful repetition of the conditions in the habendum that "all the rights, privileges, immunities, and appurtenances" conveyed should be limited by the condition.

On December 6, 1893, the President made rules and regulations to govern contracts for the sale of timber by the Indians to whom allotments had been made and patents issued, prescribing certain conditions and prices, and requiring such contracts to be approved by the Commissioner of Indian Affairs, which approval, it was provided, should "operate as specific consent of the Executive to the sale of the timber to which the contract relates." Rule 7, which we have already given, was part of these rules and regulations. In December, 1902, however, the President made an order amending rule 7, giving the Indian agent, subject to the approval of the Commissioner of Indian Affairs, authority to fix the sum or sums, if any, an allottee should be permitted to withdraw from deposit. Subject to this addition to rule 7 the contract with Stearns was made and the timber cut. We cannot yield to the contention that the consent of the President to the contract ended his authority over the matter. In other words, that he could put *no conditions upon it. [534] United States v. Thurston County, 74 C. C. A. 425, 143 Fed. 287; National Bank of Commerce v. Anderson, 77 C. C. A. 259, 147 Fed. 87.

The restriction upon alienation, however, it is contended, does not extend to the timber, and United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697, is adduced as conclusive of this. We do not think so. There, as said by the Solicitor General, the land granted was arable, and could be of no use until the timber was cut; here the land granted is all timber land. And that the distinction is important to observe is illustrated by the allegations of the complaint. It is alleged that the value of the land, exclusive of the timber, is no more than $1,000; fifteen thousand dollars' worth of lumber has been cut from the land. The restraint upon alienation would be reduced to small consequence if it be confined to one sixteenth of the value of the land and fifteen sixteenths left to the unrestrained or unqualified disposition of the Indian. Such is not the legal effect of the patent.

Judgment affirmed.

DRUMM-FLATO COMMISSION COMPANY, Plff. in Err.,
v.
R. C. EDMISSON.

(See S. C. Reporter's ed. 534-540.)

Evidence — books of account — copies.

1. The original books of account should be produced, where copies made by a notary, who took the deposition of the bookkeeper, are objected to, both before the notary and at the trial, as not the best evidence.

NOTE.—When interest is recoverable as damages—see note to Sneed v. Wister, 5 L. ed. U. S. 717, and Wilson v. Troy, 18 L.R.A. 449.

As to secondary evidence of contents of books of account—see note to Post v. Kenerson, 52 L.R.A. 604.

Appeal — harmless error — ruling on evidence.

2. Error, if any, in excluding copies of books of account, is harmless where all persons from whose reports the books are made up were permitted to testify.

Interest — as damages — for conversion.

3. Interest is expressly made by Oklahoma Statutes 1893, § 2640, a part of the detriment caused by the conversion of personal property.

Trial — special interrogatories — necessity of answer.

4. The court need not require the jury to answer a special interrogatory which inquires into a fact only incidental to the issue. and which was, besides, undefined and uncertain as to time.

Appeal — necessity of exception.

5. Failure to except to remarks by the court regarded as prejudicial is not excused because of the belief of counsel that to make objection would make a bad matter worse.

[No. 139.]

Submitted January 27, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Woods County, in that territory, in favor of plaintiff in an action for conversion. Affirmed.

See same case below, 17 Okla. 344, 87 Pac. 311.

The facts are stated in the opinion.

Mr. **James S. Botsford** submitted the cause for plaintiff in error. Messrs. Buckner F. Deatherage and Odus G. Young were on the brief:

The court erred in rejecting the books of account kept by the defendant, and showing the number of Edmisson cattle sold by the defendant in December, 1899.

Kesler v. Cheadle, 12 Okla. 494, 72 S. W. 367; Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 505; Chaffee v. United States, 18 Wall. 541, 21 L. ed. 912.

In actions of tort, interest is only allowable in the discretion of the jury.

Lincoln v. Claflin, 7 Wall. 132, 139, 19 L. ed. 106, 109; The Scotland, 118 U. S. 507, 518, 30 L. ed. 153, 155, 6 Sup. Ct. Rep. 1174; District of Columbia v. Robinson, 180 U. S. 92, 107, 45 L. ed. 440, 447, 21 Sup. Ct. Rep. 283.

It was the duty of the trial court to submit all questions asked by the parties on material points in the case to the jury, for their answer, and the parties have the right to require answers to all such questions submitted by the court.

Bent v. Philbrick, 16 Kan. 190; Wichita & W. R. Co. v. Fechheimer, 36 Kan. 50, 12 Pac. 362; Chicago, I. & K. R. Co. v. Townsdin, 38 Kan. 78, 15 Pac. 889; Hulme v. Diffenbacher, 53 Kan. 181, 36 Pac. 60; Walker v. Brantner, 59 Kan. 126, 68 Am. St. Rep. 344, 52 Pac. 80; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722.

The general rule which governs the admissibility of entries in books made by private parties in the ordinary course of their business requires that the entries shall be contemporaneous with the facts to which they relate, and shall be made by the parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court.

Chaffee v. United States, 18 Wall. 516, 541, 21 L. ed. 908, 912.

A judgment should be reversed where the trial judge indulges in prejudicial remarks.

Rose v. Kansas City, 125 Mo. App. 231, 102 S. W. 578; Wright v. Richmond, 21 Mo. App. 76; Padgitt v. Moll, 159 Mo. 143, 52 L.R.A. 854, 81 Am. St. Rep. 347, 60 S. W. 121; McIntosh v. McIntosh, 79 Mich. 198, 44 N. W. 592; Chesapeake, O. & S. W. R. Co. v. Barlow, 86 Tenn. 537, 8 S. W. 147.

Objection to the copies of the books should have been made at the time of taking the depositions; or, at least, before the coming on of the trial of the cause.

13 Cyc. Law & Proc. pp. 1014, 1019.

Where a deposition is taken in another state, copies of exhibits instead of the originals may be produced and used in evidence.

Craig v. Russell, 2 Harr. (Del.) 353; 2 Wigmore, § 1223; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 443; Todd v. Bishop, 136 Mass. 386; Amherst Bank v. Conkey, 4 Met. 459; Marvin v. Raigan, 12 Cush. 132; Petersburg Sav. & Ins. Co. v. Manhattan F. Ins. Co. 66 Ga. 460; Howard v. Orient Mut. Ins. Co. 9 Bosw. 645; Fant v. Campbell, 8 Okla. 592, 58 Pac. 741.

Mr. **Elijah Robinson** submitted the cause for defendant in error. Mr. Charles Swindall was on the brief:

The entries in defendant's books were not made contemporaneously with the transactions to which they related, nor by persons who had any knowledge of those transactions, and consequently were not admissible in evidence.

Batre v. Simpson, 4 Ala. 312; Davis v. Tarver, 65 Ala. 102; Walling v. Morgan County, 126 Ala. 326, 28 So. 433; Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U. S. 598, 24 L. ed. 295; Wells v. Hobson, 91 Mo.

App. 379; Nelson v. Nelson, 90 Mo. 460, 2 S. W. 413; Robinson v. Smith, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. 29; 2 Wigmore, Ev. § 1530.

The trial court committed no error in its instructions on the question of interest.

George R. Barse Live Stock Commission Co. v. McKinster, 10 Okla. 708, 64 Pac. 14; Straw v. Jenks, 6 Dak. 414, 43 N. W. 941; Thompson v. Schaetzel, 6 Dak. 284, 42 N. W. 765.

Interrogatories that are calculated to mislead, confuse, or harass the jury, should not be submitted.

Lawton v. McAdams, 15 Okla. 412, 83 Pac. 429.

The question asked to be submitted was too general.

Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698.

Objection must be made to any action of the trial court at the time it occurs; and, if not then made, it cannot be made in the appellate court.

8 Enc. Pl. & Pr. p. 272; Sloan v. Frye, 36 Mo. App. 523; People v. Abbott, 101 Cal. 645, 36 Pac. 129; State v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Glenny v. Territory, 15 Okla. 231, 79 Pac. 754; Blain v. State, 34 Tex. Crim. Rep. 448, 31 S. W. 368; Irvin v. Kutruff, 152 Pa. 615, 25 Atl. 796; Roten v. State, 31 Fla. 521, 12 So. 910.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an action brought by defendant in error against plaintiff in error for $8,000, for the conversion of 410 head of cattle. The case was tried to a jury, which returned a verdict for the sum of $7,436.06. The jury also returned with the general verdict answers to special interrogatories which were submitted at the request of the commission company. Judgment was entered upon the verdict, which was affirmed by the supreme court of the territory of Oklahoma. This writ of error was then sued out.

The assignments of error assail the sufficiency of the evidence to justify the verdict and judgment, and certain rulings of the trial court.

1. As to the sufficiency of the evidence to justify the verdict, we may say that we agree with the courts below. Upon the questions of fact presented the evidence was so far conflicting as to remove the verdict of the jury and the action of the lower courts from reversal by an appellate tribu-
[536] nal. The *issue between the parties was clearly defined. Edmisson had become indebted to the commission company in large amounts of money, secured by certain notes and chattel mortgages on the cattle which are the subject of the action.

In full satisfaction of the indebtedness the company and he entered into an agreement on the 22d November, 1899,† by which he agreed to deliver to the company 1,900 of the cattle as they run on the range, if that number could be found, of various ages. And it was further agreed that if, after the delivery of that number, Edmisson should gather as many as 200 head, he should turn over 100 of them to the company, or if he delivered as many as 2,000 head, "any residue thereafter" was "to be retained by said Edmisson." Edmisson contended that he delivered 1,700 head in compliance with this agreement and was ready and had "rounded up" about 350 head of other cattle and held them for a time ready to deliver to the company. These cattle, after being held for a time, were turned *loose in a larger pasture. [537]
And Edmisson further contended that the company, by its agents, forcibly took from his ranges and pastures in excess of the number the company was entitled to under the agreement, and for this conversion the action was brought. Edmisson's evidence was addressed to the proof of these contentions.

The counter contentions of the commission company were that Edmisson delivered to it only 1,550 head of cattle, and that he refused to deliver any more, and, instead of delivering enough more to comply with his agreement, he scattered them through the various pastures in bunches at distances of 40 or 50 miles from his range, and it was with difficulty that the company, through its agents, collected 356 head, making in all 1,881 head. In support of these contentions evidence was adduced and the jury rendered the verdict already mentioned.

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†This agreement, made and entered into this 22d day of November, 1899, by and between Drumm-Flato Commission Company, party of the first part, and R. C. Edmisson, party of the second part.

Witnesseth, That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company nineteen hundred (1,900) head of cattle as they run on the range (provided the same can be found to make this number of head) of various ages, and on which said Drumm-Flato Commission Company hold a chattel mortgage.

The parties of the first part agree, in consideration of the delivery of the abovementioned number of cattle, to deliver to said second party, R. C. Edmisson, all of his notes, mortgages, and other indebtedness due said Drumm-Flato Commission Company to this date.

It is further agreed by the parties mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said 1900 head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as 2,000 head of cattle, any residue thereafter is to be retained by said Edmisson.

In witness whereof, we have hereunto set our hands the day and year above written.

R. C. Edmisson,
Drumm-Flato Com. Co.,
Per A. Drumm, P't.

2. The next assignment of error is that the court erred in rejecting the books of account kept by the commission company, showing the number of cattle received and sold by the company. In support of the contention involved in this assignment of error the commission company relies on § 4277 of the Statutes of Oklahoma of 1893 and the case of Kesler v. Cheadle, 12 Okla. 489, 72 Pac. 367, and Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

Section 4277 is as follows: "Entries in books of account may be admitted in evidence when it is made to appear by the oath of the person who made the entries that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

To the contention the supreme court of the territory replied that the entries were not part of the *res gestæ*, that, besides, the books were not produced, and that neither they nor the original entries were attached to the deposition of the witness, nor were they [538] shown to be lost or destroyed. "We *know of no rule of evidence," the court said, "that would permit a witness to state the entries or the contents of a book of account unless the book were lost or destroyed."

It is, however, contended that the books were before the notary public who took the deposition of the bookkeeper, and that copies of the entries were made by the notary. But when the copies were offered as evidence they were immediately objected to as incompetent and immaterial and not the best evidence. The commission company was therefore put upon notice that the production of the books themselves would be insisted on. The notary was not trying the case, and before the court and jury who were trying it the objection to the copies of the entries was renewed. We think that the books should have been produced. They were intended as independent evidence,—independent of the witness from whose returns they were made. But if it should be granted their exclusion was error, it is difficult to see how the commission company was prejudiced. The persons who received the cattle at the place they were delivered to the company, and the employee of the company who sold them after they were received, and from whose report the books were made up, all were permitted to testify. And it may be that the entries in the books were inadmissible for the other reasons given by the supreme court. They were not entries of any transaction relating to the cattle between the commission company and Edmisson. They were entries of sales made by the commission company after the cattle had been delivered to its agent and shipped to it by that agent.

3. Error is assigned upon the instruction of the court that, if the jury found a conversion of the property, 7 per cent interest should be added to its value from the time of its conversion. The contention is that interest can only be given in actions by a creditor against a debtor, and that § 2615 of the Oklahoma Statutes of 1893 controls. That section reads as follows:

"In an action for the breach of an obligation not arising from *contract, and in every [539] case of oppression, fraud, or malice, interest may be given in the discretion of the jury."

The supreme court of the territory rejected the contention, deciding that § 2640 governed the case. It provides as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: First. The value of the property at the time of the conversion, with the interest from that time." There was no error in this ruling. It may be that, in the absence of statute, the general rule is that in actions for tort the allowance of interest is not an absolute right (Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; The Scotland [Dyer v. National Steam Nav. Co.] 118 U. S. 507, 30 L. ed. 153, 6 Sup. Ct. Rep. 1174; District of Columbia v. Robinson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. Rep. 283; Frazer v. Bigelow Carpet Co. 141 Mass. 126, 4 N. E. 620); but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same.

4. The next assignment of error is based upon the refusal of the court to require an answer to interrogatory number 5, as to the number of Edmisson's cattle the agent of the commission company shipped from Curtis to Kansas City.

To establish error in the refusal of the court, plaintiffs in error cite § 298 of the Civil Code of the territory, which provides that, in all cases, the jury shall render a general verdict, and the court shall, in any case, at "the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same."

It certainly cannot be contended that the statute requires every interrogatory to be answered, however remote the fact it inquires about may be from the issue. The supreme court of the territory pointed out the fact inquired into was only incidental to the issue, and was, besides, undefined and uncertain as to time. The number of cattle shipped might have some bearing or relation of proof to the number delivered, which was the issue in the case, but, under the circumstances and conditions of the other proofs, [540]it was within the discretion *of the court to decide whether a specific answer should or should not have been required. Indeed, the interrogatory seems to have been improvidently submitted, for the supreme court, in its opinion, says:

"The evidence disclosed that a large number of Edmisson cattle had been shipped to Kansas City, in various shipments. Bryson testifies that the total number of cattle shipped was 2,578. There was no dispute on the part of the plaintiff as to the number of cattle that were shipped. The entire controversy was as to the number of cattle that were delivered by the plaintiff to the agent of the defendant, and the number converted after allowing the defendant all that it was entitled to under and pursuant to the contract." [17 Okla. 353, 87 Pac. 314.]

5. Plaintiffs in error finally complain as ground of error of certain remarks by the court which, it is contended, were prejudicial. The supreme court replied to this assignment of error that no objection had been taken to the remarks complained of. Counsel now say that to have made objection would have made "a bad matter much worse." But we cannot accept the excuse. We have examined the remarks complained of, and we do not think they had the misleading strength that is attributed to them. At any rate, it was the duty of counsel to object to them, and if then the court made matters worse, or did not correct what was misleading or prejudicial, its action would be subject to review.

Judgment affirmed.

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[541]*GEORGE C. RANKIN, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plff. in Err.,

v.

CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

(See S. C. Reporter's ed. 541-547.)

Banks — conversion by correspondent bank — fictitious credit.

A bank which, in order to deceive a bank examiner, discounts the note of a president of another national bank and places the proceeds to the credit of his bank in a special account, not subject to check, does not, by charging the note against the account, in accordance with the agreement, without knowledge of the other bank's failing condition, become liable to the receiver of such other bank as for a conversion, on the theory that, because such president drew his check on the other bank for the full amount, and deposited it to his credit in his own bank, and, by means of a corresponding check against his personal account, removed from the assets of his bank certain notes objected to by the bank examiner, the transaction must be regarded as really a loan to the president, secured by an attempted pledge of the funds of his bank.

[No. 51.]

Argued November 12, 13, 1907. Decided February 24, 1908.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western Division of the Western District of Missouri, in favor of defendant in an action brought by the receiver of a national bank to recover money alleged to have been standing to the credit of such bank in another national bank, which the latter is alleged unlawfully to have appropriated to its own use, for the payment and satisfaction of promissory notes held by it, and made by the president of the former bank. Affirmed.

Further facts are stated in the opinion.

See same case below, 75 C. C. A. 343, 144 Fed. 587.

Mr. **C. B. Ames** argued the cause, and, with Messrs. D. T. Flynn and W. C. Scarritt, filed a brief for plaintiff in error:

The Kansas City bank, by accepting Billingsley's individual note and his individual check and a letter from him as president, pledging the funds of the bank for the payment of this individual note, placed itself in the attitude of dealing with Billingsley acting as an individual and as president of his bank. It therefore was charged with notice of the real facts and of his authority in the premises, and it occupies the same position now as though it had known then that Billingsley was deceiving them and robbing his bank. That a person dealing with an officer of a bank who acts in this dual capacity is charged with knowledge of the exact facts is thoroughly established by the authorities, as well as by reason.

Chrystie v. Foster, 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551; Lamson v. Beard, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30; Anderson v. Kissam, 35 Fed. 699; Gale v. Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214; Rankin v. Chase Nat. Bank, 188 U.

S. 557, 47 L. ed. 594, 23 Sup. Ct. Rep. 372; State Nat. Bank v. Newton Nat. Bank, 14 C. C. A. 61, 32 U. S. App. 52, 66 Fed. 691; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742.

The bank itself, through its board of directors, could not lawfully enter into such a contract, because becoming surety for another is *ultra vires* a national bank.

Angell & A. Priv. Corp. 139; Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Sedgw. Stat. & Const. Law, 2d ed. 291; Central Bank v. Empire Stone Dressing Co. 26 Barb. 23; National Park Bank v. German-American Mut. W. & Secur. Co. 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567; Bridgeport City Bank v. Empire Stone Dressing Co. 30 Barb. 421; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Ætna Nat. Bank v. Charter Oak L. Ins. Co. 50 Conn. 167; Davis v. Old Colony R. Co. 131 Mass. 258, 41 Am. Rep. 221; Culver v. Reno Real Estate Co. 91 Pa. 367; Park Hotel Co. v. Fourth Nat. Bank, supra; Germania Safety-Vault & T. Co. v. Boynton, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

Mr. **John A. Eaton** argued the cause and filed a brief for defendant in error:

The contracts were not illegal, and no such claim was made. The plaintiff, as receiver of the Guthrie bank, has no legal authority to impeach or disaffirm the lawful and authorized acts of the bank, and, where its contracts have been executed and performed, a receiver subsequently appointed cannot litigate obligations arising under such contracts in any action, legal or equitable.

Alderson, Receivers, p. 738, §§ 534. 535.

The contracts in this case were what are defined to be "executed contracts."

Farrington v. Tennessee, 95 U. S. 683. 24 L. ed. 559.

And having been executed. even if they were illegal, no action would lie in favor of the receiver of the Guthrie bank.

Thomas v. West Jersey R. Co. 101 U. S. 85, 25 L. ed. 953; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 407, 36 L. ed. 754, 12 Sup. Ct. Rep. 953; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 151, 43 L. ed. 114, 18 Sup. Ct. Rep. 808.

The notes and special deposits were bank transactions. The notes were the obligations of the Guthrie bank, and the deposits in the Kansas City bank were used by the Guthrie bank for the purpose named in the contract.

Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 421; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; American Preservers' Trust v. Taylor Mfg. Co. 46 Fed. 152.

The transactions and contracts were within the power of the Guthrie bank, and within the authority of its president.

Auten v. United States Nat. Bank, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628; Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 556; Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495; United States Nat. Bank v. First Nat. Bank, 13 C. C. A. 472, 27 U. S. App. 605, 64 Fed. 985, 24 C. C. A. 597, 49 U. S. App. 67, 79 Fed. 296; Bell v. Hanover Nat. Bank, 57 Fed. 821; Coats v. Donnell, 94 N. Y. 168; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750; Whitney v. First Nat. Bank, 154 U. S. 664, Appx. and 26 L. ed. 212, 14 Sup. Ct. Rep. 1215.

The Guthrie bank recognized and ratified the transactions and contracts of its President, Billingsley, with the Kansas City bank as its acts, and as made for its use and benefit.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Blanchard v. Commercial Bank, 21 C. C. A. 319, 44 U. S. App. 556, 75 Fed. 249; Burton v. Burley, 9 Biss. 253, 13 Fed. 811.

The special deposit in this case comes under that class of special deposits made for the purpose of security, and a national bank may become the repository of the fund which is to stand as security, and to be paid or applied under certain contingencies.

Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

And when such special deposit is created, the bank receiving the same is obligated to apply it to the payment of the designated indebtedness.

Judy v. Farmers & T. Bank, 81 Mo. 404.

A deposit is always presumed to be general unless made special by contract.

Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. ed. 437; Brahm v. Adkins, 77 Ill. 263.

It requires a contract between the parties to create a special deposit; otherwise, it will be general.

National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; Bank of Blackwell v. Dean, 9 Okla. 626, 60 Pac. 226.

The acceptance and receipt of the benefits, advantages, and profits of the contracts preclude and estop the Guthrie bank from asserting that they were not made in its behalf.

First Nat. Bank v. Mason, 95 Pa. 113,

40 Am. Rep. 632; Roe v. Bank of Versailles, 167 Mo. 424, 67 S. W. 303.

The contract is made up of all of the several instruments and correspondence which were made and written contemporaneously.

2 Parsons, Contr. 6th ed. p. 502; 1 Dan. Neg. Inst. § 156; Missouri P. R. Co. v. Atkinson, 17 Mo. App. 485; Brownlee v. Arnold, 60 Mo. 79.

Mr. Justice **Holmes** delivered the opinion of the court:

This suit was brought by the receiver of the Capitol National Bank of Guthrie, Oklahoma territory, which we shall call the Guthrie bank, to recover the amount of an alleged deposit in the City National Bank of Kansas [542] City, Missouri, *which we shall call the City bank. At a trial without a jury in the circuit court the facts were found and judgment was given for the defendant, which judgment was affirmed by the circuit court of appeals. 75 C. C. A. 343, 144 Fed. 587. We give an abridgment of the findings of the circuit court.

The bank examiner had complained of excessive loans by the Guthrie bank and especially of three notes for $10,000 each, made, respectively, by the Missouri, Kansas, & Oklahoma Company, the Wild West Show Company, and the Western Horse Show Company, and had directed them to be reduced. Thereupon one Billingsley, its president, who managed its business with the defendant, wrote to the defendant's cashier, saying: "I want you to take my note of 30,000.00 and Cr. my Bank with like amount in a special account, with the understanding that said account is not to be checked against. My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about. . . . You will not be out any money and loan and deposit will offset each other on your books." The Guthrie bank had a general deposit with the City bank, but this on its face was a scheme for a separate paper transaction. The proposal was accepted, Billingsley sent his note, and wrote saying that he had given the Guthrie bank his check on the City bank for the amount, adding: "And it is agreed that said [Guthrie bank] is to keep this 30 Th with you until note is retired, together with as large a balance as possible. . . . Chas. E. Billingsley, Pres't."

Billingsley gave the above-mentioned check to the Guthrie bank, which credited it to his personal account, in which the bank's money was kept, as will be stated later. The same day he gave to the bank a check against his personal account for the same sum, which was charged to that account and credited to bills receivable, and thereupon the three notes objected to by the bank examiner were taken out of the bank's assets and possession. What became of them does not appear. It was argued from several circumstances not necessary to mention *that they were paid by [543] Billingsley, but that fact is not found. Billingsley does not seem to have been personally liable upon them, and all that can be said is that the scheme to get them off the books was carried out. The cashier of the City bank was away when the letter with Billingsley's note arrived, and there were telegrams; after which the City bank, on September 10 or 11, 1903, charged the note to bills receivable, the check to Billingsley, and credited the Guthrie bank with $30,000 on general account. On September 14 the cashier, having returned, transferred $30,000 to a special account, according to the plan. Billingsley was notified and all transactions in this matter thereafter were entered by the City bank on this special account.

On November 9, 1903, Billingsley's note falling due, the account was charged with the amount and interest. The same day a letter from Billingsley was received, asking an extension. The cashier replied that they had charged his account with the note, but would renew it on satisfactory collateral, and returned the note. Billingsley answered, inclosing a note for $30,000, and requesting that the former arrangement be continued. In answer to this the president of the City bank wrote that they preferred a demand note, and that to satisfy the Comptroller they would rather that it should be for $25,000 instead of $30,000. On November 30, 1903, Billingsley inclosed his note for $25,000 in a letter to the president, requesting that the proceeds be placed as a special deposit to the credit of the bank, and repeating the old agreement: "It being expressly understood and agreed that this fund is not subject to check, but is to remain with the City National Bank for the payment of the note, and you are hereby authorized to charge this note to said account at any time you desire." Originally the note was signed "Chas. E. Billingsley Pt.," and the letter with his name, without addition. On December 12 the president of the City bank wrote that the note should be signed individually and the letter as president, and inclosed the letter for the change. Billingsley admitted the mistake, added "Prest." to *his signature, and returned the letter, at [544] the same time authorizing the City bank to strike off the "Pt." from the signature on the note, which was done.

On November 30, 1903, in order to make the balance of the City bank account on the books of the Guthrie bank correspond with the books of the City bank, Billingsley gave the teller of the Guthrie bank his check upon it in favor of the City Bank for $5,000, which was stamped paid, and the amount credited to the City bank on the books of the Guthrie bank. On December 7 the City bank credited the Guthrie bank with $25,000 on the special account. It credited 2 per cent interest at the end of each month while the account was open, and there was a small deduction as the result of the first stage for interest on the $30,000 note, so that on April 4, 1904, the special credit to the Guthrie bank was $24,994.54. On that day the City bank, having no knowledge that the Guthrie bank was in a failing condition, charged the note to the account, returned the same duly canceled, and closed the account. Later on the same day the Guthrie bank failed and went into the hands of a receiver. The receiver notified the City bank that the note was not a liability of the Guthrie bank and that the City bank would be held.

There are few other facts needing mention. Statements of account were made monthly by the banks to each other up to February 1, 1904, and after that daily reconcilements were made. The statements of the City bank showed the special or No. 2 account as well as the general one, and these were entered in the Guthrie bank reconcilement book as No. 1 and No. 2. The Guthrie bank also recognized the existence of the special account in corrections sent to the City bank. But the whole amount appeared in its general account. It should be added that the Guthrie bank was in the habit of borrowing money by issuing notes and crediting the proceeds to Billingsley's personal account, the notes being paid by Billingsley's checks. Billingsley also entered his personal deposits and drew his personal checks upon the same account. It [545] should be added *further that in the circuit court both counsel agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie bank.

The plaintiff, the receiver of the Guthrie bank, argues that the foregoing transaction was really a loan to Billingsley, with an attempted pledge of a deposit of the Guthrie bank in the City bank, and is shown to have been so by the facts that he gave his personal note, that he gave his check on the City bank for the amount to the Guthrie bank, and that, by means of another corresponding check, the three notes objected to by the bank examiner were taken out of its assets and possession. It is added that Billingsley was interested in two at least of these notes, as he was vice president of the companies that made them, and that the entries on the books and other facts show that they were paid. But, as we have said, neither legal interest on Billingsley's part nor payment is found, and we cannot find those facts here. Generes v. Campbell, 11 Wall. 193, 20 L. ed. 110. Leaving them on one side, the argument for the plaintiff stands mainly on the technicality that Billingsley, instead of merely writing the letter in which the agreement was embodied, and having the credit on special account issued without more to the Guthrie bank, gave his check on the City bank as the means of getting the credit on to the Guthrie bank's books. We will deal with these arguments in our own order and way.

This suit, it will be remembered, is to recover an alleged deposit, and the first thing to notice is that the whole business, from beginning to end, was, and was intended to be, a mere juggle with books and paper to deceive the bank examiner. The City bank never received anything from the Guthrie bank, the Guthrie bank never parted with anything to the City bank, or with anything for the loss of which the City bank is responsible, if it parted with anything at all. It would stretch the findings to say that the Guthrie bank does not still own the three notes. But, if it does not, the City bank had nothing to do with its giving them up. The supposed surrender was not a consideration to the City bank, and, so far as appears, *never was known by it to have taken [546] place. It was a transaction wholly between Billingsley and his own bank. So far as the surrender of the notes goes, the parties stand exactly as if that had taken place without a check, in consideration of Billingsley making the note on which the credit was given to the Guthrie bank. It is said that the Guthrie bank got the money, but did not get the benefit of the loan. As between the banks, no one got any money; and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner. If the City bank should be held, it would be held without ever having received a *quid pro quo* except in the most narrowly technical sense. The consideration would be the delivery of Billingsley's note by the Guthrie bank.

Again, the alleged deposit was a parol contract made by the letters of which we have given extracts. There is no other contract but the one so made. But, by those letters, the City bank did not promise to hold $30,000, or, at the later stage, $25,000, to the credit of the Guthrie bank, out and out. On the contrary, it merely agreed to credit these sums against the notes which it held, on the express condition that no checks should be drawn against them, and that, when the first note matured, or, after the second, whenever the bank pleased, the notes should be charged against the account and extinguish it. We perceive no sufficient ground for substituting a fiction for the only promise the City bank ever really made. If the Guthrie bank had sued while it was a going concern, it could not have recovered, and the receiver stands no better than the bank.

This promise, however, the City bank made to the Guthrie bank at the first step of the transaction, and not to Billingsley. The plan was proposed as a plan for the help of the Guthrie bank. It provided from the start for a credit to the Guthrie bank. At the moment when the agreement was reached and Billingsley sent his note, he signed a promise as president, embodying the terms. He corrected the letter with his second note to an official promise in like [547]form. This meant a promise *by the Guthrie bank, and shows that the Guthrie bank, not Billingsley, was the other party to the bargain. It is true that Billingsley's personal obligation was given to the City bank, but the only reasonable interpretation is that he lent his credit to the bank, of which he was the leading spirit, to help it to perpetrate its fraud. It seems to us too plain for further argument that the contract concerning the credit was made between the banks at the beginning and governs all that happened later.

The only material thing that happened was Billingsley's drawing his check on the City bank for the amount of the loan and depositing it to his credit in his own Guthrie bank. Even if this, as in other cases, was regarded as a deposit of the bank's money, still it was not quite logically consistent with his contract that Billingsley should make his check upon the City bank for money which it had agreed with the Guthrie bank to credit to it. But the check was only a documentary form to justify the entry of a deposit. To the City bank it was immaterial, as the result no less was the credit to the Guthrie bank upon the special account and subject to the terms to which both parties had agreed. The subsequent check on the Guthrie bank to the Guthrie bank was another documentary form to give a plausible justification for getting the three notes out of the assets. But with that, as we have said, the City bank had nothing to do.

In view of the statement of counsel, at the argument, to the circuit judge, that they did not contend that the contract was illegal, a disclaimer repeated to us, and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. It would not help the plaintiff. McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839. We are of opinion upon the facts that we have set forth that the courts below were right.

Judgment affirmed.

Mr. Justice **White** and Mr. Justice **McKenna** dissent.

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*FIRST NATIONAL BANK OF ALBUQUERQUE, Appt., [548]
v.
GEORGE F. ALBRIGHT, Frank A. Hubbell, and F. W. Clancy.

(See S. C. Reporter's ed. 548–553.)

Taxation — of national banks.

1. The only taxation of national banks contemplated by U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, is taxation on shares of stock and on real property.

Injunction — against illegal taxation.

2. Equity will not enjoin a reassessment of a tax on the stock and real property of a national bank because of the apprehension that U. S. Rev. Stat. § 5219 will be violated by the assessing officer in making the assessment.

[No. 123.]

Argued and submitted January 22, 1908. Decided February 24, 1908.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which reversed a decree of the District Court of Bernalillo County, in that territory, overruling a demurrer to a complaint seeking to enjoin the reassessment of a tax, and remanded the cause with instructions to dismiss the complaint. Affirmed.

See same case below (N. M.) 86 Pac. 548.

The facts are stated in the opinion.

Mr. **Alonzo B. McMillen** argued the cause and filed a brief for appellant:

The right of the territorial legislature to impose taxes upon national banks is limited to two classes of property:

NOTE.—As to taxation of national banks—see notes to Providence Bank v. Billings, 7 L. ed. U. S. 939, and McHenry v. Downer, 45 L.R.A. 737.

As to when injunction restraining collection of taxes will be granted—see notes to Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

(1) Shares of stock in the name of the shareholder, provided that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, and that shares of nonresidents shall be taxed in the city or town where the bank is located.

(2) Real property of national banks to the same extent, according to its value, as other real property is taxed.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Mercantile Nat. Bank v. New York, 121 U. S. 156, 30 L. ed. 902, 7 Sup. Ct. Rep. 826; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

Where a national bank is taxed at a rate materially higher than all other property, and that discrimination is the result of a general rule, the necessary effect of which is to discriminate, it denies to said bank the equal protection of the law; and it is immaterial, in seeking the protection of the 14th Amendment, that the discrimination is also violative of the provision of the national banking act, requiring equality of taxation as against other moneyed capital. It must follow as a natural result that, if a national bank is discriminated against as to all other property, the discrimination is condemned by both the provisions of the national banking act and the 14th Amendment.

Whitbeck v. Mercantile Nat. Bank, 127 U. S. 194, 32 L. ed. 119, 8 Sup. Ct. Rep. 1121; Mercantile Nat. Bank v. New York, 121 U. S. 155–157, 30 L. ed. 901, 902, 7 Sup. Ct. Rep. 826; New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; Pelton v. Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Boyer v. Boyer, 113 U. S. 695, 28 L. ed. 1090, 5 Sup. Ct. Rep. 706; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 733; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 397; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Sup. Ct. Rep. 1234; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305; Kentucky Railroad Tax Cases, 115 U. S. 338, 29 L. ed. 419, 6 Sup. Ct. Rep. 57; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; New York v. Barker, 179 U. S. 285, 45 L. ed. 193, 21 Sup. Ct. Rep. 115.

The right to have a cloud on real estate, caused by an illegal tax, removed, and the right to prevent threatened illegal taxes by injunction, are well established.

Pelton v. Commercial Nat. Bank, 101 U. S. 143, 148, 101 L. ed. 901, 902; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 156, 25 L. ed. 903, 904; Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; San Francisco Nat. Bank v. Dodge, 197 U. S. 75, 49 L. ed. 672, 25 Sup. Ct. Rep. 384; Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234, 105 U. S. 305, 26 L. ed. 1044; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; Evansville Nat. Bank v. Britton, 105 U. S. 322, 26 L. ed. 1053; 5 Pom. Eq. Jur. § 371; Louisville Trust Co. v. Stone and Taylor v. Louisville & N. R. Co. supra.

Mr. **Frank W. Clancy** submitted the cause for appellees:

The proposed assessment is unobjectionable as far as plaintiff is concerned.

It is clearly less than the territorial statute requires.

Albuquerque Nat. Bank v. Perea, 147 U. S. 89, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; Nickerson v. Kimball, Thompson, Nat. Bank Cas. 409; Wagoner v. Loomis, 37 Ohio St. 581; Carroll v. Alsup, 107 Tenn. 257, 64 S. W. 200; People ex rel. Youmans v. Delaware County, 60 N. Y. 381.

It makes no discrimination against national banks.

Talbott v. Silver Bow County, 139 U. S. 447, 35 L. ed. 213, 11 Sup. Ct. Rep. 594; Mercantile Nat. Bank v. New York, 121 U. S. 155, 30 L. ed. 901, 7 Sup. Ct. Rep. 826; Pelton v. Commercial Nat. Bank, 101 U. S. 146, 25 L. ed. 902; First Nat. Bank v. Chehalis County, 166 U. S. 461, 462, 41 L. ed. 1078, 17 Sup. Ct. Rep. 629.

It involves no denial of the equal protection of the laws.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 464, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; New York v. Barker, 179 U. S. 286, 45 L. ed. 194, 21 Sup. Ct. Rep. 121; Michigan C. R. Co. v. Powers, 201 U. S. 293, 50 L. ed. 761, 26 Sup. Ct. Rep. 459.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a complaint or bill against the assessor, the treasurer and *ex officio* collector, and the district attorney of the county of Bernalillo, New Mexico, to enjoin the reassessment of a tax on stock and real estate for the year 1903 upon the plaintiff bank, which the plaintiff is informed and believes the defendants will attempt. The bill alleges that the plaintiff gave the assessor a list in which capital stock, surplus, and real estate were lumped in a single item with a single valuation of $90,000. Thereupon the assessor made a different valuation, lumping the capital stock and valuing it at 60 per cent of its par value, and giving separate figures for the surplus and the several parcels of real estate, the total being $150,542. This was affirmed by the territorial board of equalization on appeal. Afterwards the plaintiff paid the amount admitted by it to be due, and was sued for the residue; but the suit was dismissed, the district attorney giving out that a new assessment would be made. It is alleged that the assessor, in 1903, announced as his method of valuation that all property except bank property and bank shares would be assessed at one third of its real value, but that he would assess banks at 60 per cent of the capital stock and surplus in addition to their real estate; that he did as he announced, and also assessed the real estate without deducting the value "from the valuation of other property assessed against said banks." Beside the [552] prayer for an injunction *there is another that the treasurer and *ex officio* collector be ordered to cancel the above-mentioned assessment upon his books. There was a demurrer, which was overruled below, but sustained by the supreme court of the territory, with directions to dismiss the complaint.

The complaint admits that the plaintiff's return was not in accordance with the law, and the supreme court of the territory says that both that and the assessment were bad, and that a reassessment is authorized by local law. We see no reason to reverse its decision upon that point. If a reassessment is made, that now on the treasurer's books will be disposed of and will be no cloud upon the plaintiff's title, so that the whole question is whether a reassessment shall be made. The plaintiff's objection is not the technical one that no reassessment is authorized by statute, but the substantial apprehension that the shares will be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," contrary to the words of Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, and that the value of real estate separately assessed and taxed will not be deducted from the valuation of shares, as it is thought to be implied by that section and required by the territorial laws of 1891, chap. 40 (Comp. Laws, 1897, § 259), that it should be.

We assume that such an assessment of shares as is apprehended would be invalid under Rev. Stat. § 5219. First Nat. Bank v. Chapman, 173 U. S. 205, 219, 220, 43 L. ed. 669, 674, 675, 19 Sup. Ct. Rep. 407. We assume that it would be invalid none the less if disguised as a tax on 60 per cent of the par value, if other moneyed capital was uniformly and intentionally assessed at one third of its actual value and if 60 per cent of the par value of the bank shares was more than one third of their actual value. Accidental inequality is one thing, intentional and systematic discrimination another. See, further, Raymond v. Chicago Union Traction Co. 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7. We agree with the plaintiff that the only taxes contemplated by § 5219 are taxes on the shares of stock and taxes on the real estate. Owensboro Nat. *Bank v. Owens- [553] boro, 173 U. S. 664, 669, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537. Hence, while the law does not consider the nature of the bank's investments not taxed in fixing the value of its stock (Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324), it may be argued consistently with the decisions that real estate taxed to the bank, and land out of the territory, which could not be taxed by it at all (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36), are meant to be deducted by Rev. Stat. § 5219, and are required to be by the territorial law. But we agree with the supreme court of the territory that the time for deciding these and other questions has not come.

The acceptance of what was admitted to be due created no estoppel to demand more. There are no such precise averments in the complaint as would warrant our assuming that no assessment could be made for a further amount, still less that none in any form could be made, when there is no valid one upon the books. We cannot tell, and much more positive averments of intent than those before us would not warrant a court in prejudging, what the assessing officer will do. It is not for a court to stop an officer of this kind from performing his statutory duty for fear he should perform it wrongly. The earliest moment for equity to interfere is when an assessment has been made. Probably it will be made with caution, after this case.

Judgment affirmed.

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*HERRING-HALL-MARVIN SAFE COM- [554]
PANY, Petitioner,
v.
HALL'S SAFE COMPANY. Edward C. Hall,
William H. Hall, and Charles O. Hall.

(See S. C. Reporter's ed. 554–560.)

Unfair competition — use of one's own name.

The purchaser of all the property and assets as a going concern, together with the business, good will, and trade rights of a safe and lock manufacturing company which was to wind up its affairs, has the right to use the surname of the founder, where that name had acquired a commercial value, and to be protected by an injunction against a rival safe-making corporation organized by the sons of the founder, who were members of the original corporation, forbidding the use of the surname of such founder, either alone or in combination, in the corporate name, on safes, or in advertisements, unless accompanied by information that the corporation is not the original corporation or its successor, or that the article is not the product of such original company or its successor.

[No. 136.]

Argued January 30, 1908. Decided February 24, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which, reversing in part and modifying a decree of the Circuit Court for the Southern District of Ohio, enjoined certain use of a surname as unfair competition. Modified by making the injunction more specific, and, as modified, affirmed.

See same case below, 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 37.

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.**, argued the cause, and, with Mr. Charles H. Aldrich, filed a brief for petitioner:

"Hall's Safes" was a trade name of the old concern, indicating the source of manufacture.

The trade name passed to the purchaser as part of the good will of the old concern.

Sebastian, Trade-Marks, 4th ed. 308; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Brown Chemical Co. v. Meyer, 139 U. S. 540, 548, 35 L. ed. 247, 250, 11 Sup. Ct. Rep. 625; LePage Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 943; Russia Cement Co. v. LePage, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304.

The defendants were not entitled to appropriate the good will of the old concern by carrying on business under a corporate title substantially the same, and by calling their product "Hall's Safes."

Menendez v. Holt, 128 U. S. 514, 521, 522, 32 L. ed. 526, 528, 9 Sup. Ct. Rep. 143; Russia Cement Co. v. LePage, supra; LePage Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; Holmes, Booth, & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Smith v. David H. Brand & Co. 67 N. J. Eq. 529, 58 Atl. 1029; Duryea v. National Starch Mfg. Co. 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651.

The injunction awarded by the court of appeals is inadequate on any theory of the plaintiff's rights.

Swift & Co. v. United States, 196 U. S. 375, 401, 49 L. ed. 518, 526, 25 Sup. Ct. Rep. 276; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 Sup. Ct. Rep. 272; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 204, 41 L. ed. 118, 131, 16 Sup. Ct. Rep. 1002; Dodge Stationery Co. v. Dodge, supra.

The cross bill was properly dismissed.

Brown Chemical Co. v. Meyer, supra; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 302, 40 L. ed. 155, 160, 16 Sup. Ct. Rep. 30; Thynne v. Shove, L. R. 45 Ch. Div. 580; Levy v. Walker, L. R. 10 Ch. Div. 436.

If "Hall's Safes" was a trade name indicating the source of manufacture, and was sold to plaintiff's predecessor, the right acquired was necessarily exclusive.

Russia Cement Co. v. LePage, supra; Levy v. Walker, L. R. 10 Ch. Div. 449; Kidd v. Johnson, 100 U. S. 617, 619, 25 L. ed. 769, 770.

Messrs. **Judson Harmon** and **William C. Cochran** argued the cause and filed a brief for respondents:

The decision in Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609, is decisive of the case at bar.

The doctrine of this case has been applied under circumstances closely resembling the case at bar.

National Starch Mfg. Co. v. Duryea, 41 C. C. A. 244, 101 Fed. 117; Montreal Lithographing Co. v. Sabiston [1899] A. C. 610; Hunt v. Trego [1896] A. C. 25; Knoedler v. Boussod, 47 Fed. 466, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895; Bassett v. Percival, 5 Allen, 347; Hoxie v. Chaney, 143 Mass. 596, 58 Am. Rep. 149, 10 N. E. 713; Lawrence v. Hull,

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NOTE.—As to right to use one's own name as trademark or trade name—see note to Donnell v. Herring-Hall-Marvin Safe Co., ante, 481.

169 Mass. 250, 47 N. E. 1001; Marcus Ward & Co. v. Ward, 40 N. Y. S. R. 792, 15 N. Y. Supp. 913; Morgan v. Schuyler, 79 N. Y. 494, 35 Am. Rep. 543; Reeves v. Denicke, 12 Abb. Pr. N. S. 97; William Rogers Mfg. Co. v. Simpson, H. & M. Co. 54 Conn. 527, 9 Atl. 395; Cottrell v. Babcock Printing Press Mfg. Co. 54 Conn. 122, 6 Atl. 791; Williams v. Farrand, 88 Mich. 473, 14 L.R.A. 161, 50 N. W. 446; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Iowa Seed Co. v. Dorr, 70 Iowa, 485, 59 Am. Rep. 446, 30 N. W. 866; Moreau v. Edwards, 2 Tenn. Ch. 349; McGowan Bros. Pump & Mach. Co. v. McGowan, 22 Ohio St. 370; Chattanooga Medicine Co. v. Thedford, 58 Fed. 349; Fish Bros. Wagon Co. v. LaBelle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 563, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 142 Ill. 508, 30 N. E. 339; Helmbold v. Helmbold Mfg. Co. 53 How. Pr. 459; Horton Mfg. Co. v. Horton Mfg. Co. 18 Fed. 817; Armington & S. Co. v. Palmer, 21 R. I. 116, 43 L.R.A. 95, 79 Am. St. Rep. 786, 42 Atl. 308; Bagby & R. Co. v. Rivers, 87 Md. 420, 40 L.R.A. 632, 67 Am. St. Rep. 357, 40 Atl. 171; Holmes, Booth, & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 295, 9 Am. Rep. 324; Trego v. Hunt [1896] A. C. 7.

The cases cited for complainant may be classified as follows:

(1) Cases in which the name in dispute was made a trademark, used on labels, brands, etc., and given to the firm or corporation by the retiring partner or stockholder, the firm or company going on as before:

Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 298–300, 40 L. ed. 155, 159, 160, 16 Sup. Ct. Rep. 30; Russia Cement Co. v. LePage, 147 Mass. 211, 9 Am. St. Rep. 685, 17 N. E. 304; LePage v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Frazer v. Frazer Lubricator Co. 121 Ill. 159, 2 Am. St. Rep. 73, 13 N. E. 639; Spieker v. Lash, 102 Cal. 42, 36 Pac. 362.

(2) Cases in which the vendor sold out his interest in a firm, or his stock in a company, which he had organized, and to which he had given his name or some artificial name, and which, by the terms of the agreement, kept right on doing business in that name.

Menendez v. Molt, 128 U. S. 514, 522, 32 L. ed. 526, 528, 9 Sup. Ct. Rep. 143; Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; Dodge Stationery Co. v. Dodge, 145 Cal. 387, 78 Pac. 879; Holmes, Booth, & Haydens v. Holmes, B. & A. Mfg. Co. supra; Noera v. H. A. Williams Mfg. Co. 158 Mass. 110, 32 N. E. 1037; Smith v. David H. Brand & Co. 67 N. J. Eq. 529, 58 Atl. 1029; Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co. 120 Mich. 159, 44 L.R.A. 841, 78 N. W. 1072; Penberthy Injector Co. v. Lee, 120 Mich. 174, 78 N. W. 1074; Brass & Iron Works v. Payne, 50 Ohio St. 117, 19 L.R.A. 82, 33 N. E. 88; Burckhardt v. Burckhardt, 36 Ohio St. 279, 42 Ohio St. 477, 51 Am. Rep. 842; Labouchere v. Dawson, L. R. 13 Eq. 322.

(3) Cases in which corporate franchises, name, and good will in the hands of a receiver are sold under an order of court, expressly naming such things.

Peck Bros. & Co. v. Peck Bros. Co. 62 L.R.A. 81, 51 C. C. A. 251, 113 Fed. 291.

(4) Cases in which a dissolution of partnership is effected by legal proceedings, and the property and good will of the firm are sold to that partner who bids the highest.

Levy v. Walker, L. R. 10 Ch. Div. 436; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 93, 31 L.R.A. 657, 43 N. E. 325.

In matters of property, right of control and of contract, the corporation is a legal entity, entirely distinct from the stockholders, and the corporation can no more dispose of their individual property and rights than they, as individuals, can dispose of its.

Bank of Augusta v. Earle, 13 Pet. 519, 586, 587, 10 L. ed. 274, 306, 307; Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 712, 68 Fed. 105; Bronson v. La Crosse & M. R. Co. 2 Wall. 302, 17 L. ed. 728; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 584, 18 L. ed. 234; Queen v. Arnaud, 9 Q. B. 806.

Practical interpretation of the contract by the parties by their conduct, before any controversy arose, should be decisive of the question, even if the language of the option of purchase and the various bills of sale left any doubt as to the intention of Hall's Safe & Lock Co. not to convey its name.

Merriam v. United States, 107 U. S. 441, 27 L. ed. 533, 2 Sup. Ct. Rep. 536; Tillitt v. Mann, 43 C. C. A. 617, 104 Fed. 421; Topliff v. Topliff, 122 U. S. 131, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1057; Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594.

It is not enough to say that defendants have been guilty of misrepresentation or false advertising,—which we deny,—or that people have purchased safes from them, believing they were dealing with the old Hall's Safe & Lock Co.,—which we also deny. It must appear that they have succeeded in palming off goods of their manufacture as the goods of the complainant, or the action for unfair competition fails.

Goodyear's India Rubber Glove Co. v. Goodyear Rubber Co. 128 U. S. 598, 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166; Brown Chemical Co. v. Meyer, 139 U. S. 544, 35 L. ed. 249, 11 Sup. Ct. Rep. 625; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609; American Washboard Co. v. Saginaw Mfg. Co. 50 L.R.A. 609, 43 C. C. A. 237, 103 Fed. 281; Computing Scale Co. v. Standard Computing Scale Co. 55 C. C. A. 465, 118 Fed. 965; Centaur Co. v. Marshall, 38 C. C. A. 417, 97 Fed. 785; Allen B. Wrisley Co. v. Iowa Soap Co. 59 C. C. A. 56, 122 Fed. 796; Baker v. Baker, 53 C. C. A. 159, 115 Fed. 297.

After the expiration of patents protecting articles of manufacture which have become popularly known by the name of the inventor, anyone may make and sell them by that name, the only restriction being that he must not use false or misleading labels, marks, or advertisements to induce purchasers to believe that the goods he manufactures are the product of another manufacturer.

Holzapfel's Compositions Co. v. Rathjen's American Composition Co. 183 U. S. 1, 13, 46 L. ed. 49, 55, 22 Sup. Ct. Rep. 6; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 185, 41 L. ed. 118, 124, 16 Sup. Ct. Rep. 1002; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Dover Stamping Co. v. Fellows, 163 Mass. 195, 28 L.R.A. 448, 47 Am. St. Rep. 448, 40 N. E. 105; Horlick's Food Co. v. Elgin Milkine Co. 56 C. C. 544, 120 Fed. 264; Brill v. Singer Mfg. Co. 41 Ohio St. 127, 52 Am. Rep. 74; Centaur Co. v. Heinsfurter, 28 C. C. A. 581, 56 U. S. App. 7, 10, 13–16, 84 Fed. 955; Centaur Co. v. Marshall, supra; Wheeler & W. Mfg. Co. v. Shakespear, 39 L. J. Ch. N. S. 36; Linoleum Mfg. Co. v. Nairn, L. R. 7 Ch. Div. 834.

This court thought advertisements of exactly the same nature made by the Remington-Sholes Co. and dealers in its machines no ground for an injunction.

Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609.

If advertisements made without authority by dealers were fraudulent, the remedy is against the party who committed the wrong.

Brown Chemical Co. v. Meyer, 139 U. S. 545, 35 L. ed. 249, 11 Sup. Ct. Rep. 625.

Even if it should be thought proper to enjoin such advertising, the decree ought not to go further, and enjoin the company from doing business in its corporate name, or from advertising and selling "Hall's Safes," marked with its corporate name and address. It is the office of an injunction to prevent the continuance of misconduct, and not to punish defendants by depriving them of, or curtailing, their natural rights.

Genesee Salt Co. v. Burnap, 20 C. C. A. 27, 43 U. S. App. 251, 73 Fed. 818; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 185, 199, 200, 41 L. ed. 118, 124, 129, 130, 16 Sup. Ct. Rep. 1002; Singer Mfg. Co. v. Bent, 163 U. S. 205, 41 L. ed. 131, 16 Sup. Ct. Rep. 1016; Hoxie v. Chaney, 143 Mass. 597, 58 Am. Rep. 149, 10 N. E. 713; Dodge Stationery Co. v. Dodge, 145 Cal. 393, 78 Pac. 879; Centaur Co. v. Marshall, supra.

Complainant does not come into court with clean hands; it has been guilty of the unfair competition and attempts to confuse the public, of which it complains; and, by reason of these false and misleading advertisements, it has forfeited any right it might have had to equitable relief.

Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161; Manhattan Medicine Co. v. Wood, 108 U. S. 222, 223, 227, 27 L. ed. 707, 708, 709, 2 Sup. Ct. Rep. 436; Knoedler v. Glaenzer, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 900; Raymond v. Royal Baking Powder Co. 29 C. C. A. 249, 55 U. S. App. 575, 85 Fed. 231; Hegeman & Co. v. Hegeman, 8 Daly, 22; Krauss v. Jos. R. Peebles' Sons Co. 58 Fed. 587; Buckland v. Rice, 40 Ohio St. 526; Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990.

The plaintiff, having demonstrated sufficiently that it cannot be trusted to deal fairly, should either be deprived entirely of the privilege of receiving and opening letters not plainly addressed to it or to the "Successor of Hall's Safe & Lock Co.," or should be regulated in some efficient way by the court of equity to which it appeals.

Dr. David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 59 N. E. 133.

Mr. Justice **Holmes** delivered the opinion of the court:

This is the suit referred to in Donnell v. Herring-Hall-Marvin Safe Co. [208 U. S. 267, ante, 481, 28 Sup. Ct. Rep. 288]. It was brought by the petitioner against the respondents to enjoin them from carrying on their business under their present name or any name calculated to make purchasers believe that they are dealing with the establishment founded by Joseph L. Hall, or with the plaintiff, and also to enjoin them from advertising or marking their product as Hall's safes. The facts are stated in the case referred to. In brief, the petitioner is the successor by purchase to the business of Hall's Safe & Lock Company, an Ohio corporation founded by Joseph L. Hall, a safe maker of repute, the stock of which belonged to his estate and his children. The respondents are sons of Joseph L. Hall, and an Ohio corporation formed by them in September, 1896, immediately after they were discharged from their contracts with the purchasing company. It has been decided that the Halls did not give up the right to do business in their own name by the part they took when the original company sold out, and that the petitioner has the right, but not the exclusive right, to use the name "Hall." Its rights arise by way of succession, out of the priority of the original company, not out of contract. This case requires us to discuss a little further what the respective rights of the parties are. The decision below is to be found in 76 C. C. A. 495, and 146 Fed. 37.

We think it clear, as was conceded in the other case, that the plaintiff got all the grantable rights of the original company, including that of using the name "Hall." It is true that trade names were not men-[558]tioned in the deed, but its language *was broad enough to include them. The deed, along with the plant, patterns, stock of safes, accounts, papers, etc., conveys all "trademarks, patent rights, trade rights, good will, and all its property and assets of every name and nature," and agrees that the business is "taken over in all respects as a going concern." If a particular phrase is needed in addition to the general language and the nature of the transaction, "trade rights" will do well enough. The name "Hall" was used and was expected to be used as a part of the name of the first purchasing company, the Herring-Hall-Marvin Company. There was a stipulation in the deed that the seller should be wound up, but that, far from being, as was argued, a provision in favor of the seller to avoid the use of its name by the purchaser, was a covenant to the purchaser in aid of the seller's undertaking not to engage in any business thereafter. The Hall Safe & Lock Company expressly and in reiterated terms sold all its property and assets of every description as a going concern, agreed to disappear, and disappeared. It had no reason for retaining any right and retained none, except the right to be paid. The circumstances of the case raise none of the nice questions that sometimes have arisen as to when the name is sold along with the other assets. It may be that, although the deed conveyed all that it could convey, the plaintiff could not use the corporate name proper of the original corporation, because that is a charter right, and could not be exercised without the consent of the legislature. Montreal Lithographing Co. v. Sabiston [1899] A. C. 610. But that is not what it wants to do. It only wants, so far as it may, to appropriate the name "Hall" for its safes.

The original company, from 1867 to 1892, was attaching to Hall's safes the reputation that made the name famous and desired. Whoever achieved it did so through the medium of the company. The good will thus gained belonged to the company, and was sold by it, with all its rights, when it sold out. See Le Page Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941, 943. So that the question is narrowed to what its rights would have *been at the present day if it [559] had kept on. The advantage which it would have had, and to which the petitioner has succeeded, is that of having been first and alone for so long in the field. Some of the Halls might have left it and set up for themselves. They might have competed with it, they might have called attention to the fact that they were the sons of the man who started the business, they might have claimed their due share, if any, of the merit in making Hall's safes what they were. White v. Trowbridge, 216 Pa. 11, 18, 22, 64 Atl. 862. But they would have been at the disadvantage that some names and phrases, otherwise truthful and natural to use, would convey to the public the notion that they were continuing the business done by the company, or that they were in some privity with the established manufacture of safes which the public already knew and liked. To convey that notion would be a fraud, and would have to be stopped. Therefore such names and phrases could be used only if so explained that they would not deceive.

The principle of the duty to explain is recognized in Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609. It is not confined to words that can be made a trademark in a full sense. The name of a person or a town may have become so associated with a particular product that the mere attaching of that name to a similar product, without more, would have all effect of a falsehood. Walter Baker & Co. v. Slack, 65 C. C. A. 138, 130 Fed. 514. An absolute prohibition against using the name would carry trademarks too far. Therefore the rights of the two parties have been reconciled by allowing the use, provided that an explanation is attached. Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 200, 204, 41 L. ed. 118, 130, 131, 16 Sup. Ct. Rep. 1002; Brinsmead v. Brinsmead, 13 Times L. R. 3; Reddaway v. Banham [1896] A. C. 199, 210, 222; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 87, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879. Of course, the explanation must accompany the use, so as to give the antidote with the bane.

[560] *We must assume that the name "Hall" in connection with safes has acquired this kind of significance. This, or very nearly this, is alleged by the answer, and must have been the finding of the courts below. It was suggested that really the value of the name was due to the use of patents that have run out. But we think it appears that the meaning of the name is not confined to the use of Hall's patents, and, further, has had a particular succession of makers so associated with it that the principle of the injunction granted is right. The defendants say that they have corrected advertisements, and so forth, that might be deemed fraudulent, when called to their attention. But the name of the defendant company of itself would deceive unless explained. It may have repented, but it has transgressed, and it even now asserts rights greater than we think it has. Therefore the injunction must stand.

We are not disposed to make a decree against the Halls personally. That against the company should be more specific. It should forbid the use of the name "Hall," either alone or in combination, in corporate name, on safes, or in advertisements, unless accompanied by information that the defendant is not the original Hall's Safe & Lock Company or its successor, or, as the case may be, that the article is not the product of the last-named company or its successors. With such explanations the defendants may use the Halls' name, and, if it likes, may show that they are sons of the first Hall and brought up in their business by him, and otherwise may state the facts.

There is a cross bill seeking to prevent the plaintiff from making use of the names "Hall's Safe & Lock Company," "Hall's Safe," etc., but it does not need separate consideration. The defendant shows nothing of which it can complain or which should bar the plaintiff from its relief. The portion of the decree dismissing the cross bill is affirmed.

Decree modified and affirmed.

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[561] *UNITED STATES, Appt.,
v.
SISSETON AND WAHPETON BANDS OF SIOUX INDIANS. (338.)

SISSETON AND WAHPETON BANDS OF SIOUX INDIANS, Appts.,
v.
UNITED STATES. (339.)

(See S. C. Reporter's ed. 561–569.)

Claims — Indian annuities — set-off.

Payments made by the United States on account of depredations by the Sisseton and Wahpeton bands of Sioux Indians, sums paid to their chiefs for removal and subsistence, and for manual labor schools under the treaty of July 23, 1851 (10 Stat. at L. 949), and expenditures for their support made because of the destitution produced by the forfeiture of their annuities, which was declared by the act of February 16, 1863 (12 Stat. at L. 652, chap. 37), are properly set off against their annuities by the court of claims, in the exercise of its jurisdiction under the act of June 21, 1906 (34 Stat. at L. 372, chap. 3504), to adjudicate and award the balance, if any, due such Indians, for annuities under the treaty, as if the act of forfeiture had not been passed, and to ascertain and set off all payments or other provisions made to or for such bands or any members thereof since the act of forfeiture "which are properly chargeable against unpaid annuities."

[Nos. 338, 339.]

Argued January 27, 28, 1908. Decided February 24, 1908.

CROSS APPEALS from the Court of Claims to review an award of unpaid annuities to the Sisseton and Wahpeton bands of Sioux Indians. Affirmed.

See same case below, 42 Ct. Cl. 416.

The facts are stated in the opinion.

Messrs. **William H. Robeson** and **Marion Butler** argued the cause, and, with Messrs. Josiah M. Vale, Charles A. Maxwell, and George S. Chase, filed a brief for the Indians.

Mr. **George M. Anderson** argued the cause, and, with Assistant Attorney General Thompson, filed a brief for the United States.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a claim for annuities granted by the treaty of July 23, 1851 (10 Stat. at L. 949), but declared forfeited by the act of February 16, 1863 (chap. 37, 12 Stat. at L. 652), in consequence of a great outbreak and massacre by the Indians. The claim is

[562] made *under the act of June 21, 1906 (chap. 3504, 34 Stat. at L. 372), the material part of which is as follows:

"That jurisdiction be, and hereby is, conferred upon the court of claims in congressional case numbered twenty-two thousand five hundred and twenty-four, on file in said court, entitled 'The Sisseton and Wahpeton Bands of Sioux Indians against the United States,' to further receive testimony, hear, determine, and render final judgment in said cause, for balance, if any is found due said bands, with right of appeal as in other cases, for any annuities which would be due to said bands of Indians under the treaty of July twenty-third, eighteen hundred and fifty-one (Tenth Statutes at Large, page nine hundred and forty-nine), as if the act of forfeiture of the annuities of said bands, approved February sixteenth, eighteen hundred and sixty-three, had not been passed; and to ascertain and set off against the amount found to be due to said Indians, if any, all payments or other provisions of every name or nature made to or for said bands by the United States, or to or for any members thereof, since said act of forfeiture was passed, which are properly chargeable against said unpaid annuities.

"Upon the rendition of such judgment, and in conformity therewith, the Secretary of the Interior is hereby directed to determine which of said Indians now living took part in said outbreak and to prepare a roll of the persons entitled to share in said judgment by placing on said roll the names of all living members of the said bands residing in the United States at the time of the passage of this act, excluding therefrom the names of those found to have participated in the outbreak; and he is directed to distribute the proceeds of such judgment, except as hereinafter provided, *per capita* to the persons borne on the said roll; and the court shall consider the evidence now on file in said cause in connection with such other evidence as may hereafter be adduced therein."

The act of June 21, 1906, was passed in pursuance and extension of an earlier act of March 3, 1901 (chap. 832, 31 Stat. at L. 1078), which gave the court of claims full [563] jurisdiction to *report to Congress what members of these bands of Indians were not concerned in the depredations of the outbreak, and to report what annuities would now be due to the loyal members if the act of forfeiture had not been passed. The court was "further authorized to further consider, ascertain, and report to Congress what lands, appropriations, payments, gratuities, or other provisions have been made to or for said bands or to any of the members thereof since said act of forfeiture was passed. . . . And if said court shall find that said bands preserved their loyalty to the United States, they shall ascertain and state the amount that would be due to said Indians on account of said annuities had said act of Congress of February sixteenth, eighteen hundred and sixty-three, not been passed, stating in connection therewith what credits should be charged against said annuities on account of the lands, appropriations, payments, gratuities, or other provisions as hereinbefore stated." A petition was filed, but the court found that it was impossible to determine what members of these bands remained loyal to the United States; but that a large majority, if not all, aided and abetted the massacres and depredations. 39 Ct. Cl. 172. Thereupon the later act was passed, referring to the above petition, and the present supplemental petition was filed.

The court of claims stated the account and ordered a judgment for the balance, from which both parties appeal. The account is as follows: [See opposite page.]

The amount of the unpaid annuities is not in dispute, but the questions raised by the appeals concern the items of set-off, and involve the principle upon which they are to be charged. The Indians contend that only sums specially charged by Congress against annuities come into the account, while the United States goes to the opposite extreme. We agree with the court of claims that the contention of the Indians, at least, must be rejected, for the reason stated by it, that if it was correct Congress did not need the help of the court; the figures were patent. Furthermore the language of the act implies that the court is called upon for an active exercise of judicial reason *and to do something that has [565] not yet been done. It is "to set off" all payments to said bands or to any members thereof since the acts of forfeiture which are properly chargeable against the unpaid annuities. The result is assumed to be uncertain, as the judgment is to be for the balance, if any is found due.

There are no general rules of law established for deciding what payments properly are chargeable against Indian annuities. The fact that payments of certain kinds, or gratuities, have been granted in time of peace in addition to annuities is not conclusive. There had been an Indian war. The United States, in passing these acts, was doing what it pleased. In the earlier statute it plainly indicated that the most sweeping deductions, including gratuities, were to be made from its possible bounty. In the later one it qualified the deduction of payment by the words, "which are properly chargeable against said unpaid

Credits.

By fifty instalments of $73,600, treaty July 23, 1851	$3,680,000.00
By amount allowed to chiefs for removal and subsistence by said treaty	275,000.00
By amount allowed to chiefs for manual labor schools, etc	30,000.00
	$3,985,000.00

Debits.

Item.			
1.	To twelve instalments of annuity, appropriated under the treaty of 1851 (10 Stat. at L. 949) prior to outbreak, less $104.66 returned to the Treasury ($883,200—104.66), [564] *$883,095.34, less $122,509.12 appropriated, but not paid at date of forfeiture (See p. 17, Senate Doc. 68, for various statutes.)	$760,586.22	
2.	To amount paid to the chiefs for removal and subsistence, and for manual labor schools under the treaty of 1851	305,000.00	
3.	To amount appropriated and unpaid at date of forfeiture act, but forfeited and afterwards expended for damages growing out of the outbreak of 1862–3 (12 Stat. at L. 652, chap. 37)	122,509.12	
4.	To one half of $100,000 advance annuity appropriated February 16, 1863 (12 Stat. at L. 652, chap. 37)	50,000.00	
5.	To one half amount paid to scouts and soldiers of the four bands (26 Stat. at L. 1038, chap. 543; 27 Stat. at L. 624, chap. 209; 28 Stat. at L. 889, chap. 188)	103,176.65	
6.	To one half amount expended for damages and for support, but not for removal (See p. 20, Senate Doc. 68, for various statutes.)	807,824.71	
7.	To amount paid for support, etc., under the treaty of February 19, 1867 [15 Stat. at L. 505] (See p. 17, Senate Doc. 68, for various statutes making the appropriations.)	464,953.40	
8.	To amounts paid under agreement of December 12, 1889	581,978.37	
			$3,196,028.47
	Leaving a balance due of		$788,971.53

annuities." it is true. But the careful particularity of the direction to set off "all payments or other provisions of every name and nature," even if qualified as to the bands as well as to the particular members to whom some payments properly left out of consideration had been made, shows that large set-offs still were expected. It is said that the court was to proceed "as if the act of forfeiture had not been passed." But that was only in ascertaining the amount of annuities that would be due in that case, and in rendering a judgment that otherwise would be unauthorized. Those words do not require the court to treat all payments upon the fiction that nothing had happened, or to give them a different complexion from that which they had when they were made. Common sense, the then recent decision of the court of claims as to the general conduct of the bands, and the position of the words in the section, show that they could have had no such intent.

It follows from what we have said and from a consideration of the nature of the payments and the circumstances, which the court of claims rightly considered, as well as from the treaties and acts of Congress, that the claimants properly were charged with their share of payments on account of 66] depredations. On *general grounds of fairness such payments are properly chargeable against the sum that the United States, by its condonation, consented to pay. Congress, as well as the court, is of that opinion, for the appropriation of the annuities to the indemnification of persons whose property had been destroyed by the Indians was declared just, and two thirds of the sums payable then and the next year were applied to that end by the forfeiture act of February 16, 1863. 12 Stat. at L. 652, chap. 37. In this connection the act is as important as ever it was. See further act of March 3, 1885, chap. 320. 23 Stat. at L. 344. Again, by a treaty of June 19, 1858, art. 6, 12 Stat. at L. 1037, 1039, later than that granting the annuities, which was made in 1851, the Indians had agreed that, in case of depredation, it should be paid for out of their moneys in the hands of the United States. The effect of this treaty as against those breaking it is not to be got rid of by dignifying their acts with the name of war, while at the same time the court is asked to treat all that was done by the United States as if there had been unbroken peace. The successful party to a war is apt to demand indemnity, and when that party is doing an act of grace and restoring annuities forfeited because of damage done it is absurd to ask that it should leave consideration of the charge for damage out of account. Some further arguments of detail may be passed unnoticed by reason of the general point of view from which we regard the case. We may add here that, as we do not go behind the findings of fact (McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321; District of Columbia v. Barnes, 197 U. S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401), there has been some waste of energy in arguing from public documents of which we are asked to take notice, and that we see no reason to revise the finding that the claimants should be charged with half the total payments of which their share is to be set off.

We pass to the items of the account. Item 1 of the debits is admitted to be correct, except that the court twice deducted $104.66, once expressly, the second time in the $122,509.12 from the gross debits, $883,200. The item should be $760,690.88.

We perceive no reason for questioning item 2.

[567] *Items 3 and 4 are disposed of by what we have said. The United States admits a repetition of the mistake mentioned under item 1 in item 4.

Item 5 is disputed only as charging one half instead of one-sixth, alleged to be the fair proportion, upon evidence properly not reported, and found by the court of claims to be untrustworthy. As we have said, we see no reason for not accepting the conclusion of the court of claims.

Item 6 needs mention only because it embraces expenditures for support, which, it is said, by the general practice would be granted alongside of the annuities were they running. The question of damages has been disposed of. The other will be dealt with in connection with item 7.

Item 7 is one of the chief objects of the claimants' attack. By the treaty of February 19, April 22, 1867 (15 Stat. at L. 505), the claimants ceded rights of way to the United States, and the United States, in consideration of the cession, the services of the friendly bands, and the forfeiture of their annuities, purported to set aside for them certain reservations. This was by articles 2–4. Article 6 was as follows: "And further, in consideration of the destitution of said bands of Sisseton and Wahpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time, make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life," etc. Payments under article 6 make up item 7. It is argued that the Indians already owned the land set aside for them, that there was no consideration for their grant except the promise in article 6, that the destitution of the Indians was not a consideration to the United States, and hence again that the promise should be set against the cession, and that they ought not to be charged with this sum. But without going outside the record for other matters of dispute, it is enough to say that the question is not as to the facts, but as to the assumption and purport of the document. The treaty makes the assignment of the reservation, *be it better or [568] worse, the consideration for the cession by the Indians, and the agreement in article 6 a gratuitous promise induced by consideration of the Indians' want. The words "in consideration of" do not import a technical consideration, such as is needed in a private bargain not under seal, but the inducement that led Congress to make the promise. It indicates the only inducement, and a different one cannot be substituted in its place, on the ground that assumpsit would not lie on the one named.

By the words of the treaty, then, the 6th article promised the payments in question because the claimants were in want because their annuities had been confiscated. Or, striking out the middle term and looking to the result, the payments were made because the annuities had been confiscated; that is to say, so far as appears, they would not have been made except for that cause. But, if so, then, when the annuities are restored, the sums paid on the footing that the annuities were lost must be taken into the account. It does not matter whether the Indians had a demand in conscience against the United States for their cession or not, or whether or not such demands were settled by subsequent treaties; the sum stood on its own ground and must be dealt with on the footing on which it was paid. If further argument is necessary one might be drawn from the reference to House Document 1953, Fiftieth Congress, First Session, in article 3 of the agreement of December 12, 1889, ratified by the act of March 3, 1891 (chap. 543, § 26, 26 Stat. at L. 1037), —an act not repealed by those under which this suit is brought. But as this document is not made part of the report and is said not to have been before the court of claims, we do not care to invoke for this or other purposes a help that the decision does not seem to us to need.

As to the payments for support charged in item 6, they are to be considered in the light of the act of forfeiture and the attitude of Congress indicated in article 6 of the treaty just discussed. The Indians were in the position of people having no recognized claim. They were dependents

[569]because of the *forfeiture. Payments made for their support in such circumstances cannot be compared to those that may have been made to tribes in good standing. It is mere conjecture to inquire whether similar allowances might have been granted if they had kept the peace. They were made in fact because, by reason of the forfeiture, the Indians must be supported or starve. The considerations that apply to article 6 apply, although it must be admitted less strongly, to other payments for support and the like. The act of 1901 cannot be left wholly out of sight in construing that of 1906, and as has been said, that act contemplated that every gratuity should be brought in. We are not prepared to overrule the decision of the court of claims on this point.

Item 8 is not disputed. There are some further matters of detail which we do not discuss, but have not failed to consider. Upon the whole case and in view of the cross appeal of the United States we are of opinion that, under the judgment below, the claimants came off as well as they reasonably could expect. If we were to follow the claimants outside the record, some of the questions raised by the United States might be serious; but, as the case stands, we are of opinion that the judgment should be affirmed, with the correction mentioned under item 1.

Judgment affirmed.

Mr. Justice **McKenna** dissents.

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[570]*THE DISCONTO GESELLSCHAFT, Plff. in Err.,
v.
AUGUSTUS C. UMBREIT.

(See S. C. Reporter's ed. 570–582.)

Constitutional law — due process of law — rights of alien creditors.

1. A German corporation is not deprived of its property without due process of law, contrary to United States Constitution, 14th Amendment, by the refusal of a state court, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment, to the payment of an indebtedness due the corporation from a German subject, a fund within the state to which one of its own citizens asserts a claim, where the effect of judgment in favor of the corporation would be to remove the fund to a foreign country, there to be administered in favor of the foreign creditors.

Treaties — rights of alien creditors.

2. The right of citizens of Prussia under the treaty of May 1st, 1828 (8 Stat. at L. 378), art. 1, to attend to their affairs in the United States, and for that purpose to enjoy the same security and protection as natives in the country wherein they reside, is not violated by the refusal of a state court, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment, to the payment of an indebtedness due a German corporation from a German subject, a fund within the state to which one of its own citizens asserts a claim, where the effect of judgment in favor of the corporation would be to remove the fund to a foreign country, there to be administered in favor of the foreign creditors.

[No. 63.]

Argued December 10, 11, 1907. Decided February 24, 1908.

IN ERROR to the Circuit Court of Milwaukee County (Branch No. 1), of the State of Wisconsin, to review a judgment rendered in pursuance of the mandate of the Supreme Court of that state in favor of the intervener in an attachment suit begun by a foreign corporation to subject a fund in the state to the payment of its claim against a foreign subject. Affirmed.

See same case below in Wisconsin Supreme Court, 127 Wis. 651, 115 Am. St. Rep. 1063, 106 N. W. 821; on rehearing, 127 Wis. 676, 115 Am. St. Rep. 1081, 106 N. W. 829.

The facts are stated in the opinion.

Mr. **F. C. Winkler** argued the cause, and, with Messrs. Winkler, Flanders, Bottum, & Fawsett, filed a brief for plaintiff in error:

The right of the plaintiff to pursue its absconding debtor into this country, and to invoke the latter's remedial processes against him, rests upon the comity of nations. It is, however, the comity of the sovereignty, not of the court.

Wharton, Confl. L. § 1a.

In Germany, England, and the United States the courts, as a general thing, make no distinction, so far as jurisdiction is concerned, between cases in which parties are foreigners, and those in which they are subjects.

Story, Confl. L. § 542; Kuerschner, Lexikon des Deutschen Rechts, *sub nomen*, "Auslaender;" 14 Entscheidungen des Reichgerichts in Civilsachen, p. 409; Wharton, Confl. L. 3d ed. § 705.

So constant and uniform is the practice of lending their judicial remedies and processes by civilized nations to foreigners who are driven to them for the protection of rights that it is not generally in express words provided for in treaties. It goes *sua sponte*. But it is sometimes done.

The treaty must have a liberal interpretation. It was designed to extend and liberalize the good understanding between two enlightened nations, and place the rights of their respective citizens on firmer ground,—certainly not to narrow them.

Tucker v. Alexandroff, 183 U. S. 424, 437, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195.

The trustee has and claims no rights to the bankrupt's property in Wisconsin. This can hardly be said to be so by reason of a policy of Wisconsin law. It is for the sole reason that the transfer of the bankrupt's property to the trustee is by operation of law only, and the foreign law does not operate on property beyond its jurisdiction.

Segnitz v. Garden City Bkg. & T. Co. 107 Wis. 176, 50 L.R.A. 327, 81 Am. St. Rep. 830, 83 N. W. 327.

The state of Wisconsin has no policy or prejudice against a distribution among creditors generally. On the contrary, it will enforce such a course where it is directed by a foreign voluntary assignment. It is only when the foreign assignment is the mere act of foreign law which has no extraterritorial force that it does not give it effect.

Segnitz v. Garden City Bkg. & T. Co. supra.

An alien is entitled to due process of law under the Constitution of the United States.

Re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; Ho Ah Kow v. Nunan, 5 Sawy. 562, Fed. Cas. No. 6,546; Re Ah Chong, 6 Sawy. 451, 2 Fed. 733.

Mr. **Joseph B. Doe** argued the cause, and, with Mr. Augustus C. Umbreit, *in propria persona*, filed a brief for defendant in error:

Comity is a recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; 22 Am. & Eng. Enc. Law, 2d ed. p. 1319.

The law of comity is not a law of absolute obligation, and its principles can never be invoked in aid of the enforcement of foreign laws, if such enforcement would contravene the settled policy or positive law of the state of the forum.

7 Current Law, 679; Gilman v. Ketcham (Gilman v. Hudson River Boot & Shoe Mfg. Co.) 84 Wis. 60, 23 L.R.A. 52, 36 Am. St. Rep. 899, 54 N. W. 395; Finney v. Guy, 106 Wis. 256, 49 L.R.A. 486, 82 N. W. 595; Hughes v. Hunner, 91 Wis. 120, 64 N. W. 887; Parker v. Stoughton Mill Co. 91 Wis. 180, 51 Am. St. Rep. 881, 64 N. W. 751; Wyman v. Kimberly-Clark Co. 93 Wis. 559, 67 N. W. 932.

It is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied.

Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co. 108 Ill. 317, 48 Am. Rep. 557; Woodward v. Brooks, 128 Ill. 222, 3 L.R.A. 702, 15 Am. St. Rep. 104, 20 N. E. 685.

Domestic creditors will be protected to the extent of not allowing the property or funds of a nonresident debtor to be withdrawn from the state before domestic creditors have been paid. Every country will first protect its own citizens.

Ibid.; Catlin v. Wilcox Silver-Plate Co. 123 Ind. 477, 8 L.R.A. 62, 18 Am. St. Rep. 338, 24 N. E. 250; Chafee v. Fourth Nat. Bank, 71 Me. 524, 36 Am. Rep. 345; Bagby v. Atlantic, M. & O. R. Co. 86 Pa. 291; Lycoming F. Ins. Co. v. Wright, 55 Vt. 526; Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Willitts v. Waite, 25 N. Y. 577.

Citizens and residents of the country where insolvency proceedings have been instituted are bound by such proceedings, and cannot pursue the property of the insolvent debtor in another country.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Linville v. Hadden, 88 Md. 594, 43 L.R.A. 222, 41 Atl. 1097; Chafee v. Fourth Nat. Bank, supra; Einer v. Beste, 32 Mo. 250, 82 Am. Dec. 129; Long v. Girdwood (Long v. Forrest) 150 Pa. 413, 23 L.R.A. 33, 24 Atl. 711; Bacon v. Horne, 123 Pa. 452, 2 L.R.A. 355, 16 Atl. 794.

A creditor, by proving his claim in bankruptcy or any insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending, and cannot pursue his remedy elsewhere.

Clay v. Smith, 3 Pet. 411, 7 L. ed. 723; Cooke v. Coyle, 113 Mass. 252; Ormsby v. Dearborn, 116 Mass. 386; Batchelder v. Batchelder, 66 N. H. 31, 20 Atl. 728; Wilson v. Capuro, 41 Cal. 545; Wood v. Hazen, 10 Hun, 362.

Where both parties, plaintiff and defendant, are residents of a foreign state, the plaintiff cannot come into our country and obtain an advantage by our law which he could not obtain by his own.

If he seeks to nullify the law of his own state, and asks our court to aid him in so doing, he cannot have such assistance, if for no other reason than that it is forbidden by public policy and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens.

Bacon v. Horne, supra; Re Waite, 99 N. Y. 433, 2 N. E. 440; Bagby v. Atlantic, M. & O. R. Co. supra.

Citizens of a foreign state or country will not be aided by the courts of this country to obtain, by garnishment, a preference of their claim against a foreign debtor, in disregard of proceedings in their own country for the sequestration of the debtor's estate and the appointment of a trustee thereof in bankruptcy.

Long v. Girdwood, supra.

It is the uniform rule and doctrine of all courts that the principles of comity do not require that courts confer powers upon a foreign receiver or trustee in bankruptcy, or permit him to bring and maintain actions in this state, that interfere with and impair the rights of domestic creditors.

Humphreys v. Hopkins, 81 Cal. 551, 6 L.R.A. 792, 15 Am. St. Rep. 76, 22 Pac. 892; Ward v. Pacific Mut. L. Ins. Co. 135 Cal. 235, 67 Pac. 124; Hunt v. Columbian Ins. Co. 55 Me. 290, 92 Am. Dec. 592; Pierce v. O'Brien, 129 Mass. 314, 37 Am. Rep. 360; Rogers v. Riley, 80 Fed. 759; Catlin v. Wilcox Silver-Plate Co. 123 Ind. 477, 8 L.R.A. 62, 18 Am. St. Rep. 338, 24 N. E. 250.

Mr. Justice **Day** delivered the opinion of the court:

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, began an action in the circuit court of Milwaukee county, Wisconsin, on August 17, 1901, against Gerhard Terlinden and at the same time garnisheed the First National Bank of Milwaukee. The bank appeared and admitted an indebtedness to Terlinden of $6,420. The defendant in error Umbreit intervened and filed an answer, and later an amended answer.

A reply was filed, taking issue upon certain allegations of the answer, and a trial was had in the circuit court of Milwaukee county, in which the court found the following facts:

"That on the 17th day of August, 1901, the above-named plaintiff, the Disconto [575] Gesellschaft, commenced an action in *this court against the above-named defendant, Gerhard Terlinden, for the recovery of damages sustained by the tort of the said defendant, committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant, Terlinden, for $94,145.11 damages and costs; that $85,371.49. with interest from March 26, 1904, is now due and unpaid thereon; that at the time of the commencement of said action, to wit, on August 17, 1901, process in garnishment was served on the above-named garnishee, First National Bank of Milwaukee, as garnishee of the defendant Terlinden.

"That on August 9, 1901, and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6.420.00 to his credit upon account; that said sum has remained in said bank ever since, and, at the date hereof, with interest accrued thereon, amounted to $6,969.47.

"That the defendant Gerhard Terlinden and said Theodore Grafe, mentioned in the finding, are identical and the same person.

"That the interpleaded defendant, Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery for services rendered between August 16, 1901, and February 1, 1903; that no personal service of the summons therein was had on the said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and of the complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7,500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to wit, on March 22, 1904, *on [576] the garnishee, First National Bank of Milwaukee, as garnishee of said defendant Terlinden.

"That the defendant Terlinden at all the times set forth in finding No. 1 was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the state of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

"That the above-named plaintiff, the Disconto Gesellschaft, at all the times set forth in the findings was, ever since has been, and still is, a foreign corporation, to wit, of Germany, and during all said time had its principal place of business in Berlin. Germany; that the above-named defendant, Augustus C. Umbreit, during all said times was and still is a resident of the state of Wisconsin.

"That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden, and Paul Hecking, appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21, 1901, the above-named plaintiff, the Disconto Gesellschaft, was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment; and that the above-named plaintiff, the Disconto Gesellschaft, presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff, the Disconto Gesellschaft, through the German consul in Chicago; and that the steps so taken by the plaintiff, the Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy, [577] so appointed in the bankruptcy *proceedings in Germany, and that after the commencement of the same the plaintiff, the Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: 'Sec. 14. Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors.'"

Upon the facts thus found the circuit court rendered a judgment giving priority to the levy of the Disconto Gesellschaft for the satisfaction of its judgment out of the fund attached in the hands of the bank. Umbreit then appealed to the supreme court of Wisconsin. That court reversed the judgment of the circuit court, and directed judgment in favor of Umbreit, that he recover the sum garnisheed in the bank. 127 Wis. 651, 115 Am. St. Rep. 1063, 106 N. W. 821. Thereafter a remittitur was filed in the circuit court of Milwaukee county and a final judgment rendered in pursuance of the direction of the supreme court of Wisconsin. This writ of error is prosecuted to reverse that judgment. At the same time a decree in an equity suit, involving a fund in another bank, was reversed and remanded to the circuit court. This case had been heard, by consent, with the attachment suit. With it we are not concerned in this proceeding.

No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the state court was to deprive the plaintiff in error of its property without due process of law, contrary to the 14th Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and the United States. The supreme court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. 127 Wis. 676, 115 Am. St. Rep. 1063, 106 N. W. 821. It is well settled in this court that it is too late to raise Federal questions reviewable *here by motions for rehearing in the [578] state court. Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; McMillen v. Ferrum Min. Co. 197 U. S. 343, 347, 49 L. ed. 784, 787, 25 Sup. Ct. Rep. 533; French v. Taylor, 199 U. S. 274, 278, 50 L. ed. 189, 192, 26 Sup. Ct. Rep. 76. An exception to this rule is found in cases where the supreme court of the state entertains the motion and expressly passes upon the Federal question. Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

Conceding that this record sufficiently shows that the supreme court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them.

The suit brought by the Disconto Gesellschaft in attachment had for its object to subject the fund in the bank in Milwaukee to the payment of its claim against Terlinden. The plaintiff was a German corporation and Terlinden was a German subject. Umbreit, the intervener, was a citizen and resident of Wisconsin. The supreme court of Wisconsin adjudged that the fund attached could not be subjected to the payment of the indebtedness due the foreign corporation as against the claim asserted to the fund by one of its own citizens, although that claim arose after the attachment by the foreign creditor; and, further, that the fact that the effect of judgment in favor of the foreign corporation would be, under the facts found, to remove the fund to a foreign country, there to be administered in favor of foreign creditors, was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that state.

Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore, International Law Dig. 7; Wharton, Confl. L. § 17.

But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a mat-

[579]ter of absolute *right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

"'Comity,' in the legal sense," says Mr. Justice Gray, speaking for this court in Hilton v. Guyot, 159 U. S. 113, 163, 40 L. ed. 95, 108, 16 Sup. Ct. Rep. 139, 143, "is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation, and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice Story says: "Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." Story, Confl. L. § 33.

The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other states as against the demands of local creditors, by attachment or otherwise in the state where the property is situated. The cases were [580]reviewed by Mr. Justice Brown, *delivering the opinion of the court in Security Trust Co. v. Dodd, 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. Rep. 545, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other states as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the state in which it is sought to be enforced; and, as was said by Mr. Justice McLean in Oakey v. Bennett, 11 How. 33, 44, 13 L. ed. 593, 597, "national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lessen the securities of its own citizens."

There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the state of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the state permitted such recognition was a matter for the state to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the state, the supreme court of Wisconsin has done no more than has been frequently done by nations and states in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well-known rule can be said to deprive the plaintiff in error of its property without due process of law.

Upon the motion for rehearing the plaintiff in error called attention to two alleged treaty provisions between the United States and the Kingdom of Prussia, the first from the treaty of 1828 [8 Stat. at L. 378] and the second from the treaty of 1799 [8 Stat. at L. 162]. As to the last-mentioned treaty the following provision was referred to:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land."

*The treaty of 1799 expired by its own[581] terms on June 2, 1810, and the provision relied upon is not set forth in so much of the treaty as was revived by article 12 of the treaty of May 1, 1828. See Compilation of Treaties in Force, 1904, prepared under resolution of the Senate, pp. 638 et seq. If this provision of the treaty of 1799 were in force we are unable to see that it has any bearing upon the present case.

Article one of the treaty of 1828 between the Kingdom of Prussia and the United States is as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places, and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

This treaty is printed as one of the treaties in force in the compilation of 1904, p. 643, and has undoubtedly been recognized by the two governments as still in force since the formation of the German Empire. See Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484; Foreign Relations of 1883, p. 369; Foreign Relations of 1885, pp. 404, 443, 444; Foreign Relations of 1887, p. 370; Foreign Relations of 1895, pt. 1, 538.

Assuming, then, that this treaty is still in force between the United States and the German Empire, and conceding the rule that treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured, is there anything in this article which required any different decision in the supreme court of Wisconsin than that given? The inhabitants of the respective countries are to be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and
[582] protection as *the natives of the country wherein they reside, upon submission to the laws and ordinances there prevailing. It requires very great ingenuity to perceive anything in this treaty provision applicable to the present case. It is said to be found in the right of citizens of Prussia to attend to their affairs in this country. The treaty provides that for that purpose they are to have the same security and protection as natives in the country wherein they reside. Even between states of the American Union, as shown in the opinion of Mr. Justice Brown in Security Trust Co. v. Dodd, supra, it has been the constant practice not to recognize assignments for the benefit of creditors outside the state, where the same came in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force as against natives of the country residing in other states, and it is this doctrine which has been applied by the supreme court of Wisconsin to foreign creditors residing in Germany. In short, there is nothing in this treaty undertaking to change the well-recognized rule between states and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders.

The judgment of the Circuit Court of Milwaukee County, entered upon the remittitur from the Supreme Court of Wisconsin, is affirmed.

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*NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err., **[583]**
v.
STATE OF MINNESOTA EX REL. CITY OF DULUTH.

(See S. C. Reporter's ed. 583–598.)

Error to state court — Federal question — impairing contract obligations.

1. Municipal legislation carried into effect by mandamus, which requires a railroad company to make repairs in a viaduct at its own expense, in accordance with plans adopted and approved by the municipal council, cannot be regarded as a mere repudiation by the municipality of its agreement to maintain the viaduct, so as to defeat the appellate jurisdiction of the Supreme Court of the United States over a state court, invoked on the ground that contract obligations were thereby impaired.

Constitutional law — impairing contract obligations — validity of municipal contract.

2. Requiring a railway company to repair, at its own expense, a viaduct and its approaches, built to carry over a railroad a street which was not extended over the right of way until after the railroad was built, cannot be said to impair the obligation of a contract by which the municipality, in consideration of a contribution from the railroad company toward the expense of the original construction, agreed to maintain the viaduct for fifteen years, and to maintain the approaches perpetually, where the highest state court, consistently with its earlier decisions, holds that the railway charter, as well as the common law, requires the railway company to construct and maintain suitable crossings at existing and future streets, and that any contract limiting the exercise of legislative power in this regard is void as against public policy, although there may have been some doubt when the contract was made as to what the rights of the parties were, and the contract may have been a compromise.

[No. 92.]

Argued December 20, 23, 1907. Decided February 24, 1908.

NOTE.—As to error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the St. Louis County Court, in that state, compelling a railroad company by mandamus to repair a viaduct carrying a city street over its tracks. Affirmed.

See same case below, 98 Minn. 429, 108 N. W. 269.

The facts are stated in the opinion.

Mr. **Charles W. Bunn** argued the cause and filed a brief for plaintiff in error:

The supreme court of Minnesota held there was no contract, and therefore did not come to the question whether a law of the state violated a contract. But this court has jurisdiction of the question, and will decide for itself whether there was a contract.

Stearns v. Minnesota, 179 U. S. 223, 232, 233. 45 L. ed. 162, 169, 170, 21 Sup. Ct. Rep. 73.

The action of the city was not confined to a denial of the validity, or of the binding force in some particular, of the contract, as in St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

It is well settled that city laws are state laws within the meaning of the Federal Constitution.

Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83.

And the jurisdiction of this court is sustained by Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 81, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 530, 531, 48 L. ed. 1102, 1106, 1107, 24 Sup. Ct. Rep. 756; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

In Minnesota, neither the common law nor any statute compels a railway to provide for public travel upon new streets opened across its tracks.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; Boston & A. R. Co. v. Cambridge, 159 Mass. 287, 34 N. E. 382; State ex rel. St. Paul, M. & M. R. Co. v. District Court, 42 Minn. 252, 7 L.R.A. 121, 44 N. W. 7; State v. Ensign, 54 Minn. 372, 56 N. W. 41; State ex rel. St. Paul v. Chicago, St. P. M. & O. R. Co. 85 Minn. 422, 89 N. W. 1.

Upon the validity of an alleged contract this court follows the law of the state as it existed when the contract was consummated, and will disregard later decisions to the contrary.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 432, 14 L. ed. 997, 1003; Taylor v. Ypsilanti, 105 U. S. 60, 71, 26 L. ed. 1008, 1012; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 575, 44 L. ed. 886, 894, 20 Sup. Ct. Rep. 736; Loeb v. Columbia Twp. 179 U. S. 472, 492, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174; Deposit Bank v. Frankfort, 191 U. S. 499, 517, 518, 48 L. ed. 276, 283, 284, 24 Sup. Ct. Rep. 154.

The record now before the court shows that whether the railway or the street was prior was a close question of fact, and an obligation of the railway to bridge if it was prior had not been (to say the least) so clearly established by any statute or by any decision, as to preclude the railway from reasonably denying such obligation. Considering the then rights of the parties, as between each other, which were in so many respects doubtful, they were certainly fair matters of compromise; and to say that a compromise, honestly entered into and fully carried out, is without consideration because, some fifteen years after, the supreme court of Minnesota, for the first time, holds that the whole obligation could have been thrown upon the railway, is to violate the fundamental principle upon which compromise agreements are founded.

Stapleton v. Stapleton, 1 Atk. 12; 1 Chitty, Contr. 11th ed. 47, note; Hager v. Thomson, 1 Black, 80, 93, 17 L. ed. 41, 44; United States v. Child, 12 Wall. 232, 20 L. ed. 360; Demars v. Musser-Sauntry Land, Logging & Mfg. Co. 37 Minn. 418, 35 N. W. 1.

Mr. **Bert Fesler** argued the cause and filed a brief for defendant in error:

This court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute, either expressly or by necessary implication.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 351, 46 L. ed. 936, 943, 944, 22 Sup. Ct. Rep. 691; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650. 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252.

The inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Sup. Ct. Rep. 437.

The constitutional provision does not apply to contracts made by parties dealing with a department of government concerning the future exercise of governmental power conferred by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public.

Board of Education v. Phillips, 67 Kan. 549, 100 Am. St. Rep. 475, 73 Pac. 97.

The rule that upon the validity of an alleged contract this court follows the law of the state as it existed when the contract was made, and will disregard later decisions to the contrary, is limited to decisions of the state court as to the interpretation or validity of its own constitution and statute laws. It does not apply to the general law, not found in written constitutions or statutes.

After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968.

The decisions of the state court, at the time the contract of 1891 was made, were not contrary to the decision in this case.

A compromise is a contract. If a compromise is made, by the terms of which a municipality forever surrenders its police power, it is nothing more or less than contracting away its police power; and because a city may have the right to compromise matters within the domain of its proprietary functions it does not follow that it also has the right to compromise matters within the domain of its governmental functions.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; New York & N. E. R. Co. v. Bristol, supra; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 72–74, 42 L. ed. 948, 953, 954, 18 Sup. Ct. Rep. 513; Chicago, B. & Q. R. Co. v. Illinois. 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341.

A municipality contracts away its police power when it contracts away the right to say who shall pay for compliance with an exercise of the police power. It is uncompensated compliance with the requirements of governmental authority to preserve the safety of crossings that the law requires.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 254, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113.

Mr. Justice **Day** delivered the opinion of the court:

This case comes here from the supreme court of Minnesota, to review a judgment of that court affirming a judgment in mandamus of the St. Louis county court in that state, which required the Northern Pacific Railway Company, plaintiff in error, to repair a certain viaduct in the city of Duluth, carrying Lake avenue over the railway company's tracks. 98 Minn. 429, 108 N. W. 269. The Northern Pacific Railway Company is the successor in title of the St. Paul & Duluth Railroad Company, which derived its title from the Lake Superior & Mississippi Railroad Company. The Lake Superior & Mississippi Railroad Company, whose rights and obligations have devolved upon the Northern Pacific Railway Company, had the following provisions in its charter:

"Sec. 6. The said company may construct the said railroad across any public or private road, highway, stream of water, or water course if the same be necessary: Provided, That the same shall not interfere with navigation; but said company *shall [588] return the same to their present state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water, or water course, to the owner or to the public."

"Sec. 17. This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation."

The Lake Superior & Mississippi Railroad laid its first track across what is now Lake avenue in 1869. Lake avenue was graded and improved for public traffic in the winter and spring of 1871, and since that time it has been in continuous use as a public street. In the year 1891 the amount of business on Lake avenue and the number of tracks therein had become so great that the constant passage of cars and engines endangered the safety of the public. The city of Duluth thereupon prepared plans and specifications for the construction of the viaduct upon Lake avenue, and made a demand upon the railroad company to construct the same. The railroad company, after considerable negotiation, in which it denied its obligation to build the viaduct, entered into a contract with the city of Duluth, which is set up in its answer in this case as a full defense to the right of the city of Duluth to require the repair of the viaduct at the railroad company's expense. This contract was dated September 2, 1891, and provided that the city should build the bridge or viaduct upon Lake avenue to carry that street over the railroad tracks which had theretofore crossed said avenue at grade. The railroad was to contribute to the expense of the construction in the amount of $50,000, and the city undertook, for the period of fifteen years, to maintain the part of the bridge over the railroad's right of way, and to perpetually maintain the approaches. The city built the bridge at an expense of $23,000, in addition to the $50,000 which was paid by the railroad company.

In 1903, the viaduct and its approaches having become dangerous for public use, the [589] city of Duluth acted within the *power conferred on it by law to require railroad companies to construct bridges and viaducts at their own expense at public railroad crossings, and, having investigated the subject, approved the plans prepared by the city engineer, and on the 13th of July, 1903, passed the following resolution:

"Resolved, That the repairs set forth in said specifications are necessary and proper, and are demanded by the public safety and convenience.

"Resolved, further, That said repairs are reasonable and practicable for the repairs of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.

"Resolved, further, That this council does hereby demand that the Northern Pacific Railway Company immediately proceed to repair said viaduct and approaches in accordance with said specifications.

"Resolved, further, That a copy of this resolution be forthwith served upon the Northern Pacific Railway Company in the same manner as service may be made of summons in a civil action by the city clerk.

"Resolved, further, That, in the event of the failure or refusal of said company to comply with such demand, that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said railway company to make such repairs, or such portion thereof as the court may determine it is legally liable to make."

It was in pursuance of this resolution that this action in mandamus was begun and the writ issued, requiring the railroad company to make the repairs in accordance with the plans adopted and approved by the city council.

We are met at the threshold with the question of the jurisdiction of this court. It is the contention of the plaintiff in error that, in requiring the railroad company to repair the viaduct at its own expense, the obligation of the contract of September 2, 1891, has been impaired by legislation of the municipal corporation, in violation of the contract clause of the *Constitution of the [590] United States. In cases arising under this clause of the Federal Constitution this court determines for itself whether there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the State. Stearns v. Minnesota, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73. If the plaintiff in error set up a claim of contract upon substantial grounds and with allegations showing an impairment of its obligation by state or municipal legislation, a case was presented which might be brought to this court in event such legislation was upheld. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

It is no longer open to question that municipal legislation passed under supposed legislative authority from the state is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts. Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311-320, 51 L. ed. 198-202, 27 Sup. Ct. Rep. 83, and cases there cited. But it is contended that the action of the city in this case amounts to no more than a denial of the validity and binding force of the contract in question and brings the case within St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, followed in Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420. In the St. Paul Case the city refused to pay certain sums claimed to be due on contract of the company, and ordered the gas posts to be removed from the streets. Such a denial of liability on the part of a municipal corporation was contained in an ordinance to that effect; it was held this was not legislation impairing the obligation of the contract, and it was said in that case that the ordinance "created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is thus clearly understood it is seen that the contention here advanced of the impairment of the obligations of the contract arising from this [591] provision *of the ordinance reduces itself at once to the proposition that, wherever it is asserted, on the one hand, that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises, in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

And such was the effect of the ordinance in the subsequent case of Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. supra.

We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 351, 46 L. ed. 936, 943, 944, 22 Sup. Ct. Rep. 691. And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65–81, 46 L. ed. 808–815, 22 Sup. Ct. Rep. 585; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756. As was said in Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. supra, it is not always easy to determine on which side of the line a given case may fall. But, recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the *merits. [592] For the judgment of mandamus against the railroad company could not have been rendered in this case without the prior legislation by the city ascertaining the necessity for repairs upon the viaduct, the character and extent of the same, and imposing upon the railroad company the duty to enter upon the street and construct the improvement.

This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years, and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question; we therefore think there is jurisdiction in the case.

Passing to the merits, it is the contention of the railroad company that when this contract was made the supreme court of Minnesota had decided that, as to highways which were constructed after the railroad was built, there was no obligation upon the company to construct overhead bridges or crossings, and whatever the rule might be as to requiring a railroad company to construct such overhead bridges in the interest of public safety as to streets in existence when the railroad was built, it could not be required so to do when the highway was constructed after the railway had acquired its right of way and laid its tracks.

It is difficult to perceive how a judicial determination that *the railroad company [593] could not be charged with the expense of such structures as this viaduct as to streets laid out *after* the railroad was built could have induced the agreement to pay $50,000 towards the improvement in question in a street first occupied by the railroad company. And the recitals of the contract of September, 1891, are to the effect that the payment of the $50,000 was in lieu of assessments for benefits in excess of damages for the taking of property of the railroad company to be caused by said public improvement, which might be imposed upon the property of the railroad company.

But was there such settled judicial construction? In the case of State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, a case decided by that court upon the same day it handed down its decision in the case at bar, the subject was elaborately examined and a conclusion reached that the charter of a railroad, similar to the one granted the Lake Superior & Mississippi Railroad Company, above set forth, imposed an obligation upon the railroad company as to highways, roads, and streets, over which the railroad was constructed, to keep the same in good condition and repair, whether laid out after the building of the railroad or before, and that such requirement in the interest of public safety embraced an overhead bridge necessary for the public safety, and that a requirement that it should be built at the expense of the railroad company was an exercise of the police power of the state, and did not amount to taking property without due process of law. In that case the cases relied upon by the learned counsel for the plaintiff in error in this case as establishing a contrary doctrine, prior to the making of the contract, were reviewed. They are: State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3, and State ex rel. St. Paul, M. & M. R. Co. v. District Court, 42 Minn. 247, 7 L.R.A. 121, 44 N. W. 7. It was there pointed out, and we think correctly, [594]*that while the learned court, in State ex rel. St. Paul, M. & M. R. Co. limited its ruling to cases where railroads had been constructed in streets already laid out, and expressly disclaimed that the doctrine there announced would necessarily apply where a new street had been laid out over the railroad after its construction, the question now made was not involved in the case, and the decision then made was limited to existing streets only. In the second case above cited (42 Minn. 247), while it was held that planking the tracks at crossings was a part of the construction of the highway, and not a safety device for the protection of the thoroughfare, and therefore not within the proper exercise of the police power, so that the cost thereof could be required from the company, the court did say, in the most emphatic manner, that safety devices might be required at new streets, and that cattle guards and gates were such safety devices, the construction of which would be required at the expense of the company. And the court said:

"When the railroad company accepted its charter it received its franchises subject to the authority and power of the state to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then-existing regulations as applicable to then-existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously-existing law becomes applicable, can make no difference.

"The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the Constitution from being devested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator involves *an assumption that [595] when the railroad constructed its line of road, conforming to the requirements of the law as to all then-existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterwards operate its road unembarrassed by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its acquired property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly-existing conditions,—of conforming to a general police regulation of the state, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that, when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the state, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company, to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new state rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement. Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co. 30 Ohio St. 604; Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 388, 400, 404, 44 Am. Rep. 799; Hannibal v. Hannibal & St. J. R. Co. 49 Mo. 480; [596]*Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63."

As the supreme court of Minnesota points out in the opinion in 98 Minn. 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited in 98 Minn. 380.

There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437, 440, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468."

The principle was recognized and enforced in Chicago, B. & *Q. R. Co. v. Chicago, 166 [597] U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the state, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540, it was held that the state of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471, where it was held that, although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the state was not a taking of property without due process of law.

The same principles were recognized and the previous cases cited in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, and again in Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

In this case the supreme court of Minnesota has held that *the charter of the com- [598] pany, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513.

We find no error in the judgment of the Supreme Court of Minnesota, holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed.

ANN M. HAIRSTON, Plff. in Err.,
v.
DANVILLE & WESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 598-609.)

Constitutional law — due process of law in condemnation proceedings — public use.

The condemnation of land by a railroad company for a spur track will not be held to be for a private use, and therefore forbidden by the United States Constitution, 14th Amendment, where the state courts, in effect, have held that the use was public, on evidence tending to show that the spur track was designed, in part, for the storage of cars while loading and unloading, and to relieve the congestion of business, although the motive which dictated its location over the land in question was to reach a private industry, which contributed to the cost.

[No. 6.]

Argued January 10, 13, 1908. Decided February 24, 1908.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment denying a review of a judgment of the Circuit Court of Henry County, condemning land for railroad purposes. Affirmed.

Statement by Mr. Justice **Moody**:

This is a writ of error to the highest court of the state of Virginia. The defendant in error is a corporation created by the state of Virginia and operating a railroad entirely within that state. Its main line runs near the town of Martinsville, and from it a branch line runs into Martinsville and there ends. The railway company began a proceeding in a circuit court of that state for the condemnation of land belonging to Miss Hairston, the plaintiff in error, for the construction of a spur track, which was alleged to be needed for the transaction of its business, for the accommodation of the public generally, and for the purpose of reaching the factory of a large shipper, the Rucker & Witten Tobacco Company. By pleadings duly filed the landowner set up the defense (*inter alia*) that the proposed condemnation was not for a public use, and was therefore contrary to the Constitution and laws of Virginia and the 14th Amendment to the Constitution of the United States. Testimony was taken on this issue before the judge of the circuit court, who found against the contention, and appointed commissioners to ascertain the damage caused by the taking. The commissioners ascertained the amount of the damages. *The **[600]** judge confirmed their report, and ordered that, upon payment of the damages, a fee simple in the land should be vested in the railway company. The landowner petitioned the supreme court of appeals to grant a writ of error to review the judgment of the circuit court. The petition was denied, and a writ of error transferring the record to this court was allowed.

The uses for which the land sought to be condemned was needed are described in the testimony of the superintendent of the railroad. The material parts of it follow:

"The Danville & Western comes into Martinsville on a branch spur from the main line, running between Danville and Stewart. This spur leaves the main line about very nearly half a mile east of Martinsville. It comes into Martinsville and ends at Franklin street. The Danville & Western has in the town of Martinsville this main line referred to. The main line proper runs parallel with and about 3 feet from the platform of the freight and passenger station. Parallel to this track there is another track, about 15 feet between the centers of the two tracks, running parallel with and about 4

NOTE.—As to power to condemn right of way for railway sidings to private establishments—see note to St. Louis, I. M. & S. R. Co. v. Petty, 20 L.R.A. 434.

or 5 feet from the Alliance warehouse. Both of those tracks are spur tracks, and end at Franklin street. The company also has a freight and passenger station and platform, with a portion of the platform shedded. There is also another track, designated Tabernacle track. This track is several hundred feet east of this freight and passenger station referred to, and is parallel with the main line. This track will hold seven box cars, but is quite a heavy grade,—about 2 feet to the hundred feet. There is also parallel with the main line and also parallel with this Tabernacle track a spur track, which is designated spur track. These are all the tracks that the company has in the town of Martinsville, except a track known as Lester's siding. This, however, is a private siding and is fenced in. The gate is, as a rule, locked, and the company can use for its business only about two box-car lengths on the outside of the fence. When I took charge of the road as superintendent, on the 10th day of September, 1903, I [601] was very much impressed *with the congested condition of things in Martinsville, the danger of operating the yard, and was especially impressed with the lack of team track room; I mean by that, suitable tracks on which solid cars loaded with freight can be placed, such freight to be unloaded by consignees and teams, or *vice versa;* tracks to place empty cars on, into which shippers could load freight from their teams. I found only space for three box cars.—I mean by that, proper and suitable space. That was the portion of the track described as parallel with the platform, and west of the station building, about three car lengths. Being impressed with the danger of operating this yard, soon after taking charge I gave positive instructions that the track designated as Tabernacle track must never be used for storing cars, and must be kept clear and used only to pass trains. The track was built and intended to pass trains, —that is, to sidetrack one train on it and let the other pass. On account of the increase of the business at Martinsville, it has been necessary to change these instructions, and we have been forced to use the Tabernacle track on which to place team track cars, solid cars to be unloaded by consignees. . . . In order to get out of Franklin street I selected a lower route, and employed a competent engineer to lay off and make plans for the most feasible track, to obtain as much team track room as possible, and at the same time to reach the plant of the Rucker & Witten Tobacco Company. I was informed that this plant would be very greatly enlarged, and in fact the entire business of this concern would eventually be consolidated at Martinsville. By adopting the route proposed we would not only reach the plant of the Rucker & Witten Tobacco Company and thereby secure for the Danville & Western a great increase in business, but we would also greatly enlarge our team track facilities. I mean by that, the portion of the track on which loaded cars would be placed to be unloaded by merchants and others in Martinsville doing business here. The map shows that about 500 feet of this proposed track is level; this would be used entirely for the public. This 500 feet would store about 16 or 18 team track cars, and will *be used entirely to place cars on for [602] the general public. In addition to that we would reach the Rucker & Witten Tobacco Company's plant, and we would thus be enabled to place cars for that concern immediately at the factory doors, thus relieving the short team track we have in the yard, and also doing away entirely with the danger of using this Tabernacle track as a team track. We can also place empty cars at the Rucker & Witten Tobacco Company's plant, in which they can load their tobacco shipments. This will also greatly relieve us at the station. This concern has within the last thirty days made in one shipment 14 solid cars of manufactured tobacco, going to one destination, and all shipped the same day. At present we have team track room for seven cars on this Tabernacle siding, which, I have explained, is on a grade of about 2 feet to the hundred feet, and, therefore, very dangerous to operate and to stand cars on. There is room for three cars west of the station building between the station building and Franklin street, and on this same track there is room for five cars to be placed at the platform. These last five cars are, as a rule, merchandise cars that come here loaded for various consignees, and are unloaded by the station force into the station building. Unloaded freight is placed by shippers on the platform and is loaded into empty cars standing in this same five-car space. In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here. We wish to get away from the danger of using this Tabernacle track as a team track as early as possible. The track is on a heavy grade and cars are liable to get loose and roll down the grade. In case one of these cars should happen to get loose just as a train was approaching Martinsville a serious accident would result, the grade is so heavy. Consignees sometimes attempt to move cars a little themselves, and are not able to hold them, and they strike the others on the track, and they have invariably been derailed. We have in the last sixty days had several derailments on this track. I will say, on account of the danger, the east end [603] of the track is protected *by a modern safety switch,—derailing switch. When the cars strike this switch, they are thrown off the track on the ground. That damages the cars, and damages the track, and causes delay and expense in rerailing them again. To give some idea of the increase of business at Martinsville, I will state that the auditor of the Danville & Western Company made me a statement for November and December, 1904, as compared to same months last year, outbound or forwarded business in November, 1904.

"Mr. Staples: Will you file that report with your deposition?

"The Witness: Yes, sir.

"Answer (continued): Outbound or forwarded business for November, 1904, as compared with same month 1903, shows an increase of about 16⅔ per cent. The inbound business for November, 1904, compared to same month last year, shows an increase of about 89 per cent. The outbound business for December, 1904, as compared to same month 1903, shows an increase of about 16⅔ per cent, and the inbound business for December, 1904, as compared to same month last year, shows an increase of about 100 per cent. So, in order to at all handle the business with safety or convenience to patrons it is absolutely necessary to get more and better terminal facilities. In order to do that, we have located what we think to be the best and most feasible line to accomplish the two objects,—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Company.

"Q. Now, Major, will there be access along the line from Fontaine street to the depot of the Danville & Western Ry., in Martinsville, for the purpose of reaching the cars standing upon the track?

"A. These cars will be standing on this proposed track, not at the station, and parties can reach such cars with ease from Fontaine street. It is also proposed to have an entrance on the alley near the Alliance warehouse, near the proposed track.

"Q. Has the city of Martinsville grown very much in size and business within the last year or two?

[604] "A. *It has grown very much in business over our line, and I notice there is considerable building.

"Q. Well, in your opinion, is this proposed extension of your track necessary for the public convenience and for enabling the railroad to meet the business demands of the city of Martinsville?

"A. It is, sir. There is another fact of public interest which occurs to me that probably the court would like to know. The manufacturers, or parties who use steam coal, are more conveniently located to the Danville & Western station than to the Norfolk & Western station. The coal, however, comes into Martinsville over the Norfolk & Western. The manufacturers are very anxious to handle this coal on the Danville & Western tracks on account of saving which there would be in drayage and on account of convenience. We have an understanding with the Norfolk & Western traffic people that we will switch this coal to our tracks. It is not practicable now to do this, because we have no track room. It will be practicable if this proposed road is built, and that is the object of the understanding.

"Q. Then this proposed extension will be, or will it not be, for the use of the public and for the reception and delivery of consignments by your railway to the entire public?

"A. It will be for the use of the public in that cars loaded with car-load shipments consigned to various consignees in Martinsville will be placed on these tracks to be unloaded, and empty cars will be placed on these tracks to be loaded by shippers.

"Q. You mean by shippers, shippers generally?

"A. Yes, sir; shippers generally; anybody who wants to ship a car load of freight will get his car on the track."

The testimony given by other witnesses did not materially add to or affect this evidence, though the other testimony and the cross-examination of the superintendent tended to show that, in order to render the general public use of the spur track practicable and convenient, grading, the construction of retaining *walls, and the im- [605] provement and change of grade of Fountain street would be required. It was shown that the tobacco company agreed, in writing, to give to the railway company a part of the land over which the spur track was to be constructed, and to pay the cost of the remainder. The railway company, on the other hand, agreed to continue the operation of the spur track as long as the tobacco factory was operated, but reserved the option to abandon the spur track in case the factory was abandoned for six months. In that case the land given by the tobacco company was to revert to it.

Messrs. **Waller R. Staples** and **Abram P. Staples** argued the cause, and, with Mr. John W. Carter and Hunt & Staples, filed a brief for plaintiff in error:

Whether the purpose or use for which the said land was sought to be condemned was public or private is always a judicial question; and, since a taking of private property for a private use is a deprivation without due process of law, is always a Federal question.

Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

To lay with one hand the power of the government on the property of the citizen, and, with the other, to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less robbery because it is done under the forms of law and is called taxation.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 461; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

And the case is to be heard and determined without any presumption attaching to the judgment of the state court.

Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227.

The courts will closely scrutinize the real, and not the avowed, purpose for the proposed condemnation; the burden of showing a real public purpose is upon the petitioner; a mere possibility of an incidental public benefit will not suffice; and especially is this true when the court will find from the entire evidence that the allegations of public necessity are merely colorable, and that the real and underlying motive, actuating the proceedings, is the benefit of a private individual.

Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802; West River Bridge Co. v. Dix, 6 How. 538, 545, 12 L. ed. 547, 550; 3 Kent, Com. 20; Louisville, C. & C. R. Co. v. Chappell, Rice, 383; Memphis v. Overton, 3 Yerg. 387; King v. Russell, 6 Barn. & C. 566; King v. Ward, 4 Ad. & El. 384; Varner v. Martin, 21 W. Va. 534; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Great Falls Power Co. v. Great Falls & O. D. R. Co. 104 Va. 416, 52 S. E. 172; Rensselaer & S. R. Co. v. Davis, 43 N. Y. 146; South Chicago R. Co. v. Dix, 17 Am. & Eng. R. Cas. 162, note; Baltimore & H. de G. Turnp. Co. v. Union R. Co. 35 Md. 224, 6 Am. Rep. 397; Getz's Appeal, 10 W. N. C. 453; Cooley, Const. Law, 534; Kyle v. Texas & N. O. R. Co. (Tex. App.) 4 L.R.A. 279; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Re Rochester, H. & L. R. Co. 110 N. Y. 119, 17 N. E. 678; Chicago & E. I. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co. 161 Mo. 288, 51 L.R.A. 949, 84 Am. St. Rep. 717, 61 S. W. 684.

Mr. **George E. Hamilton** argued the cause, and, with Mr. M. J. Colbert, filed a brief for defendant in error:

What is a public use for which private property may be taken by due process of law depends upon the particular facts and circumstances connected with the particular subject-matter.

Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The question of public use is determined by the right of the public to use it, and not by the actual use; and so long as the public has the right to use the track, the fact that it is intended primarily for the benefit of a private enterprise is immaterial.

Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Chicago & N. W. R. Co. v. Morehouse (Re Chicago & N. W. R. Co.) 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; Hays v. Risher, 32 Pa. 169; Harvey v. Thomas, 10 Watts, 63, 36 Am. Dec. 141; Denver R. Land & Coal Co. v. Union P. R. Co. 34 Fed. 386; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802.

Mr. Justice **Moody** delivered the opinion of the court:

The condemnation of land in this case has been held by the courts of Virginia to be authorized by the Constitution and laws of that state, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Dice v. Sherman (Va.) 59 S. E. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. The plaintiff in error, however, insists that the record in this case, which includes all the evidence, shows, unmistakably, that the taking was for private uses, and that the claim by the railway company, that the spur track was designed in part for public uses, is no better than a colorable pretense. We assume that, if the condemnation was for private uses, it is forbidden by the 14th Amendment. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Falbrook Irrig. District v. *Bradley, 164 U. S. 112, 161, 41 [606] L. ed. 369, 389, 17 Sup. Ct. Rep. 56; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 251, 252, 260, 49 L. ed. 462, 467, 468, 471, 25 Sup. Ct. Rep. 251; Clark

v. Nash, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301.

We proceed to consider whether the uses of the spur track for which the land was taken were private, and therefore such uses for which a taking by the right of eminent domain is forbidden by the 14th Amendment. The courts of the states, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. But, as has been shown by a discriminating writer (1 Lewis, Em. Dom. 2d ed. § 157), the decisions have been rested on different grounds. Some cases proceed upon the express and some on the implied prohibitions of state Constitutions, and some on the vaguer reasons derived from what seems to the judges to be the spirit of the Constitution or the fundamental principles of free government. The rule of state decision is clearly established, and we have no occasion here to consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. Some cases illustrative of the tendency of local conditions to affect the judgment of [607] courts are Hays v. Risher, 32 Pa. 169; *Boston & R. Mill Corp. v. Newman, 12 Pick. 467, 23 Am. Dec. 622 (Conf. Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39); Turner v. Nye, 154 Mass. 579, 14 L.R.A. 487, 28 N. E. 1048; Ex parte Bacot, 36 S. C. 125, 16 L.R.A. 586, 16 S. E. 204; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676; Strickley v. Highland Boy Gold Min. Co. supra; Otis Co. v. Ludlow Mfg. Co. 201 U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353. The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Falbrook Irrig. District v. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co.,—ubi supra. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In Missouri P. R. Co. v. Nebraska, ubi supra, it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aërial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state Constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States.

*Entering upon the consideration of the [608] case at bar in the spirit of our previous decisions, it presents no difficulties. The Virginia court has, in effect, found that the condemnation was for public uses. The evidence fully warranted that finding. We need not consider whether a condemnation by a railroad, authorized by a state law and approved by the state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the 14th Amendment; nor the authorities bearing upon the question whether such a use is public. Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company, but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. We think the court below was justified in finding that the superintendent testified accurately when he said: "In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here:" and "We have located what we think to be the best and most feasible line to accomplish two objects,—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Company:" and "It will be for the use of the public, in that cars loaded with car-load shipments . . . will be placed on these tracks to be unloaded and empty cars will be placed on those tracks to be loaded by shippers." This testimony describes a use which is clearly public. Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Chicago & N. W. R. Co. v. Morehouse (Re Chicago & N. W. R. Co.) 112 Wis. 1, 56 L.R.A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 369, 20 L.R.A. 434, 21 S. W. 884; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802. The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.

[609] *We have considered the elaborate argument of counsel, that the track was not intended for the use of the public generally, and that it could not, in fact, be so used, and are not convinced by it. The judgment is affirmed.

WABASH RAILROAD COMPANY, Plff. in Err.,
v.
ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY et al.

(See S. C. Reporter's ed. 609-612.)

Courts — conflict of jurisdiction — when state jurisdiction excluded.

1. To adjudge that certain railroad equipment bonds are a lien upon the railroad property is beyond the power of a state court, where that court, by reason of the possession of the *res* by a Federal court, is without power to decree a sale of the property to satisfy the lien, and the declaration of the lien is sought only as an essential part of the order of sale.

Error to state court — questions reviewable.

2. Whether or not the amount due to the holders of certain railroad equipment bonds on the issue of an execution against the railway company can be determined in a proceeding to enforce the lien of such bonds by a sale of the railroad property is not open on a writ of error from the Supreme Court of the United States to a state court.

[No. 40.]

Submitted February 24, 1908. Decided March 9, 1908.

PETITION for a rehearing or modification of a judgment reversing a decree of the Supreme Court of the State of Ohio, which had affirmed a decree of the Circuit Court of Lucas County, in that state, rendered on an appeal from the Court of Common Pleas of that county, ordering a sale of railroad property to satisfy the lien of certain equipment bonds. Denied.

For prior decision, see ante, 379.

Statement by Mr. Justice Moody:

After the decision in this case, reported 208 U. S. 38, ante, 379, 28 Sup. Ct. Rep. 182, the defendants in error petitioned for a rehearing and moved, if that were denied, that the judgment be modified. The substance of the motion was stated by counsel to be that the judgment should be modified "by specifically directing that the supreme court of Ohio affirm so much of the judgment of the circuit court of Lucas county, Ohio, as finds and adjudicates the rights of these defendants in error, and each of them, *against the property and parties in said [610] cause, as set forth in the judgment entry, respecting the equities of the cause and right of recovery, the ownership and the lien of the equipment bonds, and the sums due thereon to the parties, respectively, with interest and costs; and by further specifically directing that said Ohio supreme court reverse the judgment of said circuit court so far as it directs a seizure and sale of the property held by the plaintiff in error in Ohio and affected by such lien, and limit the rights of the defendants in error to the recovery on such modified judgment in the Federal circuit court found by this court to have jurisdiction of the property."

Messrs. **John W. Warrington** and **John C. F. Gardner** in support of the motion. Messrs. Murray Seasongood and Thomas B. Paxton, Jr., were on the brief.

Mr. **Rush Taggart** opposed.

Note.—As to what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

Mr. Justice **Moody** delivered the opinion of the court:

In the original decision of this cause we treated the proceeding in the state court as one whose sole direct purpose was to procure a sale of the railroad property in satisfaction of the lien which the holders of the equipment bonds asserted against it. We assumed that the judgment of the state court was one for the sale of the property, and that the adjudication of the amounts due the plaintiffs below, and of the existence of the lien claimed, were merely incidental and preliminary to the judgment ordering the sale. Believing, for the reasons given in the opinion, that such a judgment was beyond the jurisdiction of the state court, we reversed it. That such a conception of the proceeding and judgment was not unnatural or strained appears quite clearly from a passage in the brief of the learned counsel for the defendant in error, filed in support of this motion. There [611]it is said: "No one can read the *foregoing abstract of the petition, or the petition itself, without observing its purpose to set up the lien of the equipment bonds with all other liens, also, to have the amount found due on the equipment bonds sued on, and to enforce payment through sale of the property, subject only to the liens of the two prior Ohio mortgages and two prior Indiana mortgages; also, to have an accounting and marshaling of liens and a distribution of the proceeds. Plainly, then, the action contemplated the ultimate seizure and sale of all the property now in question, subject only to two underlying mortgage liens."

It is, however, urged that the judgment of the court below should be directed to stand so far as it found the amount due to the several plaintiffs in respect of the equipment bonds held by them, and so far as it declared that those bonds were entitled to a lien upon the property to secure payment. But, after renewed consideration of the cause, we decline to modify our general judgment of reversal. For the purpose, however, of avoiding misunderstanding, and in hope that this prolonged litigation may be hastened to an end, we think it fitting, without extended discussion, to add a few observations to what was said in the former opinion.

1. The declaration of a lien on the property is a step toward the invasion of its possession, which we have held to be beyond the jurisdiction of the state court. It was sought, not for itself, since it would have no significance except as a basis for the order of sale of the property affected by it, but only as an essential part of the order itself. The declaration of the lien must stand or fall with the order of sale, and is, therefore, with that order, beyond the power of the state court.

2. The ascertainment of the amount due to the plaintiffs on the issue of an execution against the Toledo, Wabash, & Western Railway Company may be regarded as independent of the proceedings for the enforcement of the lien. Whether such a judgment can be rendered upon a proceeding of this nature (Giddings v. Barney, 31 Ohio St. 80) is a question exclusively for the state court.

3. *If the claims of the defendant in error[612] should be presented to the circuit court of the United States, the question would arise whether that court, in determining the rights of the bondholders against the property, should follow the decision of this court (114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. Rep. 1081), or the decision of the state court (45 Ohio St. 592, 16 N. E. 110, 18 N. E. 380). That question is not here, has not been argued by counsel, and we cannot now properly decide it. We do not express or intimate any opinion upon it. It must, in the first instance, be passed upon by the circuit court.

The petition for rehearing and the motion to modify the judgment are denied.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[613]*FRITZ DUREIN, Plaintiff in Error, v. STATE OF KANSAS [No. 7]; FRED ROSS et al., Plaintiffs in Error, v. STATE OF KANSAS [No. 8]; FRED SIMMONS et al., Plaintiffs in Error, v. STATE OF KANSAS [No. 9].

In Error to the Supreme Court of the State of Kansas.

See same case below, 70 Kan. 13, 80 Pac. 987.

Mr. C. A. Magaw for plaintiffs in error.

Mr. C. C. Coleman for defendant in error.

January 13, 1908. *Per Curiam:* Judgments affirmed with costs. Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; State v. Durein, 70 Kan. 1, 78 Pac. 152, 80 Pac. 987, and cases cited.

NELSON THOMASSON, JR., et al., Petitioners, v. CHICAGO RAILWAYS COMPANY et al. [No. 16, Original.]

Petition for appeal.

Messrs. Henry Crawford, Henry S. McAuley, and Charles H. Aldrich for petitioners.

Messrs. George W. Wickersham, Wm. W. Gurley, William Burry, and A. H. Van Brunt, for respondents.

January 23, 1908. Denied for the want of jurisdiction.

EDWARD CORCORAN et al., Appellants, v. TERENCE O'BRIEN, Administrator, etc., et al. [No. 125.]

Appeal from the Circuit Court of the United States for the Western District of Washington.

Messrs. Samuel H. Piles, James B. Howe, George Donworth, and Corwin S. Shank for appellants.

No appearance for appellees.

January 27, 1908. Decree affirmed with costs.

*UNITED LAND ASSOCIATION et al., Plaintiffs[614] in Error, v. LEWIS ABRAHAMS et al. [Nos. 5 and 4.]

In Error to the Supreme Court of the State of California.

See same case below, 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988.

Messrs. C. A. Keigwin and John G. Johnson for plaintiffs in error.

Messrs. W. B. Treadwell, Charles H. Lovell, P. F. Dunne, Wm. Grant, Charles S. Cushing, James T. Boyd, and Jos. C. Campbell for defendants in error.

February 24, 1908. *Per Curiam:* Judgments affirmed, with costs. Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; San Francisco v. Le Roy, 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364.

ELY BERNAYS, Appellant, v. UNITED STATES. [No. 137.]

Appeal from the Court of Claims.

See same case below, 41 Ct. Cl. 519.

Messrs. Sigmund Zeisler and W. H. Robeson for appellant.

The Attorney General, Assistant Attorney General Thompson, and A. C. Campbell for appellee.

February 24, 1908. *Per Curiam:* Judgment affirmed. Chesebrough v. United States, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327.

NORFOLK & WESTERN RAILWAY COMPANY, Petitioner, v. LOUELLA MAY, Administratrix, etc. [No. 524.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Theodore W. Reath and Joseph I. Doran for petitioner.

Mr. Clement Manley for respondent.

January 13, 1908. Denied.

METROPOLITAN LIFE INSURANCE COMPANY, Petitioner, v. CAMILLA B. TALBOTT, Administratrix, etc. [No. 540.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 156 Fed. 1022.

Mr. Maurice E. Locke for petitioner.

Mr. M. L. Crawford for respondent.

[615] *January 13, 1908. Denied.

SAILORS' UNION OF THE PACIFIC et al., Petitioners, v. HAMMOND LUMBER COMPANY. [No. 546.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 156 Fed. 450.

Mr. Jackson H. Ralston for petitioners.

Messrs. S. S. Burdett and J. B. Thompson for respondent.

January 13, 1908. Denied.

OWEN AHEARN, Petitioner, v. UNITED STATES. [No. 551.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 158 Fed. 606.

Mr. Frederick S. Tyler for petitioner.

The Attorney General and the Solicitor General for respondent.

January 13, 1908. Denied.

JENNIE L. GRAVES et al., Petitioners, v. ANNA P. ASHBURN, Executrix, etc., et al. [No. 564.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Marion Erwin and Wm. J. Wallace for petitioners.

No appearance for respondents.

January 20, 1908. Granted.

UNITED STATES, Petitioner, v. J. T. B. HILLHOUSE. [No. 555.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 81 C. C. A. 475, 152 Fed. 163.

The Attorney General and the Solicitor General for petitioner.

Mr. Howard T. Walden for respondent.

January 20, 1908. Denied.

*CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 552.] [616]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. O. M. Spencer and O. H. Dean for petitioner.

The Attorney General, the Solicitor General, and Assistant to the Attorney General Purdy for respondent.

January 27, 1908. Granted.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, v. UNITED STATES [No. 557]; JOHN N. FAITHORN, Petitioner, v. UNITED STATES [No. 558]; FRED A. WANN, Petitioner, v. UNITED STATES [No. 559].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. F. S. Winston, Robert Mather, John Barton Payne, S. H. Strawn, and Blackburn Esterline for petitioners.

The Attorney General, the Solicitor General, and Assistant to the Attorney General Purdy for respondent.

January 27, 1908. Granted.

WILLIAM T. WAGGONER et al., Petitioners, v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO. [No. 568.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 156 Fed. 1023.

Mr. W. O. Davis for petitioners.

No appearance for respondent.

January 27, 1908. Denied.

HENRY CLAY PIERCE, Petitioner, v. EDMUND P. CREECY, Chief of Police, etc. [No. 588.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Joseph H. Choate and Joseph H. Choate, Jr., for petitioner.

Messrs. Shepard Barclay and Thomas T. Fauntleroy for respondent.

February 3, 1908. Denied.

*JOSEPH PAOLUCCI, Petitioner, v. UNITED STATES. [No. 578.] [617]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 30 App. D. C. 217.

Mr. Wilton J. Lambert for petitioner.

The Attorney General and the Solicitor General for respondent.

February 24, 1908. Denied.

CITY OF ST. CHARLES, Petitioner, v. CHARLES A. STOOKEY. [No. 586.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 154 Fed. 772.

Messrs. Shepard Barclay and Thomas T. Fauntleroy for petitioner.

Mr. Charles Nagel for respondent.

February 24, 1908. Denied.

FISHER BOOK TYPEWRITER COMPANY et al., Petitioner, v. FREDERIC W. HILLARD. [No. 589.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 159 Fed. 439.

Mr. Wm. A. Redding for petitioner.

Messrs. Thomas B. Kerr and John C. Kerr for respondent.

February 24, 1908. Denied.

MAX ALEXANDER, Petitioner, v. MILLS B. LANE et al., Executors, et al. [No. 592.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below. 157 Fed. 1002.

Messrs. William Garrard, P. W. Meldrim, and Garrard Glenn for petitioner.

Mr. Robert M. Hitch for respondents.

February 24, 1908. Denied.

COUNTY OF HAMILTON, ILL., Petitioner, v. MONTPELIER SAVINGS BANK & TRUST COMPANY. [No. 594.]

[618] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 157 Fed. 19.

Messrs. Samuel Alschuler and Charles R. Holden for petitioner.

Messrs. John F. Dillon, Harry Hubbard, and C. B. Masslich for respondent.

February 24, 1908. Denied.

CHARLES M. SMITH, SR., et al., Petitioners, v. UNITED STATES. [No. 597.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 157 Fed. 721.

Messrs. A. S. Worthington and R. B. Oliver for petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Russell for respondent.

February 24, 1908. Denied.

JOHN H. PHILLIPS et al., Plaintiffs in Error, v. W. E. BARRETT et al. [No. 108.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Mr. R. M. Hudson for plaintiffs in error.

Mr. John W. Friend for defendants in error.

January 10, 1908. Dismissed with costs, pursuant to the Tenth Rule.

MODESTO MUNITIZ AGUIRRE, Appellant, v. SOBRINOS DE EZQUIAGA. [No. 126.]

Appeal from the Supreme Court of Porto Rico.

Mr. Charles Hartzell for appellant.

Mr. John Maynard Harlan for appellees.

January 15, 1908. Dismissed with costs, pursuant to the Tenth Rule.

MODESTO MUNITIZ AGUIRRE, Appellant, v. SOBRINOS DE EZQUIAGA. [No. 127.]

Appeal from the Supreme Court of *Porto [619] Rico.

Mr. Charles Hartzell for appellant.

Mr. John Maynard Harlan for appellees.

January 16, 1908. Dismissed with costs, pursuant to the Tenth Rule.

JOSÉ DOLORES MARQUEZ et al., Appellants, v. MAXWELL LAND GRANT COMPANY. [No. 278.]

Appeal from the Supreme Court of the Territory of New Mexico.

Messrs. Geo. Peck Merrick and Frank W. Clancy for appellants.

No appearance for appellee.

January 16, 1908. Dismissed with costs, on motion of counsel for appellants.

GUY LE ROY STEVICK, Receiver, etc., Plaintiff in Error, v. NATIONAL BANK OF NORTH AMERICA IN NEW YORK. [No. 149.]

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. T. J. O'Donnell for plaintiff in error.

Mr. Bronson Winthrop for defendant in error.

January 29, 1908. Dismissed with costs, pursuant to the Tenth Rule.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1907.

Vol. 209.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1907.

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[1]*WHITE-SMITH MUSIC PUBLISHING COMPANY, Appt.,
v.
APOLLO COMPANY.

(See S. C. Reporter's ed. 1-20.)

Copyright — in musical compositions — perforated rolls.

Perforated rolls which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions, which, under U. S. Rev. Stat. § 4952, U. S. Comp. Stat. Supp. 1907. p. 1021, secures to the composer the sole liberty of printing and reprinting, publishing, completing, copying, executing, finishing, and vending the same.

[Nos. 110, 111.]

Argued January 16 and 17, 1908. Decided February 24, 1908.

APPEALS from, and writs of certiorari to, the United States Circuit Court of Appeals for the Second Circuit, to review judgments which affirmed decrees of the Circuit Court for the Southern District of New York, dismissing, for want of equity, bills alleging an infringement of copyright. Affirmed.

See same case below, 77 C. C. A. 368, 147 Fed. 226.

The facts are stated in the opinion.

Mr. **Livingston Gifford** argued the cause and filed a brief for appellant and petitioner:

A musical composition is the order of the notes, just as this court defined a literary composition as the order of the words, in Holmes v. Hurst, 174 U. S. 86, 43 L. ed. 906, 19 Sup. Ct. Rep. 606.

The Constitution, as interpreted by the decisions, is broad enough to include perforated music.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; Holmes v. Hurst, supra; Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298; American Mutoscope & Biograph Co. v. Edison Mfg. Co. 137 Fed. 262.

The copyright statute is also broad enough to include perforated music.

Holmes v. Hurst, supra.

Where the order of the notes or words is copied, infringement of literary or musical compositions is not avoided by variations in other respects.

Jollie v. Jacques, 1 Blatchf. 625. Fed. Cas. No. 7,437; Blume v. Spear, 30 Fed. 631; Daly v. Palmer, 6 Blatchf. 266. Fed. Cas. No. 3,552.

A stenographic copy of the order of words was held to be an infringement of an ordinary literary composition, notwithstanding the difference in notation. Nicols v. Pitman, L. R. 26 Ch. Div. 374.

A positive celluloid film for a moving-picture machine was held to be a photograph by the circuit court of appeals of the third circuit in Edison v. Lubin, 58 C. C. A. 604, 122 Fed. 240.

A photogravure was held to infringe an engraving or an etching by Judge Townsend in Fishel v. Leuckel, 53 Fed. 499.

A chair back was held to infringe a picture in Falk v. T. P. Howell & Co. 37 Fed. 202.

A chromo was held to infringe a painting in Falk v. Donaldson, 57 Fed. 32.

Stereoscopic slides were held to infringe a painting in Turner v. Robinson, 10 Ir. Ch. Rep. 121, 510.

A photograph was held to infringe an engraving or print in Gambart v. Ball, 14 C. B. N. S. 306, even if photographing was unknown when the statute was passed.

The author may claim it as his own, in whatever language or form of words it can be identified as his production. The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole, but whether a material part, is taken. In this view of the subject, it is no defense of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is whether the substance of the work is taken without authority.

Drone, Copyright, p. 385.

Reproduction by lithography (Novello v. Sudlow, 12 C. B. 177), or in shorthand (Nicols v. Pitman, supra), manuscript or typewritten copies (Warne v. Seebohm, L. R. 39 Ch. Div. 73), will be infringements. *Semble.* also, that a copy or copies imprinted on a phonograph or printed in the blind raised alphabet would be a "multiplication."

Scrutton, Copyright, 1903 ed. p. 135, note.

At common law, while a thing must be capable of identification in order to be the subject of exclusive ownership, yet, when its identity can be ascertained so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

Drone, Copyright, p. 6.

The right of property is not limited to the form of expression which serves to identify the intellectual creation. The oral lecture of a professor to his class, under such limitations as to preclude its being considered an indiscriminate communication, is his property, although the language is spoken, and not written.

Caird v. Sime, L. R. 12 App. Cas. 326; Scrutton, Copyright, 4th ed. 1903, p. 62.

The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation which may be communicated by a hundred different tongues,—by the labial or sign language of the mute, the raised letters of the blind, the comprehensive characters of stenography. The means of communication are manifold, but the invisible, intangible, incorporeal creation of the author's brain never loses its identity.

Drone, Copyright, pp. 97, 98.

Readability by the person without mechanical assistance is not made a test of copyrightability or of infringement by the statute.

Holmes v. Hurst, supra.

Lack of competition does not affect the question of infringement, but only the question of the measure of damages.

Falk v. Donaldson, 57 Fed. 37.

The English decision of Boosey v. Whight, [1900] 1 Ch. 122, was based upon the narrow wording of the English statute; and, in view of the amendment of that statute in 1902, can no longer be regarded as authority, even in England.

On the other hand, the fact that the German statute, like ours, covers the musical composition, and is not limited to the sheet of music, makes the German decision, 27 Dec. Imperial Court of Germany, p. 60, a very important authority in our favor.

Mr. Nathan Burkan filed a brief for Victor Herbert in support of his petition to be admitted as coappellant:

The copyright statutes should not be construed technically, but with a view to giving effect to the purposes of Congress in enacting this legislation.

Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872; Trade-Mark Cases, 100 U. S. 94, 25 L. ed. 551; Rossiter v. Hall, 5 Blatchf. 363, Fed. Cas. No. 12,082; Schumacher v. Schwencke, 30 Fed. 690; Werckmeister v. Pierce & B. Mfg. Co. 63 Fed. 445; Scoville v. Toland, Fed. Cas. No. 12,553; Higgins v. Keuffel, 140 U. S. 428, 431, 35 L. ed. 470, 471, 11 Sup. Ct. Rep. 731.

Copyright protects the ideas of a completed, identified, and copyrighted musical composition.

Trade-Mark Cases, supra; Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; Holmes v. Hurst, 174 U. S. 89, 43 L. ed. 907, 19 Sup. Ct. Rep. 606.

The physical form in which the composition is embodied does not determine or limit the right.

Millar v. Taylor, 4 Burr. 2349; Stephens v. Cady, 14 How. 528, 14 L. ed. 528.

The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or eye of another by recital, by writing, or by printing . . . it is always the identical work of the author which is so exhibited.

2 Bl. Com. 406.

Because any reproduction will answer the same purpose that accomplishes the same effect, a musical composition should be subject to the same rule that applies to a patented invention.

Thomas v. Lennon, 14 Fed. 853.

A copy is that which comes so near to the original as to give every person seeing it the idea created by the original.

West v. Francis, 5 Barn. & Ald. 743.

By analogy, a copy of a musical composition must be held to be that which gives every person hearing it the idea created by the original.

D'Almaine v. Boosey, Younge & C. Exch. 302; Daly v. Palmer, 6 Blatchf. 266, Fed. Cas. No. 3,552; Jollie v. Jacques, 1 Blatchf. 625, Fed. Cas. No. 7,437.

As a musical composition is wholly intended for the ear, musical copyright would cease to secure substantial protection to the composer if it did not protect him against the multiplication of every means of reproducing his music to the ear.

Story v. Holcombe, 4 McLean, 310, Fed. Cas. No. 13,497.

Messrs. **Charles S. Burton** and **John J. O'Connell** argued the cause, and, with Messrs. Munday, Evarts, & Adcock, and Wilcox & Brodek, filed a brief for appellee and respondent:

There never existed any common-law right of copyright in the United States; copyright in this country is the creature of statute, pure and simple.

Wheaton v. Peters, 8 Pet. 591, 664, 8 L. ed. 1055, 1081; Banks v. Manchester, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710.

Existing by virtue of statute only, the limitations of copyright are those which the statute fixes; or, more accurately speaking, its extent is only that which the statute gives.

Ewer v. Coxe, 4 Wash. C. C. 487, Fed. Cas. No. 4,584; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Perris v. Hexamer, 99 U. S. 674, 25 L. ed. 308.

The statutes creating and covering copyright must be strictly construed in all respects.

Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; Banks v. Manchester, supra; Bolles v. Outing Co. 175 U. S. 268, 44 L. ed. 158, 20 Sup. Ct. Rep. 94.

The first class of cases in which this rule of strict construction is manifested consists of cases involving questions relating to the formal requirements for obtaining and preserving copyright. The following are typical:

Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291; Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; Werckmeister v. American Lithographic Co. 117 Fed. 360; Tompkins v. Rankin, Fed. Cas. No. 14,090; Thompson v. Hubbard, supra.

A second class of cases in which the rule of strict construction of the statute is applied, in view of the strictly statutory character of the right, consists of those involving questions as to the classes of subject-matter which may obtain copyright protection, and the application of the statutory terms or conditions to the different classes; and the question whether the definitions of or limitations as to subject-matter are to be treated as flexible or as subject to extension in any direction. The following cases are significant:

Littleton v. Oliver Ditson Co. 62 Fed. 597; Wood v. Abbott, 5 Blatchf. 325, Fed. Cas. No. 17,938; Hills & Co. v. Austrich, 120 Fed. 862.

The third class of cases in which the rule of strict construction of the statute is applied, and the statutory right held limited in respect to the scope of the monopoly created, consists of those in which contention has been made for the judicial extension of the monopoly so as to include collateral, secondary, or derived presentations or embodiments of the intellectual product, and on which the right has been held not extensible, but, on the contrary, limited to the multiplication of copies.

Such secondary or derived embodiments or presentations include:

1. Translations.
2. Public performance.
3. Dramatizations.
4. Abridgments.
5. Embodiments of the substantive thought or idea of a work of art of one class, such as painting, in a work of art in another class, tableaux, wax miniatures, or vice versa.

Stowe v. Thomas, 2 Wall. Jr. 547, Fed. Cas. No. 13,514; Drone, Copyright, p. 91; Toole v. Young, L. R. 9 Q. B. 523; Reade v. Conquest, 9 C. B. N. S. 755, 31 L. J. C. P. N. S. 153; Tinsley v. Lacy, 1 Hem. & M. 747, 32 L. J. Ch. N. S. 537; Warne v. Seebohm, L. R. 39 Ch. Div. 73; Story v. Holcombe, 4 McLean, 306, Fed. Cas. No. 13,497; Lawrence v. Dana, 4 Cliff. 11, Fed. Cas. No. 8,136; Hanfstaengl v. Empire Palace, 63 L. J. Ch. N. S. 681, [1894] 3 Ch. 109, Affirmed in 64 L. J. Ch. N. S. 81; Hanfstaengl v. Empire Palace, 70 L. T. N. S. 459; Dicks v. Brooks, 43 L. T. N. S. 71, L. R. 15 Ch. Div. 22.

Musical compositions mentioned as the subject of copyright are tangible and legible embodiments of the intellectual product of the musician, and not the intangible intellectual product itself.

A "copy" in the sense of the statute is simply one of the multiples, not distinguished from "original."

Pierce & B. Mfg. Co. v. Werckmeister, 18 C. C. A. 431, 33 U. S. App. 399, 72 Fed. 54.

"Copies" which infringe a musical copyright must be tangible embodiments of the intellectual product of the composer in the same sense and for the same purpose as the tangible embodiment which constitutes the copyrighted "musical composition."

Baker v. Selden, 101 U. S. 99, 25 L. ed. 841; Corbett v. Woodward, L. R. 14 Eq. 407; Amberg File & Index Co. v. Smith, 27 C. C. A. 246, 53 U. S. App. 449, 82 Fed. 314, Affirming 78 Fed. 479; Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; Werckmeister v. Springer Lithographing Co. 63 Fed. 808; Falk v. Gast Lithograph & Engraving Co. 4 C. C. A. 648, 14 U. S. App. 15, 54 Fed. 890; Schumacher v. Wogram, 35 Fed. 210; Harper v. Shoppell, 23 Blatchf. 431, 26 Fed. 519, Affirmed in 28 Fed. 613; Hollinrake v. Truswell, 71 L. T. N. S. 419.

The protection designed to be afforded to the composer by copyright of a musical composition is only the monopoly of the multiplication and selling of copies.

Stephens v. Cady, 14 How. 529, 14 L. ed. 528; Stowe v. Thomas and Lawrence v. Dana, supra; Perris v. Hexamer, 99 U. S. 674, 25 L. ed. 308.

That the perforated sheets and other mechanical means of automatically producing music audibly are not infringements of copyrights upon the musical compositions which are thus audibly reproduced has been the conclusion of every court of England and America before which this question has ever come for decision.

Stern v. Rosey. 17 App. D. C. 562; Kennedy v. McTammany, 33 Fed. 584; Boosey v. Whight, 15 Times L. R. 322, [1899], 1 Ch. 836, 80 L. T. N. S. 561.

The French courts have decided that a music roll is not an infringement of the copyrighted sheet.

Massent & Puccini v. Pathe Freres, Feb. 1, 1905.

The supreme judicial court of Belgium has decided that a music roll is not an infringement of the copyrighted sheet.

Massent & Puccini v. Pathe Freres, May 2, 1907.

The only judicial decision holding that a mechanical device for reproducing musical sounds is an infringement of copyright is that of an Italian court, which is now on appeal.

Ricordi v. Gramaphone Co., Milan, July, 1906, Vol. 390, Judicial Acts, No. 931.

Mr. Albert H. Walker filed a brief for the Connorized Music Company.

Mr. George W. Pound filed a brief for the De Kleist Musical Instrument Manufacturing Company and the Rudolph Wurlitzer Company.

Mr. Justice **Day** delivered the opinion of the court:

These cases may be considered together. They are appeals from the judgment of the circuit court of appeals of the second circuit (77 C. C. A. 368, 147 Fed. 226), affirming the decree of the circuit court of the United States for the southern district of New York, rendered August 4, 1905 (139 Fed. 427), dismissing the bills of the complainant (now appellant) for want of equity. Motions have been made to dismiss the appeals, and a petition for writ of certiorari has been filed by appellant. In view of the nature of the cases the writ of certiorari is granted, the record on the appeals to stand as a return to the writs. Montana Min. Co. v. St. Louis Min. & Mill. Co. 204 U. S. App. 204, 51 L. ed. 444, 27 Sup. Ct. Rep. 254.

The actions were brought to restrain infringement of the copyrights of two certain musical compositions, published in the form of sheet music, entitled respectively, "Little Cotton Dolly" and "Kentucky Babe." The appellee, defendant below, is engaged in the sale of piano players and player pianos known as the "Apollo," and of perforated rolls of music used *in connection therewith. The [9] appellant, as assignee of Adam Geibel, the composer, alleged compliance with the copyright act, and that a copyright was duly obtained by it on or about March 17, 1897. The answer was general in its nature, and upon the testimony adduced a decree was rendered, as stated, in favor of the Apollo Company, defendant below, appellee here.

The action was brought under the provisions of the copyright act, § 4952 (U. S. Comp. Stat. Supp. 1907, p. 1021), giving to the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same. The circuit courts of the United States are given jurisdiction under § 4970 (U. S. Comp. Stat. 1901, p. 3416) to grant injunctions according to the course and principles of courts of equity in copyright cases. The appellee is the manufacturer of certain musical instruments adapted to be used with perforated rolls. The testimony discloses that certain of these rolls, used in connection with such instruments, and being connected with the mechanism to which they apply, reproduce in sound the melody recorded in the two pieces of music copyrighted by the appellant.

The manufacture of such instruments and the use of such musical rolls has developed rapidly in recent years in this country and abroad. The record discloses that in the year 1902 from seventy to seventy-five thousand of such instruments were in use in the United States and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.

It is evident that the question involved in the use of such rolls is one of very considerable importance, involving large property interests and closely touching the rights of composers and music publishers. The case was argued with force and ability, orally and upon elaborate briefs.

Without entering into a detailed discussion [10] of the mechanical *construction of such instruments and rolls, it is enough to say that they are what has become familiar to the public in the form of mechanical attachments to pianos, such as the pianola, and the musical rolls consist of perforated sheets, which are passed over ducts connected with the operating parts of the mechanism in such manner that the same are kept sealed until, by means of perforations in the rolls, air pressure is admitted to the ducts which operate the pneumatic devices to sound the notes. This is done with the aid of an operator, upon whose skill and experience the success of the rendition largely depends. As the roll is drawn over the tracker board the notes are sounded as the perforations admit the atmospheric pressure, the perforations having been so arranged that the effect is to produce the melody or tune for which the roll has been cut.

Speaking in a general way, it may be said that these rolls are made in three ways. First. With the score or staff notation before him the arranger, with the aid of a rule or guide and a graduated schedule, marks the position and size of the perforations on a sheet of paper to correspond to the order of notes in the composition. The marked sheet is then passed into the hands of an operator who cuts the apertures, by hand, in the paper. This perforated sheet is inspected and corrected, and when corrected is called "the original." This original is used as a stencil and by passing ink rollers over it a pattern is prepared. The stenciled perforations are then cut, producing the master or templet. The master is placed in the perforating machine and reproductions thereof obtained, which are the perforated rolls in question. Expression marks are separately copied on the perforated music sheets by means of rubber stamps. Second. A perforated music roll made by another manufacturer may be used from which to make a new record. Third. By playing upon a piano to which is attached an automatic recording device producing a perforated matrix from which a perforated music roll may be produced.

It is evident, therefore, that persons skilled in the art can take such pieces of sheet music in staff notation, and, by means *of the proper instruments, make drawings [11] indicating the perforations, which are afterwards outlined and cut upon the rolls in such wise as to reproduce, with the aid of the other mechanism, the music which is recorded in the copyrighted sheets.

The learned counsel for the parties to this action advance opposing theories as to the nature and extent of the copyright given by statutory laws enacted by Congress for the protection of copyright, and a determination of which is the true one will go far to decide the rights of the parties in this case. On behalf of the appellant it is insisted that it is the intention of the copyright act to protect the intellectual conception which has resulted in the compilation of notes which, when properly played, produce the melody which is the real invention of the composer. It is insisted that this is the thing which Congress intended to protect, and that the protection covers all means of expression of the order of notes which produce the air or melody which the composer has invented.

Music, it is argued, is intended for the ear as writing is for the eye, and that it is the intention of the copyright act to prevent the multiplication of every means of reproducing the music of the composer to the ear.

On the other hand, it is contended that while it is true that copyright statutes are intended to reward mental creations or conceptions, that the extent of this protection is a matter of statutory law, and that it has been extended only to the tangible results of mental conception, and that only the tangible thing is dealt with by the law, and its multiplication or reproduction is all that is protected by the statute.

Before considering the construction of the statute as an independent question the appellee invokes the doctrine of *stare decisis* in its favor and it is its contention that in all the cases in which this question has been up for judicial consideration it has been held that such mechanical producers of musical tones as are involved in this case have not been considered to be within the protection of the copyright act; and that, if within the power of Congress to extend protection to such subjects, *the uni- [12] form holdings have been that it is not intended to include them in the statutory protection given. While it may be that the decisions have not been of that binding character that would enable the appellee to claim the protection of the doctrine of *stare decisis* to the extent of precluding further consideration of the question, it must be admitted that the decisions, so far as brought to our attention in the full discussion had at the bar and upon the briefs, have been uniformly to the effect that these perforated rolls operated in connection with mechanical devices for the production of music are not within the copyright act. It was so held in Kennedy v. McTammany, 33 Fed. 584. The decision was written by Judge Colt in the first circuit; the case was subsequently brought to this court, where it was dismissed for failure to print the record. 145 U. S. 643, 36 L. ed. 853, 12 Sup. Ct. Rep. 983. In that case the learned judge said:

"I cannot convince myself that these perforated strips of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument."

Again the matter was given careful consideration in the court of appeals of the District of Columbia in an opinion by Justice Shepard (Stern v. Rosey, 17 App. D. C. 562), in which that learned justice, speaking for the court, said:

"We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the appellants, as the copy or publication of the same within the meaning of the act. The ordinary signification of the words 'copying,' 'publishing,' etc., cannot be stretched to include it.

"It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph.

[13] *"Conveying no meaning, then, to the eye of even an expert musician, and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared wax cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box, and this, though in use at and before the passage of the copyright act, has never been regarded as infringing upon the copyrights of authors and publishers."

The question came before the English courts in Boosey v. Whight [1899] 1 Ch. 836, 80 L. T. N. S. 561, and it was there held that these perforated rolls did not infringe the English copyright act protecting sheets of music. Upon appeal Lindley, Master of the Rolls, used this pertinent language [1900] 1 Ch. 122, 81 L. T. N. S. 265:

"The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music,—*i. e.*, of the bars, notes, and other printed words and signs on those sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

"The plaintiffs' rights are not infringed except by an unauthorized copy of their 'sheets of music.' We need not trouble ourselves about authority from the plaintiffs; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiffs' sheets of music.

"The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or *enable the machines or instruments to produce the music indicated on the plaintiffs' sheets. [In this sense the defendant's perforated rolls have been copies from the plaintiffs' sheets.] [14]

"But is this the kind of copying which is prohibited by the copyright act; or rather, is the perforated sheet, made as above mentioned, a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within [the meaning of] the copyright act? A sheet of music is treated in the copyright act as if it were a book or sheet of letter press. Any mode of copying such a thing, whether by printing, writing, photography, or by some other method not yet invented, would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to play an instrument from a sheet of music which appears to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing."

Since these cases were decided Congress has repeatedly had occasion to amend the copyright law. The English cases, the decision of the District of Columbia court of appeals, and Judge Colt's decision must have been well known to the members of Congress; and although the manufacture of mechanical musical instruments had not grown to the proportions which they have since attained, they were well known, and the omission of Congress to specifically legislate concerning them might well be taken to be an acquiescence in the judicial construction given to the copyright laws.

This country was not a party to the Berne convention of 1886, concerning international copyright, in which it was specifically provided:

"It is understood that the manufacture and sale of instruments serving to reproduce mechanically the airs of music borrowed from the private domain are not considered as constituting musical infringement."

But the proceedings of this convention [15]were doubtless well *known to Congress. After the Berne convention the act of March 3, 1891, was passed. Section 13 of that act provides ([26 Stat. at L. 1110, chap. 565] U. S. Comp. Stat. 1901, p. 3417):

"Sec. 13. That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; and when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this act may require."

By proclamation of the President July 1, 1891 [27 Stat. at L. 981], the benefit of the act was given to the citizens of Belgium, France, British possessions, and Switzerland, which countries permitted the citizens of the United States to have the benefit of copyright on the same basis as the citizens of those countries. On April 15, 1892, the German Empire was included. [27 Stat. at L. 1021.] On October 31, 1892, a similar proclamation was made as to Italy. [27 Stat. at L. 1043.] These countries were all parties to the Berne convention.

It could not have been the intention of Congress to give to foreign citizens and composers advantages in our country which, according to that convention, were to be denied to our citizens abroad.

In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory. Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Banks v. Manchester, 128 U. S. 244, 253, 32 L. ed. 425, 429, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123, 151, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710; American Tobacco Co. v. Werckmeister, 207 U. S. 284, ante, 208, 28 Sup. Ct. Rep. 72.

Musical compositions have been the subject of copyright protection since the statute of February 3, 1831 (4 Stat. at L. 436, chap. 16), and laws have been passed including them since that time. *When we[16] turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. Section 4956 (U. S. Comp. Stat. 1901, p. 3407) provides that two copies of a book, map, chart, or musical composition, etc., shall be delivered at the office of the Librarian of Congress. Notice of copyright must be inserted in the several copies of every edition published, if a book, or, if a musical composition, etc., upon some visible portion thereof. Section 4962, copyright act ([18 Stat. at L. 78, chap. 301] U. S. Comp. Stat. 1901, p. 3411). Section 4965 (U. S. Comp. Stat. 1901, p. 3414) provides in part that the infringer "shall forfeit . . . every sheet thereof, and . . . one dollar for every sheet of the same found in his possession," etc., evidently referring to musical compositions in sheets. Throughout the act it is apparent that Congress has dealt with the concrete, and not with an abstract, right of property in ideas or mental conceptions.

We cannot perceive that the amendment of § 4966 by the act of January 6, 1897 ([29 Stat. at L. 481, chap. 4] U. S. Comp. Stat. 1901, p. 3415), providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, can have the effect of enlarging the meaning of the previous sections of the act which were not changed by the amendment. The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions, so as to prohibit their public performance. There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers. This amendment was evidently passed for the specific purpose referred to, and is entitled to little consideration in construing the meaning of the terms of the act theretofore in force.

[17] *What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing. A definition was given by Bailey, J., in West v. Francis, 5 Barn. & Ald. 743, quoted with approval in Boosey v. Whight, supra. He said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."

Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be "a written or printed record of it in intelligible notation." It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Also it may be noted in this connection that if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds, or the record of the graphophone, or to the [18] pipe organ operated by *devices similar to those in use in the pianola. All these instruments were well known when these various copyright acts were passed. Can it be that it was the intention of Congress to permit them to be held as infringements and suppressed by injunctions?

After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notations are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read this record as he could a piece of music written in staff notation. But the weight of the testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which, to those skilled in the art, conveys, by reading, in playing or singing, definite impressions of the melody.

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative, and not to the judicial, branch of the government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.

The decrees of the Circuit Court of Appeals are affirmed.

Mr. Justice **Holmes**, concurring specially:

In view of the facts and opinions in this country and abroad to which my brother Day has called attention, I do not feel *justified [19] in dissenting from the judgment of the court, but the result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand. Therefore I desire to add a few words to what he has said.

The notion of property starts, I suppose, from confirmed possession of a tangible object, and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time and therefore, I may remark, in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

The ground of this extraordinary right is that the person to whom it is given has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation, although, but for the invention and the statute, anyone would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. One would expect the protection to be coextensive not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its [20] meaning and worth. A *musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose. What license may be implied from a sale of the copyrighted article is a different and harder question, but I leave it untouched, as license is not relied upon as a ground for the judgment of the court.

MARY B. DUN, Robert Dun Douglass, Francis L. Minton, and Walter D. Buchanan, Executors and Trustees under the Will of Robert G. Dun, Deceased, Appts.
v.
LUMBERMEN'S CREDIT ASSOCIATION, William Clancy, and Burton W. Stadden.

(See S. C. Reporter's ed. 20-24.)

Appeal — review of facts — concurrent findings.

1. Concurrent findings of facts of the courts below in a suit in equity will not be disturbed by the Federal Supreme Court on appeal unless clearly erroneous.

Injunction — in copyright cases.

2. Injunctive relief will not be granted to the proprietor of a mercantile agency publishing at intervals a copyrighted book giving information as to the business, capital, and credit rating of merchants, manufacturers, and traders, because of the improper use of such work with respect to a few names by a corporation publishing a similar book limited to those engaged in lumber and kindred trades, where the latter book contains about 60,000 names, 25 per cent more than the former, and the subjects of information given by it concerning the persons named are six times as many as are given by the other work.

[No. 138].

Argued January 31, 1908. Decided February 24, 1908.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed, with an immaterial modification, a judgment of the Circuit Court for the Northern District of Illinois, dismissing, for want of equity, the bill in a copyright infringement suit. Affirmed.

See same case below, 75 C. C. A. 241, 144 Fed. 83.

The facts are stated in the opinion.

Messrs. **John O'Connor** and **Charles K. Offield** argued the cause, and, with Messrs. Thomas M. Hoyne and Henry S. Towle, filed a brief for appellants:

A compiler of a map, guidebook, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, is bound to do for himself that which was done by the first compiler. He is not entitled to take one word of the information without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information.

Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; List Pub. Co. v. Keller, 30 Fed. 772; Kelly v. Morris, L. R. 1 Eq. 697; Morris v. Ashbee, L. R. 7 Eq. 34; Morris v. Wright, L. R. 5 Ch. 279; Banks v. McDivitt, 13 Blatchf. 163, Fed. Cas. No. 961; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Dun v. International Mercantile Agency, 127 Fed. 173; Sampson & M. Co. v. Seaver-Radford Co. 134 Fed. 890.

The existence of the same errors in the two publications affords one of the surest tests of copying. The improbability that both compilers would have made the same mistake if both had derived their information from independent sources suggests such a cogent presumption of copying by the later compiler from the first, that it can be overcome only by clear evidence to the contrary; and the burden of proof is on the defendants to show, if they can, what part of their book, if any, was not copied from complainant's book.

Mawman v. Tegg, 2 Russ. Ch. 393; Spiers v. Brown, 31 L. T. 16; Chicago Dollar Directory Co. v. Chicago Directory Co. 14 C. C. A. 213, 24 U. S. App. 636, 66 Fed. 977; West Pub. Co. v. Lawyers' Co-op. Pub. Co. 35 L.R.A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756; Drone, Copyright, pp. 428, 515; Longman v. Winchester, 16 Ves. Jr. 269; George T. Bisel Co. v. Welsh, 131 Fed. 564.

Where the evidence shows that the defendant has, to some extent, appropriated the information of plaintiff in compiling his book, then he must segregate the pirated from the original matter, or the court will restrain the publication of the whole of defendant's work.

Chicago Dollar Directory Co. v. Chicago Directory Co. supra; Trow Directory, Printing & Bookbinding Co. v. Boyd, 97 Fed. 586.

Where a material piracy is shown, plaintiff will not be required to prove actual damages to maintain his right to an injunction.

Drone, Copyright, p. 521; Campbell v. Scott, 11 Sim. 39; Tinsley v. Lacy, 32 L. J. Ch. N. S. 539; Reed v. Holliday, 19 Fed. 327; Fishel v. Lueckel, 53 Fed. 499.

Complainant, having proved infringement, is entitled to an interlocutory decree and to an accounting for damages.

Sanborn Map & Pub. Co. v. Dakin Pub. Co. 39 Fed. 266; Belford, C. & Co. v. Scribner, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734; Falk v. Gast Lithograph & Engraving Co. 4 C. C. A. 648, 14 U. S. App. 15, 54 Fed. 890.

Where a part of the infringing work is pirated and a part of it is original, and the court cannot determine from the evidence how much of the profits of the work were derived from the pirated portion and how much from the original portion, the defendant must answer for the entire profits.

Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Belford, C. & Co. v. Scribner, supra.

A party prosecuting his legal right in a legal manner cannot be called to account for the motives which prompt him to action.

Dickerman v. Northern Trust Co. 176 U. S. 181, 190, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; McMullen v. Ritchie, 64 Fed. 261; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 177; Morris v. Tuthill, 72 N. Y. 575; Davis v. Flagg, 35 N. J. Eq. 491; Dering v. Winchelsea, 1 Cox, Ch. Cas. 318.

Messrs. **Charles O. Loucks** and **Fred H. Atwood** argued the cause, and, with Mr. Frank H. Pease, filed a brief for appellees:

Where one book is alleged to be an infringement of another, piracy should be shown from a comparison of the two books.

7 Am. & Eng. Enc. Law, 2d ed. p. 595; Boucicault v. Fox, 5 Blatchf. 92, Fed. Cas. No. 1,691.

Similar errors and mistakes are not necessarily evidence of piracy.

Mead v. West Pub. Co. 80 Fed. 380.

The author or publisher of a book or compilation may make use of another's book as a guide to authorities, for supplying suggestions as to the treatment of the subject, and for the purpose of checking the accuracy of his own work, and supplying omissions therein.

Drone, Copyright, p. 396; Kelly v. Morris, L. R. 1 Eq. 697; Morris v. Wright, L. R. 5 Ch. 279; Simms v. Stanton, 75 Fed. 6; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Pike v. Nicholas, L. R. 5 Ch. 263; List Pub. Co. v. Keller, 30 Fed. 772; Sampson & M. Co. v. Seaver-Radford Co. 134 Fed. 890; Jarrold v. Houlston, 3 Kay & J. 708; Macgillivray, Copyright, 103; Mead v. West Pub. Co. supra; Dun v. International Mercantile Agency, 127 Fed. 173; Moffatt v. Gill, 86 L. T. N. S. 465.

A material and substantial part of the prior work must be taken in order to constitute piracy.

Drone, Copyright, pp. 413, 523; 7 Am. & Eng. Enc. Law. pp. 572, 573, 578; Chatterton v. Cave, L. R. 10 C. P. 572; Drury v. Ewing, 1 Bond, 540, Fed. Cas. No. 4,095; Lewis v. Fullarton, 2 Beav. 11; Mawman v Tegg, 2 Russ. Ch. 394; Bohn v. Bogue, 10 Jur. 421; Spottiswoode v. Clarke, 2 Phil. Ch. 154; M'Neill v. Williams, 11 Jur. 344; Webb v. Powers, 2 Woodb. & M. 497, Fed Cas. No. 17,323; Greene v. Bishop, 1 Cliff. 203, Fed. Cas. No. 5,763; Baily v. Taylor, 1 Russ. & M. 73; Sweet v. Cater, 11 Sim. 572; Scribner v. Stoddart, 8 W. N. C. 61, Fed. Cas. No. 12,561; Hanson v. Jaccard Jewelry Co. 32 Fed. 202; Goldmark v. Kreling, 25 Fed. 349; Ainsworth v. Bentley, 14 Week. Rep. 630.

*Mr. Justice **Moody** delivered the opinion of the court: **[21]**

The appellants are the proprietors of a mercantile agency which publishes at intervals a copyrighted book of reference containing lists of merchants, manufacturers, and traders in the United States and the North American British possessions. The book contains information as to the business, capital, and credit rating of those who are enumerated in it. The information is obtained at large expense and is useful to those who are engaged in trade and commerce, who, in large number, subscribe to the privilege of consulting copies of it, which are furnished but not sold to them. The appellee is a corporation engaged in preparing and publishing a similar book, limited, however, to those engaged in the lumber and kindred trades. The book is called the Reference Book of the Lumbermen's Credit Association. The appellants brought in the circuit court of the United States a suit in equity, alleging an infringement of their copyright by the appellee, and praying for an injunction, for an account, and for general relief. After hearing evidence, the circuit court entered a decree dismissing the bill for want of equity, which, with an immaterial modification, was affirmed by the circuit court of appeals. An appeal to this court was then taken.

Both the courts below made findings of fact, which are in substantial agreement. Those findings best appear by quotations from the opinions which follow. The judge of the circuit court said:

"From the evidence it appears that defendant admits using complainants' book, but insists that it did so merely for the purpose of comparison and for information as to names, but that in every case it, at great cost, procured original and independent information as to the rating and other facts contained in defendants' book. There are in respondents' reference book more than 60,000 names. The evidence shows that there are on hand more than 1,000,000 reports, replies to inquiries, etc. It further appears that defendants receive large [22]*numbers of newspapers, magazines, trade journals, and bulletins; that they use traveling men, lumber dealers, agents, lawyers, justices of the peace, mercantile associations, railroad companies, and the clippings sent out by a number of clipping bureaus. At times defendants' mail reaches approximately 2,000 pieces of mail per day. A large force of employees and large offices are required in the management of the business.

"On the other hand, a number of instances are disclosed in the evidence which have strong tendency to establish the charge that defendants have used some of complainants' copyright material in making their book. The same mistakes occur in each. In one case complainants' witness swears to an entirely fictitious item placed in complainants' book as a test, which was duly appropriated by defendants. In regard to a number of items said to be duplicated, defendants show original investigation. Still, when all the explanations are considered, it seems to be fairly established that defendants did take some of the items complained of. Generally such *indicia* is held to indicate a substantial theft of copyright property; but, taking all the evidence together, I am satisfied that the items selected as tests constitute the bulk of all the items taken, and that they are of small moment in comparison with the whole.

"Defendants' book gives information on 113 subjects, complainants on 19. When we consider that the matter consists of names and other *data* which, when true, must be the same in any report, and that in many cases the source of information must often be the same with both the parties thereto, it would seem to be just to lay down a different rule from that which obtains in cases where syllabi and summaries of law and fact are appropriated. Here seems to be no attempt to coin money out of another's labor. It is clearly a case in which the matter taken must be substantial and such as to really work injury to complainants.

"When we take note of the character of the items alleged to be appropriated on the one hand and the consequences of *granting [23] the injunction prayed for, it would be an unwarrantable use of the power of the court to do so."

The circuit court of appeals said:

"The question is one of fact, to be solved by a study of the evidence. From our examination we concur in the conclusion of the circuit court. The large features are that appellees' book of about 60,000 names contains over 16,000 (and over 400 towns) that are not in Dun's; that of the names in common only about 15 per cent have similar capital ratings, that of the names with similar capital ratings a large proportion are classified differently respecting the particular businesses; and that six times as many different classes of information are given in appellees' book as in Dun's. On every page of appellees' book the names that are not given in Dun's and the names regarding which the information does not exceed or substantially vary from that given in Dun's, bear the relation of three to one. These features are an ocular confirmation of appellees' testimony regarding the long-continued, elaborate, and comprehensive system of obtaining independent information. It is futile to claim that such a system, producing 25 per cent more names than Dun, and six times as many subjects of information concerning the persons named, is kept up at great expense merely as a cloak. It may be that the evidence would require a finding that, with respect to a few names, an improper use of Dun's book was made by an agent or correspondent of appellees. But the proportion is so insignificant compared with the injury from stopping appellees' use of their enormous volume of independently acquired information, that an injunction would be unconscionable. In such cases the copyright owner should be remitted to his remedy at law. Drone, Copyright, p. 413; Mead v. West Pub. Co. (C. C.) 80 Fed. 380." [75 C. C. A. 242, 144 Fed. 85.]

We cannot, as we are asked to do by the appellants, reverse the findings of fact made by the circuit court and the circuit court of appeals. Successively considering the same evidence, the two courts agree in the findings. In such a case in a suit *in equity the [24] findings will not be disturbed by this court, unless they are shown to be clearly erroneous. Towson v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; Brainard v. Buck, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259. An examination of the voluminous testimony shows that it tended to sustain the findings, and that, to say the least, there is no ground for saying that the conclusions drawn from the evidence were clearly erroneous.

Accepting as true the facts found, we think the discretion of the court was wisely exercised in refusing an injunction and remitting the appellants to a court of law to recover such damage as they might there prove that they had sustained. The reasons for this conclusion are tersely stated in the opinion of the court of appeals, which we have quoted, and we approve them.

Judgment affirmed.

CLARENCE H. VENNER, Appt.,
v.
GREAT NORTHERN RAILWAY COMPANY and James J. Hill.

(See S. C. Reporter's ed. 24-35.)

Courts — jurisdiction of Federal circuit court — diverse citizenship.

1. The corporate defendant and the complaining stockholder will not be aligned on the same side of the controversy for the purpose of determining the jurisdiction of a Federal circuit court, invoked on the ground of diverse citizenship, because it may be for the financial interests of the corporation that the suit shall succeed, where the corporation unites with the other defendant in resisting the claim of illegality and fraud, and both are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action.

Courts — jurisdiction of Federal circuit court — stockholder's suit.

2. The failure of a complaining stockholder, in an action by him against the corporation, to bring his case within the terms of equity rule 94, while justifying the dismissal of the bill for want of equity, does not defeat the jurisdiction of the Federal circuit court over the suit, if the requisite diversity of citizenship exists, the jurisdictional amount is involved, and defendant is properly served with process within the district.

[No. 485.]

Submitted January 20, 1908. Decided February 24, 1908.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment dismissing a bill in a stockholder's suit. Affirmed.

See same case below on demurrer, 153 Fed. 408.

The facts are stated in the opinion.

Messrs. **Abram J. Rose**, **George H. Yeaman**, and **Alfred C. Petté** submitted the cause for appellant. Mr. Stephen M. Yeaman was on the brief:

Because of the requirements of rule 94, in stockholders' actions the question of jurisdiction on the ground of diversity of citizenship is a preliminary one; and, if the conditions prescribed are not shown to exist, the corporation in whose behalf the action is brought will be aligned on the side of the complainant in the controversy; and if, after such alignment, the diversity of citizenship required for jurisdiction does not exist, the action will be dismissed if originally brought in the United States court, or remanded if originally brought in a state court, and removed therefrom into a Federal court.

Elkins v. Chicago, 119 Fed. 957; Kemmerer v. Haggerty, 139 Fed. 693; Dickinson v. Consolidated Traction Co. 114 Fed. 232; Waller v. Coler, 125 Fed. 821; Groel v. United Electric Co. 132 Fed. 252; Gage v. Riverside Trust Co. 156 Fed. 1002.

This case cannot be taken out of the application of the wholesome rule that, for the purpose of determining jurisdiction on the ground of diverse citizenship, the real party in interest will be aligned on the part of the complainant.

Browne v. Strode, 5 Cranch, 303, 3 L. ed. 108; McNutt v. Bland, 2 How. 9, 11 L. ed.

NOTE.—As to diversity of citizenship as ground for Federal jurisdiction—see notes to Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; M'Donald v. Smalley, 7 L. ed. U. S. 287; Roberts v. Lewis, 36 L. ed. U. S. 579; Shipp v. Williams, 10 C. C. A. 249; and Mason v. Dullagham, 27 C. C. A. 298.

159; Maryland use of Markley v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105.

The circuit court had no original jurisdiction of the case, and could not acquire jurisdiction by removal.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. St. Rep. 563; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654; Baxter, S. & S. Const. Co. v. Hammond Mfg. Co. 154 Fed. 992; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Yellow Aster Min. & Mill. Co. v. Crane Co. 80 C. C. A. 566, 150 Fed. 580.

Mr. **Julius F. Workum** submitted the cause for appellees:

The only question for review is whether there was a diversity of citizenship between the parties, as that was the ground of jurisdiction.

Chicago v. Mills, 204 U. S. 321, 326, 51 L. ed. 504, 508, 27 Sup. Ct. Rep. 286; Louisville Trust Co. v. Knott, 191 U. S. 225, 233, 234, 48 L. ed. 159, 161, 162, 24 Sup. Ct. Rep. 119; Henessy v. Richardson Drug Co. 189 U. S. 25, 33, 47 L. ed. 697, 698, 23 Sup. Ct. Rep. 532; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 432, 47 L. ed. 245, 246, 23 Sup. Ct. Rep. 211; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; United States v. Rider, 163 U. S. 132, 139, 41 L. ed. 101, 104, 16 Sup. Ct. Rep. 983; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; United States v. Jahn, 155 U. S. 109, 113, 39 L. ed. 87, 89, 15 Sup. Ct. Rep. 39; Schunk v. Moline, M. & S. Co. 147 U. S. 500, 507, 37 L. ed. 255, 259, 13 Sup. Ct. Rep. 416; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Rosenbaum v. Bauer, 120 U. S. 459, 30 L. ed. 747, 7 Sup. Ct. Rep. 633.

The mere fact that the defendant corporation might be benefited by the suit does not force its alignment with complainant, unless there is really no controversy between the complainant and the railroad company.

Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; Central R. Co. v. Mills, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 1 Sup. Ct. Rep. 190.

The case at bar, therefore, resolves itself into an inquiry whether there was a collusion between the parties to create a cause of which the Federal courts would have jurisdiction.

Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 452, 26 L. ed. 827, 829.

Complainant purchased his stock just before bringing suit, and between five and six years after the alleged facts of which he complained, and he could not, and did not, allege that he was a stockholder at the time of their occurrence. Under Hawes v. Oakland, and under the 94th rule of equity, complainant cannot maintain the action. This defect of title did not create any Federal jurisdictional question.

Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 35, 45 L. ed. 410, 412, 413, 21 Sup. Ct. Rep. 251.

Mr. Justice **Moody** delivered the opinion of the court:

The appellant, a citizen of New York, brought this suit in equity in the supreme court of New York against the defendant railroad, a citizen of Minnesota, and the other defendant, its president, also a citizen of Minnesota. The complaint set forth in substance the following facts upon which the right to relief was claimed: The plaintiff was a stockholder in the defendant railroad at the time of the beginning of the *suit in 1906. Whether or not he was a [29] stockholder at the time when the alleged wrongful acts were committed by the defendants does not appear by any allegation in the complaint. The defendant James J. Hill was a director and the president of the other defendant, the Great Northern Railway Company, and that railroad and its board of directors were under his absolute control. While holding these offices and exercising this control, in 1900 and 1901, Hill purchased, or caused to be purchased for his use, stock of the Chicago, Burlington, & Quincy Railroad Company of the par value of $25,000,000, at an average price of $150 a share. This purchase was made with the design of selling the stock at a higher price to the company of which he was a director and president. Subsequently, in 1901, while still holding his offices in the Great Northern Railway and exercising the same control over that corporation, he sold to it a large amount of the stock of the Chicago, Burlington, & Quincy Railroad company owned by him, and made an unlawful profit of $10,000,000 on the transaction. Before bringing this suit the plaintiff demanded of the Great Northern Railway Company that it bring suit against Hill to compel him to account for and pay over to it the wrongful profit which he had obtained. The railroad refused to comply with this demand, and thereupon the plaintiff brought this suit as a stockholder, in his own behalf, and in the behalf and for the benefit of other stockholders similarly situated. The prayer was that Hill should account for his profit and pay it to the Great Northern Railway Company with interest, and for general relief. On the defendants' petition the case was removed to the United States circuit court for the southern district of New York, on the ground of diversity of citizenship of the plaintiff and the defendants. In that court the plaintiff was ordered to "replead the complaint herein according to the forms and practice prevailing in equity." This was done on November 9, 1906. The new complaint set forth the facts in greater detail and with some variations, but its substance and effect [30]was *similar to that of the first complaint. The complaint did not conform to the requirements of the 94th equity rule, relating to suits of this nature, in that it failed to allege that the plaintiff was a shareholder at the time of the transactions of which he complains, or that his shares had devolved on him since by operation of law, or that the suit was not collusive, or the particulars of his efforts to procure action by the corporation defendant. The defendants then demurred separately to the bill, and the defendant Hill subjoined to his demurrer an affidavit denying every allegation in it tending to show wrongful conduct on his part. Thereafter the plaintiff moved to remand the cause to the state court on the ground that the circuit court was without jurisdiction over it. This motion was denied. The demurrer was sustained and the bill dismissed. The correctness of the ruling on the demurrer and the dismissal is not before us. The case comes here on direct appeal from the circuit court on the question of jurisdiction alone, certified in the following terms: "Now, therefore, the court hereby certifies to the Supreme Court of the United States the question of jurisdiction which has arisen upon the aforesaid motion to remand and the demurrers to the complaint, to wit: Whether or not the complainant's amended bill of complaint showed that there was such diversity of citizenship between the party complainant and the parties defendants in this cause as would be sufficient, under the provisions of the United States Revised Statutes, to confer jurisdiction upon the United States circuit court for the southern district of New York of this cause, and whether this cause, as brought in the supreme court of the state of New York, was one over which this court would have had original jurisdiction, and was therefore removable into this court."

We consider nothing but the question of jurisdiction, and express no opinion upon the decision upon the demurrer, which is not properly here. Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Hennessy v. *Richardson Drug Co. 189 U. S. [31] 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286.

The cause was removable to the circuit court by the defendants if it was one of which that court was given jurisdiction. 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251. The only ground of original jurisdiction or of removal was that the suit was a controversy between citizens of different states. In that case Congress has given the circuit court jurisdiction over it, with certain limitations not material here. 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508. The plaintiff contends that the circuit court was without jurisdiction of the cause, and should therefore have remanded it to the state court, for two reasons: First, because, upon a proper alignment of the parties, there was not a controversy between citizens of different states. Second, because the cause of action, as disclosed by the pleadings, showed that the circuit court had no jurisdiction over the subject-matter. These reasons are entirely independent of each other and require separate consideration. First, was there a controversy between citizens of different states? As the parties were arranged by the plaintiff himself, on the face of the record there was a diversity of citizenship. The plaintiff was a citizen of New York and the two defendants were citizens of Minnesota. But the plaintiff insists that, by looking through the superficial aspects of the controversy to its real substance, it is seen that the railway company's interest is adverse to that of the other defendant, and the same as that of the plaintiff, and that therefore, for the purpose of determining the jurisdiction, the defendant railroad should be regarded as a plaintiff. If this should be done there would be a citizen of Minnesota, a plaintiff, and another citizen of Minnesota, a defendant, and the diversity of citizenship which is indispensable to the jurisdiction of the circuit court would no longer exist. Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy [32] *really place them, and then may determine the jurisdictional question in view of this alignment. Removal Cases, 100 U. S. 457, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Harter Twp. v. Kernochan, 103 U. S. 562, 566, 26 L. ed. 411, 412; Wilson v. Oswego Twp. 151 U. S. 56, 63, 38 L. ed. 70, 73, 14 Sup. Ct. Rep. 259; Merchants' Cotton Press Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 385, 38 L. ed. 195, 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Evers v. Watson, 156 U. S. 527, 532, 39 L. ed. 520, 522, 15 Sup. Ct. Rep. 430. If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; Central R. Co. v. Mills, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; Groel v. United Electric Co. 132 Fed. 252; and see Chicago v. Mills, supra. The case of Doctor v. Harrington is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the circuit court against the corporation and Harrington, another stockholder, "who directed the management of the affairs of the corporation, dictated its policy, and selected its directors." It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interests was the same as that of the plaintiff, should be regarded as a [33] plaintiff. *The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court." There was therefore in the case at bar the diversity of citizenship which confers jurisdiction.

Second. Did the circuit court have jurisdiction of the subject-matter of the litigation? It has already been shown that the plaintiff in his petition did not bring this case within the terms of the 94th rule in equity, which is printed in the margin.† It may be noted that the plaintiff in Doctor v. Harrington complied with the requirements of the rule. It is argued that a compliance with that rule is essential to the jurisdiction, and that a controversy of the general nature contemplated by the rule is beyond the jurisdiction of the circuit court unless the plaintiff shows the existence of all the facts which the rule makes indispensable to his success in the suit. But this argument overlooks the purpose and nature of the rule. The rule simply expresses the principles which this court, after a review of the authorities, had declared in Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827, *to be applicable in the decision of a [34] stockholder's suit of the kind now under consideration. Neither the rule nor the decision from which it was derived deals with the question of the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised. If a controversy of this general nature is brought in the circuit court and the necessary diversity of citizenship exists, but, upon the pleadings or the proof, it appears that the plaintiff has not shown a case within the decision in Hawes v. Oakland, or the rule of court declaratory of that decision, the bill should be dismissed for want of equity, and not for want of jurisdiction. The dismissal of the bill would not be the denial but the assertion and exercise of jurisdiction. So it was that in Hawes v. Oakland the demurrer was sustained and the bill dismissed, not for want of jurisdiction, but, in the words of the court (p. 462), "because the appellant shows no standing in a court of equity,—no right in himself to prosecute this suit." The same order was made in Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833, and Quincey v. Steel, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520. This very question was considered by the court in Illinois C. R. Co. v. Adams, 180 U. S., where it said, p. 34, 45 L. ed. 412, 21 Sup. Ct. Rep. 253: "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one state, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain quasi jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the circuit courts. It may undoubtedly be shown in defense that plaintiff has no right, under the allegations of his bill or the facts of the case, to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that [35] the plaintiff *had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no interest in the cause of action, can maintain a suit in his or her own name: but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, and Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497, that it was not a question of the jurisdiction of the circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the 94th rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case." These observations may not have been strictly necessary to the disposition of the case, but they declare the true purpose and effect of the rule. The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States. Congress has given to the circuit courts jurisdiction of all suits of a civil nature (in which the matter in dispute is of a certain value) where "there shall be a controversy between citizens of different states,"—language taken from that part of the Constitution which defines the judicial power. There was such a controversy in the case at bar, and the circuit court had cognizance of it.

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†Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law: and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

The judgment of the Circuit Court is **affirmed.**

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*THOMAS BATTLE, Plff. in Err., [36]
v.
UNITED STATES.

(See S. C. Reporter's ed. 36-39.)

Courts — conflict of jurisdiction — crime committed on land ceded for postoffice.

1. A murder committed upon land bought by the United States in the city of Macon, Georgia, on which it is building a postoffice and courthouse, and over which the state has ceded jurisdiction, is made an offense against the United States, justiciable in the Federal courts, by U. S. Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627, making it a capital offense to commit murder within any fort, arsenal, dockyard, or in any other place or district of country under the exclusive jurisdiction of the United States.

Appeal — refusal of requested instructions.

2. Requested instructions upon the law of justifiable homicide and involuntary hom-

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NOTE.—As to conflict of jurisdiction between Federal and state courts—see note to Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356.

icide are properly refused where, according to the testimony of the accused, the death was due to an accident, and, according to all the other evidence, was caused by an intentional and unjustified assault with a deadly weapon.

Trial — refusal of requested instructions.

3. A requested instruction as to the insanity of the accused is properly refused where there is only the merest shadow of evidence that such accused was not of sound mind, and the judge has instructed the jury that the burden of proof is on the government to prove sanity beyond a reasonable doubt, and told the jury to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and stated the evidence relied upon by him.

Trial — argument of counsel — interruption by court.

4. The court properly interrupts counsel to ask him to make an argument that does not tend to degrade the administration of justice, where counsel is appealing to race prejudice, and is asking the jury to believe a white man not on his oath before a negro who is sworn, adding that the jury can "swallow those niggers" if it wishes, but counsel will not.

[No. 438.]

Submitted January 28, 1908. Decided March 2, 1908.

IN ERROR to the Circuit Court of the United States for the Southern District of Georgia to review a conviction of murder. Affirmed.

See same case below on demurrer, 154 Fed. 540.

The facts are stated in the opinion.

Mr. John Randolph Cooper submitted the cause for plaintiff in error:

The circuit court had no jurisdiction to try Thomas Battle. The alleged offense in the bill of indictment was a crime against the state of Georgia, and not against the United States. Congress has failed to describe and designate a postoffice site as a place within the exclusive jurisdiction of the United States. The Federal statute making it a crime to commit murder within a fort, arsenal, dockyard, magazine, or in any place or district of country under the exclusive jurisdiction of the United States, has not designated a postoffice site as one of the places.

United States v. Bevans, 3 Wheat. 336, 4 L. ed. 404; Tennessee v. Davis, 100 U. S. 279, 25 L. ed. 655; Re Neagle (Cunningham v. Neagle) 135 U. S. 98, 34 L. ed. 82, 10 Sup. Ct. Rep. 658; Jones v. United States, 137 U. S. 216, 34 L. ed. 697, 11 Sup. Ct. Rep. 80.

Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the circuit and district court; but the acts of Congress give those courts no jurisdiction whatever of offenses committed against the authority of the state. Criminal homicide, committed in a state, is an offense against the authority of the state, unless it is committed in a place within the exclusive jurisdiction of the United States. Congress has never defined such an offense when committed within the territorial limits of a state under the circumstances described in the transcript; nor is there any pretense for the suggestion either that the circuit or district courts have any jurisdiction of the case, or that there is any conflict of jurisdiction between the judicial authorities of the state and those of the United States.

Tennessee v. Davis, 100 U. S. 281, 25 L. ed. 656.

The court erred in not charging the jury in this case on the law of self-defense. The prisoner did not get the benefit of his contention and his evidence before the jury. In a word, the court ignored his defense altogether. The defendant claimed that he struck Berry in defense of his own person and in order to save his own life.

Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; Smith v. United States, 161 U. S. 88, 40 L. ed. 627, 16 Sup. Ct. Rep. 483; Beard v. United States, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962; Allison v. United States, 160 U. S. 203, 40 L. ed. 395, 16 Sup. Ct. Rep. 252.

The burden was upon the government to show that the prisoner was sane; hence, it was error to decline to charge the jury as requested by defendant's counsel.

Davis v. United States, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353.

The court erred in reflecting upon counsel for the prisoner while he was making his concluding argument to the jury. The language used by the court was calculated, and probably did, prejudice the minds of the jury against the prisoner.

Potter v. State, 117 Ga. 693, 45 S. E. 37; Jaques v. State, 111 Ga. 832, 36 S. E. 104; Cunningham v. People, 195 Ill. 550, 63 N. E. 517; People v. O'Hare, 124 Mich. 515, 83 N. W. 279; Wilson v. Territory, 9 Okla. 331, 60 Pac. 112; State v. Taylor, 7 Idaho, 134, 61 Pac. 288.

The court erred in declining to charge the jury in this case, as requested by defendant's counsel, on the law of involuntary manslaughter. The defendant contended in his statement to the jury that he did not intend to kill Berry, but tried to catch him as he fell from the scaffold to the ground.

Allison v. United States, supra.

Assistant Attorney General **Cooley** submitted the cause for defendant in error:

Congress, in the performance of its constitutional powers, may exercise exclusive legislation over places purchased, with the consent of the legislature of the state in which such place may be situated, for the erection of forts, arsenals, dockyards, and magazines.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 532, 29 L. ed. 266, 5 Sup. Ct. Rep. 995; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; United States v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930; United States v. Meagher, 37 Fed. 875; Com. v. Clary, 8 Mass. 72; Sinks v. Reese, 19 Ohio St. 306. 2 Am. Rep. 397; United States v. Bevans, 3 Wheat. 390, 4 L. ed. 417; 1 Kent, Com. 429; Cohen v. Virginia, 6 Wheat. 428, 5 L. ed. 297.

The objection that the indictment does not set out the act of Georgia, ceding jurisdiction, is without merit.

Lamar v. Micou, 114 U. S. 223, 29 L. ed. 95, 5 Sup. Ct. Rep. 857; Owings v. Hull, 9 Pet. 607, 625, 9 L. ed. 246, 252.

The ruling of the court, excluding evidence of the general character of the defendant, and limiting him to proof as to those features of character which were in issue in the particular case, was proper.

People v. Fair, 43 Cal. 148; State v. King, 78 Mo. 555; State v. Bloom, 68 Ind. 54, 34 Am. Rep. 247; People v. Garbutt, 17 Mich. 16, 97 Am. Dec. 162; Wigmore, Ev. § 59; 3 Greenl. Ev. § 25.

The ruling that the construction of deeds and other instruments in writing was for the court, and not for the jury, to which the defendant excepted, is unquestionably correct.

Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 255, 34 L. ed. 423, 10 Sup. Ct. Rep. 945; Starkie, Ev. 10th ed. p. 785.

Mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter.

Allen v. United States, 164 U. S. 492, 497, 41 L. ed. 528, 529, 17 Sup. Ct. Rep. 154; United States v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15,978.

A person who is assaulted or in danger of being assaulted must retreat as far as he safely can before turning on his adversary.

4 Bl. Com. 185; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; Finch v. State, 81 Ala. 41, 1 So. 565.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes up on a writ of error to the United States circuit court, after a conviction of the plaintiff in error of murder without capital punishment. The chief error assigned is that the court proceeded without jurisdiction,—an objection *taken by demurrer [37] and renewed in other forms. The crime was committed upon land bought by the United States in the city of Macon, on which it was building a postoffice and courthouse, and over which the state of Georgia had ceded jurisdiction; but it is said that murder in a postoffice of the United States has not been made an offense against the United States, whatever might be the power of Congress if it saw fit to put it forth.

There can be no doubt of the power of Congress to purchase land within a state for postoffices or courts, by consent of the legislature of the state, and to exercise exclusive legislation over the same. Postoffices are among the "other needful buildings" for the erection of which, as well as of "forts, magazines, arsenals, dockyards," it is assumed that land will be bought, and for which land has been bought by the government all over the United States. Const. art. 1, § 8, cl. 17. Indeed, this is not denied. The power to establish postoffices is given by art. 1, § 8, cl. 7, in terms. See Kohl v. United States, 91 U. S. 367, 372, 23 L. ed. 449, 451; Burt v. Merchants' Ins. Co. 106 Mass. 356, 8 Am. Rep. 339; People ex rel. Trombley v. Humphrey, 23 Mich. 471, 475, 9 Am. Rep. 94; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397. The exclusive legislative power and jurisdiction of the United States is equally clear. Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60. So that the question is only whether the statutes of the United States extend to this case, which was the question intended to be raised.

By Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627, "Every person who commits murder—first, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; . . . shall suffer death;" and by the act of January 15, 1897, chap. 29, § 1, 29 Stat. at L. 487, U. S. Comp. Stat. 1901, p. 3620, in such cases "the jury may qualify their verdict by adding thereto 'without capital punishment,'" whereupon the sentence is imprisonment at hard labor for life. The jurisdiction of the United States courts under these sections is exclusive. Rev. Stat. § 711, U. S. Comp. Stat. 1901, p. 577. If the language of the Constitution is wide enough to *authorize the [38] purchase of land for a postoffice and courthouse, and the acceptance of a grant of jurisdiction, there is no reason for taking the language of the statute in any narrower sense. The argument, although ostensibly directed against the statute, must embrace the Constitution; and, as we have implied, such an argument comes many years too late.

There was an exception to a refusal of the court to instruct the jury on the law of justifiable homicide. Sufficient instructions were given. The evidence, however, would not have warranted such a verdict. According to the defendant's own testimony the death was due to an accident. According to all the other evidence, even the most favorable, the defendant was upon a platform above Berry, and Berry either was below, standing on a beam in a very insecure place, or else was climbing up to or upon the platform, when the defendant struck him over the head, according to several witnesses, with an iron bolt, until he dropped 50 or 60 feet. So as to involuntary homicide. There was no evidence of such a case, and the jury, under the charge, must have found that the defendant made an intentional and unjustified assault of such a kind that the probable consequences were obvious; an assault with a deadly weapon, that either directly caused Berry's death, or brought it about by his inevitable fall.

It also is urged that the court erred in declining to give a somewhat confused instruction concerning sanity, that was asked. The judge instructed the jury that the burden of proof was on the government to prove that fact beyond a reasonable doubt, and he was not called upon to go further. Until evidence is given on the other side, the burden of proof is satisfied by a presumption arising from the fact that most men are sane. In this case there was the merest shadow of evidence that the defendant was not of sound mind. The jury were told to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and the evidence relied upon by him was stated. In the circumstances he could ask no more.

[39] *Finally, an exception was taken to an interruption of the judge, asking the defendant's counsel to make an argument that did not tend to degrade the administration of justice. The reference was to an appeal to race prejudice and to such language as this: "You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them." The interruption was fully justified. The foregoing are the exceptions argued. In our opinion there is nothing in them or in any that were taken. The judgment of the Circuit Court must stand.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.
EDWARD S. THAYER.

(See S. C. Reporter's ed. 39–45.)

Civil service — soliciting campaign contributions.

Solicitation by letter intended to be received and read by a postoffice employee in the postoffice building, and which was so received and read in such building, is embraced by the provision of the civil service act of January 16, 1883 (22 Stat. at L. 403, 407, chap. 27, U. S. Comp. Stat. 1901, pp. 1217, 1223), § 12, that no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in such act, solicit, "in any manner whatever," or receive, any contribution of money or any other thing of value for any political purpose whatever.

[No. 390.]

Argued February 25, 1908. Decided March 9, 1908.

IN ERROR to the District Court of the United States for the Northern District of Texas to review a judgment sustaining a demurrer to an indictment for soliciting campaign contributions. Reversed.

See same case below, 154 Fed. 508.

The facts are stated in the opinion.

Attorney General **Bonaparte** and Assistant Attorney General **Cooley** argued the cause and filed a brief for plaintiff in error:

Statutes, whether penal or remedial, must receive a reasonable construction, so as to give effect to the intention of the legislature.

United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The offense is committed at the place where the unlawful act takes effect.

Wharton, Confl. L. § 825b; Clutterback v. Chaffers, 1 Starkie, 471; King v. Burdett, 4 Barn. & Ald. 95; King v. Johnson, 7 East, 68; Re Palliser, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; Horner v. United States, 143 U. S. 207, 214, 36 L. ed. 126, 130, 12 Sup. Ct. Rep. 407; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688; People v. Rathbun, 21 Wend. 529; Simpson v. State, 92 Ga. 43, 22 L.R.A. 248, 44 Am. St. Rep. 75, 17 S. E. 984; People v. Adams, 3 Denio, 207, 45 Am. Dec. 468; State v. Grady, 34 Conn. 130; Com. v. Smith, 11 Allen, 243; State v. Hall, 114 N. C. 909, 28 L.R.A. 59, 41 Am. St. Rep. 822, 19 S. E. 602; United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932;

State v. Carter, 27 N. J. L. 499; State v. Morrow, 40 S. C. 221, 18 S. E. 853; Noyes v. State, 41 N. J. L. 418; Hatfield v. Com. 11 Ky. L. Rep. 468, 12 S. W. 310; Report on Extraterritorial Crime and The Cutting Case, Department of State (1887) p. 23; 44 Am. St. Rep. 79, note; 3 Greenl. Ev. § 45; Wharton, Crim. Law, § 228; 1 Hale, P. C. 618; 1 Am. & Eng. Enc. Law, p. 266; State v. Allen, 47 Conn. 121; Pinkard v. State, 30 Ga. 757.

Contemporaneous construction of a statute by the executive officer charged with its administration is entitled to great weight, and should be controlling unless it is clearly erroneous.

United States v. Hill, 120 U. S. 169, 180, 30 L. ed. 627, 631, 7 Sup. Ct. Rep. 510.

Mr. **J. M. McCormick** argued the cause, and, with Mr. F. M. Etheridge, filed a brief for defendant in error:

Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.

United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16,264.

Before a man can be punished, his acts must be plainly and unmistakably within the statute.

United States v. Brewer, 139 U. S. 288, 35 L. ed. 193, 11 Sup. Ct. Rep. 538.

While penal statutes are not so strictly construed as formerly, yet this very relaxation which the courts now indulge is in favor of reaching the true legislative intent, and enforcing the spirit as well as, or rather than, the letter of the law.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Morris, 14 Pet. 464, 10 L. ed. 543; American Fur Co. v. United States, 2 Pet. 358, 367, 7 L. ed. 450, 453; United States v. Winn, 3 Sumn. 211, Fed. Cas. No. 16,740; Sedgw. Stat. & Const. Law, 2d ed. p. 282; Atty. Gen. v. Sillen, 2 Hurlst. & C. 532; Foley v. Fletcher, 28 L. J. Exch. N. S. 106; Nicholson v. Fields, 31 L. J. Exch. N. S. 233; Hardcastle, Stat. Law, p. 251; Maxwell, Interpretation of Statutes, 2d ed. p. 318.

When the words are not precise and clear, such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the legislature, to avoid such conclusion.

People ex rel. Twenty-third Street R. Co. v. Tax Comrs. 95 N. Y. 558; Com. v. Kimball, 24 Pick. 371.

If it be conceded that the physical presence of the defendant, or of someone occupying the relation of agent or servant to him in the building at the time the letters containing the solicitations respectively were read, was necessary, then the government's case, as made by the indictment, falls for the reason that the postal employees are in law deemed the agents of the addressee, and not of the sender, of a letter.

Com. v. Wood, 142 Mass. 462, 8 N. E. 432; Reg. v. Jones, 4 Cox, C. C. 198.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an indictment for soliciting a contribution of money for political purposes from an employee of the United States in a postoffice building of the United States occupied by the *employee in the discharge **[42]** of his duties. By the civil service act of January 16, 1883 (chap. 27, § 12, 22 Stat. at L. 403, 407, U. S. Comp. Stat. 1901, pp. 1217, 1223), "No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy yard, fort, or arsenal, solicit in any manner whatever, or receive, any contribution of money or any other thing of value for any political purpose whatever." By § 15 a penalty is imposed of fine, imprisonment, or both. The indictment is in eleven counts, and charges the sending of letters to employees, which were intended to be received and read by them in the building, and were so received and read by them in fact. It is admitted that the defendant was not in the building. There was a demurrer, which was sustained by the district court on the ground that the case was not within the act. 154 Fed. 508. The only question argued or intended to be raised is whether the defendant's physical presence in the building was necessary to create the offense.

Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by writing as well as by spoken words. It forbids all persons to solicit "in any manner whatever." The purpose is wider than that of a notice prohibiting book peddling in a building. It is not, even primarily, to save employees from interruption or annoyance in their business. It is to check a political abuse which is not different in kind whether practised by letter or by word of mouth. The limits of the act, presumably, were due to what was considered the reasonable and possibly the constitutional freedom of citizens, whether officeholders or not, when in private life, and it may be conjectured that it was upon this ground that an amendment of [43] broader scope was *rejected. If the writer of the letter in person had handed it to the man addressed, in the building, without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer. If the solicitation is in the building, the statute does not require personal presence, so that the question is narrowed to whether the solicitation alleged took place in the building or outside.

The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation. The court below was misled by cases in which, upon an indictment for obtaining money by false pretenses, the crime was held to have been committed at the place where drafts were put into the post by the defrauded person. Com. v. Wood, 142 Mass. 459, 462, 8 N. E. 432; Reg. v. Jones, 4 Cox, C. C. 198. But these stand on the analogy of the acceptance by mail of an offer, and throw no light. A relation already existed between the parties, and it is because of that relation that posting the letter made the transaction complete. See Brauer v. Shaw, 168 Mass. 198, 200, 60 Am. St. Rep. 387. 46 N. E. 617. Here a relation was to be established, just as there is at the first stage of a contract when an offer is to be made. Whether or not, as Mr. Langdell thinks, nothing less than bringing the offer to the actual consciousness of the person addressed would do (Contr. § 151), certainly putting a letter into a postoffice is neither an offer nor a solicitation. "An offer is nothing until it is communicated to the party to whom it is made." Thomson v. James, 9 Sc. Sess. Cas. 2d series, 1, 10, 15. Therefore, we repeat, until after the letter had entered the building, the offense was not complete; but, when it had been read, the case was not affected by the nature of the intended means by which it was put into the hands of the person addressed. Neither can the 4] case be affected by speculations *as to what the position would have been if the receiver had put the letter in his pocket and had read it later at home. Offenses usually depend for their completion upon events that are not wholly within the offender's control and that may turn out in different ways.

No difficulty is raised by the coupling of solicitation and receipt in the statute. If receipt required personal presence, it still would be obvious that "solicit in any manner whatever" was a broader term. But the cases that have been relied upon to establish that the solicitation did not happen in the building, although inadequate for that, do sufficiently show that the money might be received there without the personal presence of the defendant. If, in answer to the defendant's letter, the parties addressed had posted money to him in the building where they were employed, the money undoubtedly would have been received there. To sum up, the defendant solicited money for campaign purposes; he did not solicit until his letter actually was received in the building; he did solicit when it was received and read there; and the solicitation was in the place where the letter was received. We observe that this is the opinion expressed by the civil service commission in a note upon this section, and the principle of our decision is similar to that recognized in several cases in this court. Re Palliser (Palliser v. United States) 136 U. S. 257, 266, 34 L. ed. 514, 518, 10 Sup. Ct. Rep. 1034; Horner v. United States, 143 U. S. 207, 214, 36 L. ed. 126, 130, 12 Sup. Ct. Rep. 407; Burton v. United States, 202 U. S. 344, 387, et seq., 50 L. ed. 1057, 1073. 26 Sup. Ct. Rep. 688. We do not cite them more at length, as the only dispute possible is on the meaning of the particular words that Congress has used.

We may add that this case does not raise the questions presented by an act done in one jurisdiction and producing effects in another which threatens the actor with punishment if it can catch him. Decisions in that class of cases, however, illustrate the indisputable general proposition that a man sometimes may be punished where he has brought consequences to pass, although he was not there in person. They are cited in Re Palliser, supra. Here the defendant was *within and subject to the jurisdiction of [45] the United States to the extent of its constitutional power, and the power is not in dispute. Ex parte Curtis, 106 U. S. 371, 27 L. ed. 232, 1 Sup. Ct. Rep. 381; United States v. Newton, 9 Mackey, 226.

Judgment reversed.

DOÑA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plff. in Err.,
v.
JOHN R. BROOKE, Major General, U. S. A.

(See S. C. Reporter's ed. 45–53.)

United States — effect of ratifying acts of military governor of Cuba.

1. Ratification by the Executive, Congress, and the treaty-making power, of the action of the military governor of Cuba in abolishing a hereditary office, with its emoluments, makes his act that of the United States, and exonerates him from all liability as for a tort in violation of the law of nations, or of a treaty of the United States.

International law — change of sovereignty — extinguishing official emoluments.

2. The right to the emoluments incident to the hereditary office of high sheriff of Havana, which were left by the Spanish law in the hands of the incumbent until proceedings for the condemnation of the office should be completed and the incumbent be paid, did not survive the extinction of the sovereignty of Spain over Cuba.

[No. 104.]

Argued February 28, March 2, 1908. Decided March 16, 1908.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing the complaint in a suit brought by an alien for a tort in violation of the law of nations or a treaty of the United States. Affirmed.

See same case below, 142 Fed. 858.

The facts are stated in the opinion.

Mr. **Frederic R. Coudert** argued the cause, and, with Messrs. Paul Fuller, Crammond Kennedy, and Howard Thayer Kingsbury, filed a brief for plaintiff in error:

Neither the order of the Secretary of War nor the Platt amendment was a ratification by the United States of the tortious act of General Brooke.

Congress cannot authorize any officer of the United States arbitrarily to confiscate private property anywhere; and cannot ratify what it could not authorize. This is one of the fundamental safeguards of liberty, governing the actions of all organs or agencies of the government.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

In any event, General Brooke is individually liable for his tortious act, irrespective of governmental direction or ratification.

Little v. Barreme, 2 Cranch, 170, 2 L. ed. 243; Murray v. The Charming Betsy, 2 Cranch, 64, 2 L. ed. 208; Maley v. Shattuck, 3 Cranch, 458, 2 L. ed. 498; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Bates v. Clark, 95 U. S. 204, 24 L. ed. 471; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 442.

Such recognition as the "act of state" theory has received in the United States courts has usually been in cases in which it was resorted to in order to hold the United States liable, not to relieve the officer of individual liability.

United States v. Buchanan, Crabbe, 563, Fed. Cas. No. 14,678; Wiggins v. United States, 3 Ct. Cl. 412; The Paquete Habana (United States v. The Paquete Habana) 189 U. S. 453, 47 L. ed. 901, 23 Sup. Ct. Rep. 593.

The present tendency in England is to confine the "act of state doctrine" within the narrowest limits.

Musgrave v. Pulido, L. R. 5 App. Cas. 102; Raleigh v. Goschen [1898] 1 Ch. 73; Walker v. Baird [1892] A. C. 491; Sprigg v. Sigcau [1897] A. C. 238; Campbell v. Hall, 1 Cowp. 204.

Cases involving the abolition of Spanish public offices in Porto Rico (such as Alvarez y Sanches v. United States, 42 Ct. Cl. 458) are not analogous. Plaintiff here did not hold an office, but a franchise. The office had been abolished long ago by Spain, but the franchise subsisted as a property right, like the franchise for a fishery, a ferry, a bridge, a turnpike, or any other public utility.

The treaty of Paris protected all private property in Cuba. The defendant was further limited by the Constitution and by the rules of international law in his dealing with private rights.

Strother v. Lucas, 12 Pet. 410, 438, 444, 9 L. ed. 1137, 1148, 1150; United States v. Clarke, 16 Pet. 228, 10 L. ed. 946; More v. Steinbach, 127 U. S. 70, 78, 32 L. ed. 51, 54, 8 Sup. Ct. Rep. 1067; 1 Hare, Am. Const. Law, 599; Halleck, International Law, 1st ed. chap. 33 § 24; Vattel, Nations, bk. 2, chap. 14, § 217; 1 Wharton, International Law Dig. pp. 16, 17; Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808; Downes v. Bidwell, 182 U. S. 244, 282, 45 L. ed. 1088, 1104, 21 Sup. Ct. Rep. 770; Hawaii v. Mankichi, supra; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Goodnow, Abatement of Nuisances, 2 Columbia Law Rev. 203.

Assistant Attorney General **Russell** argued the cause and filed a brief for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to review a judgment of the district court dismissing a complaint purporting to be brought under Rev. Stat. § 563, U. S. Comp. Stat. 1901, p. 459, the 16th clause of which gives the district courts jurisdiction "of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States." 142 Fed. 858. See 135 Fed. 384. The plaintiff is a Spanish subject and alleges a title by descent to the right to carry on the slaughter of cattle in the city of Havana and to receive compensation for the same. (She does not allege title to the slaughterhouse where the slaughtering was done. That belonged to the city.) According to the complaint the right was inci-[49]dent to an inheritable and alienable *office; that of alguacil mayor or high sheriff of Havana. The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid. The plaintiff has not been paid, and in 1895 one half of the emoluments was sold on execution by consent, the other half remaining to the plaintiff or those whom she represents. On May 20, 1899, the island of Cuba being under the military jurisdiction of the United States, Bragadier General Ludlow, then governor of Havana, issued an order that the grant in connection with the service of the city slaughterhouse, of which the O'Reilly family and its grantees were the beneficiaries, was ended and declared void, and that thenceforth the city should make provision for such services. The owners were referred to the courts, and it was decreed that the order should go into effect on the first of June. In pursuance of the same, it is alleged, the plaintiff was deprived of her property. She appealed to the defendant, then military governor of Cuba. On August 10 he issued an order, reciting the appeal, and stating that, it being considered prejudicial to the general welfare of Havana, etc., and in view of the cessation of Spanish sovereignty, the office of alguacil mayor de la Habana, together with all rights pertaining thereto or derived therefrom, was thereby abolished, and the right of claimants to the office or emoluments was denied. The city thereafter was to perform the services. It is alleged that by this action the plaintiff was prevented, and to this day has been prevented, from carrying out the duties and receiving the emoluments mentioned above. The complaint ends by alleging violation of the treaty of December 10, 1898 (30 Stat. at L. 1754), and of general orders No. 101, of July 18, 1898, issued by the President through the Secretary of War. It also sets up the Constitution of the United States and the Spanish law in force before the island was ceded by Spain.

The answer denies the plaintiff's right, but admits the passage of the order, and sets up a ratification by the United States in the so-called Platt amendment of the act of March 2, 1901 (chap. *803, 31 Stat. at L. [50] 897), to the effect that "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected," afterwards embodied in the treaty with Cuba of May 22, 1903. 33 Stat. at L. 2249. The district judge made a finding of facts, substantially supporting the allegations of the bill, which it is not necessary to set forth in detail, but stating one further public fact that should be mentioned. The plaintiff appealed to the Secretary of War to have General Brooke's order revoked. In answer, Mr. Secretary Root denied that the rights attached to the office of sheriff of Havana survived the sovereignty of Spain, observed that the services in question were in substance an exercise of the police power of the state, that the right to exercise that power under Spanish authority ended when Spanish sovereignty in Cuba ended, and that the petitioner had been deprived of no property whatever. In December, 1900, the United States ratified and adopted the action of General Brooke through an order of the Secretary of War, and again by the act of Congress just mentioned and the treaty of 1903. The judge was of opinion that, although there was a public nuisance in the slaughterhouse creek, General Brooke's order was not justified under the police power, but that, by the ratification of the United States, the plaintiff lost any claim against him. The judge intimated, however, that she had a just one against the United States under the treaty with Spain.

We are so clearly of opinion that the complaint must be dismissed *that we shall not do more than mention some technical difficulties that would have to be discussed before the plaintiff could succeed. In assuming that General Brooke's order permanently deprived the plaintiff of her rights, although they were attached to no tangible thing, and although General Brooke long since has ceased to be governor of Cuba or

to have any power in the premises, the plaintiff necessarily assumes that her rights follow the ancient conception of an office and are an incorporeal hereditament, sus-
[51]ceptible of disseisin. 3 *Kent, Com. 454; Stat. Westm. II. chap. 25; 2 Coke, Inst. 412; U. S. Rev. Stat. § 563, cl. 13, U. S. Comp. Stat. 1901, p. 458. If we are to apply that conception to the case, we are led to ask why the disseisin was not complete, upon the allegations of the complaint, before General Brooke had anything to do with the matter, or why the brief period during which his authority intervened should make him answerable not only for what had happened before, but also for the continued exclusion of the plaintiff by the United States and by the government of Cuba. But it is very hard to admit that the notion of a disseisin can be applied for the present purpose to such disembodied rights any more than to copyrights or patents; and, if not, then all that General Brooke could be held for, if for anything, would be damages for the disturbances of the plaintiff while he was in power, which are not the object of this suit. It becomes impossible to go further than that when it is remembered that the United States asserted no permanent sovereignty over Cuba, and that, as General Brooke could not carry the office with him, his interference must have lost all legal effect in a very short time.

Again, if the plaintiff lost her rights once for all by General Brooke's order, and so was disseised, it would be a question to be considered whether a disseisin was a tort within the meaning of Rev. Stat. § 563 (16). In any event, the question hardly can be avoided whether the supposed tort is "a tort only in violation of the law of nations" or of the treaty with Spain. In this court the plaintiff seems to place more reliance upon the suggestion that her rights were of so fundamental a nature that they could not be displaced, even if Congress and the Executive should unite in the effort. It is not necessary to say more about that contention than that it is not the ground on which the jurisdiction of the district court was invoked.

Coming one step further down, we are met by an argument on the part of the defendant that the only things that we can consider are the pleadings and the judgment dismissing the complaint. It is urged with great force that the decision denying the power of a circuit judge to find and report
[52]facts for the *consideration of this court upon a writ of error (Campbell v. Boyreau, 21 How. 223, 16 L. ed. 96), although met as to the circuit court by Rev. Stat. §§ 649, 700, U. S. Comp. Stat. 1901, pp. 525, 570, still applies to the district courts (Rogers v. United States, 141 U. S. 548, 35 L. ed. 853, 12 Sup. Ct. Rep. 91). However, if we assume this argument to be correct, there still perhaps may be gathered from the pleadings, coupled with matters of general knowledge, enough to present the questions which the plaintiff was entitled to present below, and therefore we proceed to dispose of the case upon the merits.

It is said that neither the Executive nor Congress could have taken the plaintiff's property, and that therefore they could not ratify the act of General Brooke so as to make his act that of the United States and to exonerate him. But it has been held that a tort could be ratified so far as to make an act done in the course of the principal's business, and purporting to be done in his name, his tort (Dempsey v. Chambers, 154 Mass. 330, 13 L.R.A. 219, 26 Am. St. Rep. 249, 28 N. E. 279), and it may be assumed that this is the law as to the wrongful appropriation of property which the principal retains (Ibid. 332, and cases cited). The old law, which sometimes, at least, was thought to hold the servant exonerated when the master assumed liability (1 Rolle Abr. 2, pl. 7; 95 [T.]; Cremer's Case, Godb. 385, 389; Laicock's Case, Latch, 187; Anonymous, 1 Mod. 209), still is applied to a greater or less extent when the master is the sovereign (The Paquete Habana [United States v. The Paquete Habana] 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593). It is not necessary to consider what limits there may be to the doctrine, for we think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a "tort only in violation of the law of nations, or of a treaty of the United States," it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke.

But we do not dwell longer upon the ratification of what was done during the military occupation of Cuba, or consider the question whether the ratification was needed, because we agree *with the opinion[53] of the Secretary of War, that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it no longer could be exercised, the right remained so far that it was to be paid for, and, if it had been paid for, the right to the emoluments would have ceased. If the right to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States government, and, unless it did, the plaintiff's case is at an end.

Judgment affirmed.

JESSE HOYT SMITH, Appt.,
v.
WILLIAM J. RAINEY, Lillian Rainey, his wife, Frank Luke, and John Luke.

(See S. C. Reporter's ed. 53–56.)

Partnership — lien on firm assets for repayment of advances.

A lien in favor of the partner contributing the entire capital and necessary advances to a land partnership is created by a provision of the partnership agreement for the repayment of the whole sum advanced by him for the venture before any division of profits is declared, although some earlier provisions in the agreement treat the advance of a part of the capital as a loan to the other partner.

[No. 144.]

Argued and submitted March 3, 4, 1908. Decided March 16, 1908.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed a judgment of the District Court of Maricopa County, in that territory, sustaining a demurrer to, and dismissing, the complaint in a suit to enforce a lien upon partnership property for the repayment of advances made by one partner to the firm. Judgment reversed and demurrer overruled.

See same case below, 9 Ariz. 362, 83 Pac. 463.

The facts are stated in the opinion.

Mr. **Lewis M. Ogden** argued the cause, and, with Messrs. James G. Flanders and Ryan, Ogden, & Bottum, filed a brief for appellant:

The written instrument set up in the complaint must be construed as an equitable mortgage.

Walker v. Brown, 165 U. S. 664, 41 L. ed. 870, 17 Sup. Ct. Rep. 453; Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; Legard v. Hodges, 1 Ves. Jr. 477; Re Strand Music Hall Co. 3 De G. J. & S. 147; Pinch v. Anthony, 8 Allen, 539; Leiweke v. Jordan, 59 Mo. App. 619; Blackburn v. Tweedie. 60 Mo. 507; Bryant v. Stephens, 58 Ala. 641; Smith v. Patton, 12 W. Va. 554; Powell v. Jones, 72 Ala. 398; Trimble v. Puckett, 93 Ky. 218, 19 S. W. 591; Ruffners v. Putney, 12 Gratt. 551; Spooner v. Sandilands. 1 Younge & C. Ch. Cas. 390; Smith v. Smith, 51 Hun, 164, 4 N. Y. Supp. 669.

Mr. **Walter Bennett** submitted the cause for appellees:

In order that a contract may be construed to create an equitable lien upon real or personal property, it must reveal the intention to create a lien upon the property itself, as distinguished from an agreement to apply the proceeds of a sale of it, or its income, to the payment of a debt.

1 Jones, Liens, § 32; Vaniman v. Gardner, 99 Ill. App. 345; Cook v. Black, 54 Iowa, 693, 7 N. W. 121.

The fact that the appellant, Smith, paid more than his proportion, or all, of the purchase price of the land, gives him no lien on the one-third interest conveyed to Rainey.

Brown v. Budd, 2 Ind. 442; Jones, Liens, §§ 70–75; Printup v. Barrett, 46 Ga. 407; Weathersby v. Sleeper, 42 Miss. 732; Garland v. Hull, 13 Smedes & M. 76, 51 Am. Dec. 140; Jones v. Kennedy, 138 Ala. 502, 35 So. 465; 2 Spence, Eq. Jur. 804; Sugden, Ven. & P. 902.

The appellees' demurrer does not admit all the allegations of the complaint, but admits only facts, and, of the facts alleged, only those which are material and well pleaded; and it does not admit the pleader's conclusions of law from the facts pleaded.

Branham v. San José, 24 Cal. 585.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a judgment on demurrer, dismissing the appellant's complaint. The prayer of the complaint is to have declared and foreclosed a mortgage lien on certain land as against the defendants, who also claim liens upon the same, and is based upon a written agreement set forth. This instrument recites that the appellant and William J. Rainey have bought the land for $18,000, in the proportions of two thirds and one third, respectively, for the purpose of improving and selling it; that the whole consideration was paid in cash by the appellant, and that Rainey has agreed to repay the one third with interest. It agrees that the improvements as specified shall be carried on with reasonable diligence and dispatch, and that the appellant will make necessary advances, and then goes on: "Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid at 6 per cent per annum and before any division of profits shall be made or paid."

The argument for the appellant and the decision below turned mainly on the sufficiency of this clause to create a lien. Standing by itself, and still more if taken only in connection with the next clause, which provides that, if all the loans have not been repaid with interest in five years, Rainey shall repay his one third on demand, it well might be held not to be enough. It might be held not to go beyond a personal undertaking, with an indication of a fund as the limit and only source of repayment until five years should have elapsed. But it is necessary to consider the whole document.

The 6th clause gives Rainey the general [55] management, *limiting his contracts "on account of said property" to $5,000 without Smith's written consent, requiring agreement of the parties as to prices and terms, and providing that Rainey shall give Smith true accounts "of all the transactions relating to the business" and full information, etc. The 7th clause provides more specifically for Rainey's keeping books of account, to be always open to Smith, and for his sending to Smith monthly "an account in full of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership." By the 8th clause Rainey accepts the management without other remuneration than his one third of the net profits of the business.

The 9th clause reads as follows: "That after the repayment to the said Jesse Hoyt Smith of the said sum of eighteen thousand dollars ($18,000) so advanced by him for the purchase of said tract, and his repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent per annum, the net profits of said land and said business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two thirds (⅔) thereof, and said William J. Rainey the one third (⅓) thereof; and the losses, if any, shall be shared between the parties in ratio aforesaid. It is further agreed and understood between the parties hereto that this memorandum of agreement is made for the purpose of stating explicitly the terms of copartnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement, and sale of said tract."

The result of the whole agreement, then, is that it forms a partnership, and that when it comes to the division of assets the appellant is to be repaid, not merely his share of the capital, but the whole $18,000 and his advances before any profits are declared. This means, of course, that he is to be repaid them out of the land or its proceeds. The *advance of one third of the purchase [56] price, which appears in the beginning as a loan to Rainey, is regarded at the end, with manifest justice, as standing on the same footing as the later advances made more specifically to the business. The whole land is treated as firm capital, and the whole sum paid for is treated as having been contributed, as in fact it was, by Smith, and as contributed to the firm.

A partner has a lien on the firm's assets for the repayment of his advances to the firm, and the 9th clause, providing for the repayment of the whole sum advanced by Smith for the venture, means that he shall be repaid out of the land regarded as assets. Taking the instrument as a whole, we are of opinion that it gives the appellant a lien. Whether the defendants, nevertheless, may not be entitled to priority, is not before us now. The only ground on which the demurrer was or could have been sustained was that the plaintiff had no lien at all.

Judgment reversed.
Demurrer overruled.

ARMOUR PACKING COMPANY, Petitioner,
v.
UNITED STATES. (No. 467.)

SWIFT & COMPANY, Petitioner,
v.
UNITED STATES. (No. 468.)

MORRIS & COMPANY, Petitioner,
v.
UNITED STATES. (No. 469.)

CUDAHY PACKING COMPANY, Petitioner,
v.
UNITED STATES. (No. 470.)

(See S. C. Reporter's ed. 56–89.)

Carriers — acceptance of rebates by shipper — secret or fraudulent device.

1. A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), making it a criminal offense for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported at less than the carrier's published rates, or whereby any other advantage is given or discrimination practised.

Courts — Federal criminal jurisdicton — venue — continuing offense.

2. The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by the Elkins act of February 19, 1903, is made triable in any Federal district through which such transportation is had, by the provision of that act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted.

Courts — Federal criminal jurisdiction — venue — continuing offense.

3. The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by U. S. Const., 6th Amend., is not violated by the provision of the Elkins act of February 19, 1903, under which the offense of obtaining transportation of goods from Kansas City to New York City at less than the carrier's published rates may be tried in any Federal district through which such transportation was conducted.

Note.—Effect of statutory provisions against rebates upon contracts for transportation at less than the regular rate.

The courts have unanimously held that contracts for interstate transportation at special rates, though antedating the enactment of the Federal interstate commerce act, forbidding discriminations in freight rates, became invalid upon the enactment of the statute. Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co. 38 Mo. App. 191; Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

A contract for railroad rebates upon shipments of freight, made in violation of a statute forbidding discrimination in rates between shippers and places, under penalty of fines, is void. Indianapolis, D. & S. R. Co. v. Ervin, 118 Ill. 250, 59 Am. Rep. 369, 8 N. E. 862.

A contract for a less rate than the established rate, and therefore void under the interstate commerce act, does not become valid and binding upon the carrier by the fact that the carrier lowered the rate after such contract was made, to conform to the contract rate, subsequently restoring the former rate. Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144.

But a contract for special rates, in violation of the interstate commerce act, will not invalidate the contract of affreightment so as to exempt the railroad company from liability on its bills of lading, and prevent a recovery by the shipper for loss or damage to the goods while in course of transportation. Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367.

Nor can a carrier escape liability to the extent of their value, for goods lost or damaged while in transit, by reason of a contract with the shipper which provided that in consideration of the rate given, which was less than the regular rate, the carrier should be legally liable only in a certain amount, such contract being void as violative of the provisions of the interstate commerce law. Ward v. Missouri P. R. Co. 158 Mo. 226, 58 S. W. 28.

However, a shipper obtaining from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, may not recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Southern R.

Carriers — acceptance of rebate by shipper — exports under through bill of lading.

4. Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates.

Commerce — export duties or taxes.

5. The mere incidental effect upon exports which may be produced by applying to a shipment from an interior point of the United States to a foreign port the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to U. S. Const. art. 1, § 9, ¶ 5, forbidding the levying of export taxes or duties.

Commerce — preference of ports.

6. Preference is not given to the ports of one state over those of another by applying to articles intended for foreign export the provisions of the Elkins act of February 19, 1903, making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates.

Carriers — acceptance of rebate by shipper — contract fixing former rate as defense.

7. A shipper is guilty of accepting transportation at less than the carrier's published rates, in violation of the Elkins act of February 19, 1903, where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it.

Indictment — sufficiency — charging shipper with accepting rebates.

8. An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of the Elkins act of February 19, 1903, is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates.

Appeal — prejudicial error — submitting question to jury.

9. Submitting to the jury on a prosecution against a shipper for accepting rebates in violation of the Elkins act of Feb-

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Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552 (Overruling Mobile & O. R. Co. v. Dismukes, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289); Church v. Minneapolis & St. L. R. Co. 14 S. D. 443, 85 N. W. 1001.

Where a common carrier who has complied with the terms of the interstate commerce act in respect to rates has by mistake agreed to and inserted in the bill of lading a rate less than the full schedule rate, it is not thereby precluded from collecting the full schedule rate. Savannah, F. & W. R. Co. v. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289, 21 S. E. 995.

And where the shipper has paid full rates, he cannot recover charges in excess of the amount stipulated for in a contract providing for a rate less than that exacted from others under the same conditions, and therefore void under the interstate commerce act. Kizer v. Texarkana & Ft. S. R. Co. 66 Ark. 348, 50 S. W. 871 (writ of error dismissed in 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100); Missouri, K. & T. R. Co. v. Bowles, 1 Ind. Terr. 250, 40 S. W. 899; Atchison, T. & S. F. R. Co. v. Holmes, 18 Okla. 92, 90 Pac. 22.

But in Chicago, R. I. & P. R. Co. v. Gardner (Tex. Civ. App.) 86 S. W. 793, a carrier was held liable to a shipper for charges in excess of the rate contracted for, where it appeared that the legally established rate had not been posted in the station at the shipping point, as required by the interstate commerce act, and the carrier's agent there was not notified of its existence, but acted on the tariff sheet in his possession, and made the rate to the shipper therefrom, though such rate was lower than the rate promulgated by the Interstate Commerce Commission.

In Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 846, it was held that an initial carrier could not escape liability for misrouting a shipment, on the ground that a rate given to a shipper by the agent of a connecting carrier was in violation of the Interstate Commerce law.

A connecting carrier is entitled to demand and receive upon an interstate shipment the rate as established under the interstate commerce act, though in excess of the rate agreed upon in the bill of lading issued by the initial carrier (San Antonio & A. P. R. Co. v. Clements, 20 Tex. Civ. App. 498, 49 S. W. 913), whether the stipulated rate was obtained by fraudulent representations on the part of the shipper (St. Louis & S. F. R. Co. v. Ostrander, 66 Ark. 567, 52 S. W. 435), or whether such rate was the result of a mistake on the part of the agent of the initial carrier (Chicago, R. I. & P. R. Co. v. Hubbell, 54 Kan. 232, 5 Inters. Com. Rep. 241, 58 Pac. 266).

ruary 19, 1903, the question whether or not there was a device to avoid the operation of the act and to obtain the transportation at less than the carrier's published rates, did not prejudice the accused, where, under that act, no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense, any means by which transportation by a concession from the established rate was had being sufficient to work a conviction.

Carriers — acceptance of rebate by shipper — criminal intent.

10. Intentionally accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates, which is forbidden by the Elkins act of February 19, 1903, is sufficient to sustain a conviction under that act, although such action may have been taken in good faith, under a claim of legal right.

[Nos. 467, 468, 469, 470.]

Argued January 20, 21, 22, 1908. Decided March 16, 1908.

ON WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review judgments affirming convictions in the District Court for the Western District of Missouri for securing transportation of goods in interstate or foreign commerce at less than the carriers' published rates. Affirmed.

See same case below, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 1.

The facts are stated in the opinion.

Mr. **Frank Hagerman** argued the cause, and, with Messrs. John C. Cowin, A. R. Urion, Henry Veeder, and M. W. Borders, filed a brief for petitioners:

None of the criminal features of the first interstate commerce act—that of February 4, 1887, § 10—applied to the shipper, although they were severe as against the carrier.

By the act of March 2, 1889, the shipper was made criminally liable for fraudulent conduct in the use of particular kinds of devices.

United States v. Hanley, 71 Fed. 677.

The Elkins act should have read into it the language of the act of 1889, by making wilfulness and knowledge an element. If such view is not adopted, then the statute is incomplete, and, to be sustained at all, must, as said in United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, be read in the light of the common law, leaving the court to infer that the legislative intent was only to create guilt on the part of the shipper if he knew of the published tariff, and then by some device obtained a concession thereunder.

United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 252.

The word "device" cannot be taken from the statute, for it is a word of well-defined legal meaning.

9 Am. & Eng. Enc. Law, 2d ed. p. 448; 1 Bouvier's Law Dict. (Rawle's Rev.); Black's Law Dict.; Portis v. State, 27 Ark. 362; State v. Blackstone, 115 Mo. 427, 22 S. W. 370.

Not only was it necessary for the shipper to use some device, but he must have known what the tariff was, and used the device to evade it.

Pond-Decker Lumber Co. v. Spencer. 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 848; United States v. Milwaukee Refrigerator Transit Co. supra.

The Elkins act is unconstitutional if it is to be construed to authorize a prosecution of the shipper outside of the district in which the concession was obtained. So it was decided as to the act of 1903, 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880, prohibiting shippers from obtaining concessions (Re Belknap, 96 Fed. 617; Davis v. United States, 43 C. C. A. 448, 104 Fed. 139); the act of 1887, 24 Stat. at L. 382, chap. 104, prohibiting the giving of rebates by the carrier (United States v. Fowkes, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 17); and the anti-lottery act, U. S. Rev. Stat. § 3894, as amended, 26 Stat. at L. 465, chap. 908, U. S. Comp. Stat. 1901, p. 2659, in so far as it attempted to authorize a prosecution in a district to which the matter was mailed, where the offense charged was depositing the matter in the mail (United States v. Conrad, 59 Fed. 466).

The same result has been reached in the state courts. Thus, where state constitutional provisions limit the prosecution to the county where the crime is committed, state legislatures have frequently attempted to enact statutes saying that the prosecution could be at some other place, but the courts, with great uniformity, have declared such legislation unconstitutional.

Ex parte Slater, 72 Mo. 102; State v. McGraw, 87 Mo. 161; State v. Hatch, 91 Mo. 568, 4 S. W. 502; State v. Anderson, 191 Mo. 145, 90 S. W. 95; Craig v. State, 3 Heisk. 227; State v. Smiley, 98 Mo. 605, 12 S. W. 247; State v. Dempsey, 94 Ga. 766, 22 S. E. 57; Dougan v. State, 30 Ark. 41; State v. Lowe, 21 W. Va. 782, 45 Am. Rep. 570; Armstrong v. State, 1 Coldw. 339; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; Kirk v. State, 1 Coldw. 345; State v. Denton, 6 Coldw. 539; Wheeler v. State, 24 Wis. 52.

The offense was complete in Kansas.

Dealy v. United States, 152 U. S. 539,

547, 38 L. ed. 545, 548, 14 Sup. Ct. Rep. 680; Re Belknap; Davis v. United States; United States v. Fowkes,—supra.

Transportation played the same part in the commission of the offense under the former acts as it did under the Elkins act, and no more.

United States v. Fowkes; Re Belknap, and Davis v. United States,—supra.

If a prosecution can be had in each district through which the shipment passed, it can only be upon the theory of a new offense being committed by the shipper in each district, and upon the theory that no completed offense was committed in Kansas.

State v. McGraw, 87 Mo. 164.

The purpose of art. 3, § 2, of the Constitution, and the 6th Amendment thereto, was to give to the defendant the benefit of an indictment by and a trial before a jury of his neighbors, or of the community in which the offense was committed, and to protect him against a trial as a stranger in a strange land where he had never been and in which he had committed no act.

Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; Beavers v. Henkel, 194 U. S. 73, 83, 84, 85, 48 L. ed. 882, 886, 887, 24 Sup. Ct. Rep. 605; Thompson v. Utah, 170 U. S. 343, 349, 350, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; West v. Gammon, 39 C. C. A. 271, 98 Fed. 427; Burton v. United States, 196 U. S. 283, 304, 49 L. ed. 482, 489, 25 Sup. Ct. Rep. 243.

Whenever a law is practically unintelligible, or so uncertain that it cannot be enforced, it is void.

That portion of the United States Constitution (art. 1, § 9) prohibiting a tax or duty to be laid upon exported articles is a guaranty against any form of legislation which burdens exportation.

Fairbank v. United States, 181 U. S. 283, 290, 293, 45 L. ed. 862, 866, 867, 21 Sup. Ct. Rep. 648.

The act as construed gives a distinct preference to those ports which are reached by water, as against those which are reached only by land.

The shipper in the country that reaches our ports by water is free and untrammeled. The shipper in the interior of the country, who cannot reach our ports by water, is not thus free and untrammeled, because of this discriminative, partial, and unjust regulation of commerce.

Passenger Cases, 7 How. 284, 420, 12 L. ed. 702, 759; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 453; Fairbank v. United States, 181 U. S. 283, 294, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648.

A carrier can make a contract to carry for a fixed period at the then published rates.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 194, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 848; 4 Elliott, Railroads, § 1560; Memphis & C. Packet Co. v. Abell, 17 Ky. L. Rep. 191, 30 S. W. 659; Baldwin v. Liverpool & G. W. R. Co. 11 Hun, 500, Affirmed in 74 N. Y. 132; Chicago & A. R. Co. v. Chicago, V. & W. Coal Co. 79 Ill. 126; Atlanta, K. & N. R. Co. v. Horne, 106 Tenn. 73, 59 S. W. 135; Gulf, C. & S. F. R. Co. v. Leatherwood, 29 Tex. Civ. App. 507, 69 S. W. 121; Southern Kansas R. Co. v. J. W. Burgess Co. (Tex. Civ. App.) 90 S. W. 192; Haurigan v. Chicago & N. W. R. Co. (Neb.) 113 N. W. 985.

Having made the contract in accordance with the schedule, it was the duty of the carrier to keep such schedule in force, and to carry for all others at the same rate. Hence, there was no right to change the tariff during the life of the contract.

Laurel Cotton Mills v. Gulf & S. I. R. Co. 84 Miss. 339, 66 L.R.A. 453, 37 So. 137; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 61, 203 U. S. 588, 51 L. ed. 330, 27 Sup. Ct. Rep. 776.

It was fatal to omit the allegation that the concession was obtained by a device, this being an element of the statutory offense.

United States v. Cook, 17 Wall. 168, 172, 21 L. ed. 538, 539; United States v. Cruikshank, 92 U. S. 542, 556, 23 L. ed. 588, 593; United States v. Mann, 95 U. S. 583, 24 L. ed. 532; United States v. Hess, 124 U. S. 483–486, 31 L. ed. 516–518, 8 Sup. Ct. Rep. 571; Evans v. United States, 153 U. S. 584–587, 38 L. ed. 830–832, 14 Sup. Ct. Rep. 934; United States v. Brazeau, 78 Fed. 465.

Even in statutory offenses of the character in question, there is an exception to the general rule that it is sufficient to charge the offense in the language of the statute.

United States v. Hess, supra; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934; Keck v. United States, 172 U. S. 434, 436, 43 L. ed. 505, 507, 19 Sup. Ct. Rep. 254; United States v. Britton, 107 U. S. 655, 669, 27 L. ed. 520, 525, 2 Sup. Ct. Rep. 512; United States v. Northway, 120 U. S. 327–332, 30 L. ed. 664–666, 7 Sup. Ct. Rep. 580; Batchelor v. United States, 156 U. S. 426, 37 L. ed. 478, 15 Sup. Ct. Rep. 446; United States v. Eno, 56 Fed. 219; Pettibone v. United States, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; United States v. Kelsey, 42 Fed. 890; United States v. Smith, 45 Fed. 563; Re Benson, 58 Fed. 971; United States v. Beatty, 60 Fed. 743; Re Huntington, 68 Fed. 883.

As against the shipper, there must be

read into the act that the shipper, to be guilty, must have known of the tariff, and, knowing thereof, used some device by which the concession was obtained.

Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 849; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 252; United States v. Carll, 105 U. S. 611, 613, 26 L. ed. 1135, 1136; Pettibone v. United States, 148 U. S. 197, 202, 206, 37 L. ed. 419, 422, 424, 13 Sup. Ct. Rep. 542; United States v. Slenker, 32 Fed. 694; United States v. Taylor, 57 Fed. 394.

The facts were agreed upon, and a question of law arose as to whether the parties used a device.

Com. ex rel. Atty. Gen. v. New York, L. E. & W. R. Co. 132 Pa. 591, 7 L.R.A. 634, 19 Atl. 291; Reaffirmed in 139 Pa. 457, 21 Atl. 528.

No reference to any device was made in the indictment. Hence, the charge in submitting that question enlarged the issues. If, as claimed, the indictment was bad because it charged no device, it could not be cured by the charge. If it was good without this averment, it was an enlargement of the issues to submit it. In either event the charge was erroneous.

Scott v. Lunt, 7 Pet. 596, 607, 8 L. ed. 797, 801; 11 Enc. Pl. & Pr. pp. 158, 159, 161, 163, 167.

The same kind of a contract, in principle, has been in force for years with the Chicago Great Western Railway Company, and, if not expressly approved, it has not met the disapproval of either the Interstate Commerce Commission, or the courts, although there fully considered.

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003.

Another contract, like this in principle, was that agreeing to carry for a certain period at certain rates the traffic of a milk shipper.

Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 51, 203 U. S. 588, 51 L. ed. 330, 27 Sup. Ct. Rep. 776.

Even if a statute does not use the words "wilfully or intentionally," or make *scienter* necessary, still it will, by construction, be made to mean that there must have been knowledge of wrongdoing and actual guilty intent, unless, possibly, in cases where a specific act is unconditionally made an offense.

United States v. Carll; Pettibone v. United States; United States v. Slenker; United States v. Taylor; United States v. Milwaukee Refrigerator Transit Co,—supra; Potter v. United States, 155 U. S. 438, 447, 39 L. ed. 214, 218, 15 Sup. Ct. Rep. 144; Felton v. United States, 96 U. S. 699, 701, 24 L. ed. 875, 876.

Mr. **John C. Cowin** also argued the cause and filed a brief for petitioner, the Cudahy Packing Company:

The interstate commerce law was enacted to facilitate commerce, and not to impair it. Eliminate from it the element of contract exceeding ten days' duration, and its impairment would be beyond estimate.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 218, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

A contract will be construed, if possible, as being made for a legal, rather than an illegal, purpose.

Hobbs v. McLean, 117 U. S. 569, 29 L. ed. 941, 6 Sup. Ct. Rep. 870; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038.

The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.

Clarke & M. Crimes, 2d ed. §§ 55, 56, 75.

The rule that mistake of law is no defense does not apply where a specific evil intent is an essential element of the offense charged.

Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 58 U. S. App. 173, 86 Fed. 846; Mobile & O. R. Co. v. Dismukes, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289; Re Belknap, 96 Fed. 617.

The law intended to punish only an active and wilful violator of its provisions.

United States v. Michigan C. R. Co. 3 Inters. Com. Rep. 287, 43 Fed. 30.

Attorney General **Bonaparte**, Assistant to Attorney General **Purdy**, and Mr. **A. S. Van Valkenburgh**, argued the cause and filed a brief for respondent:

Not only is the direct granting of unjust discrimination, and the acceptance of direct rebates and concessions, prohibited, but also the granting and acceptance of such as are cloaked in the guise of some specious device, of any nature whatsoever.

United States v. Tozer, 2 L.R.A. 444, 2 Inters. Com. Rep. 422, 37 Fed. 635; United States v. Standard Oil Co. 148 Fed. 719; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 392, 50 L. ed. 515, 521, 522, 26 Sup. Ct. Rep. 272.

The courts have on more than one occasion evidenced their disapproval of attempts to narrow the construction of statutes so as to destroy their remedial efficacy and prevent the accomplishment of the public purpose for which they were intended.

Miller v. United States, 66 C. C. A. 399, 133 Fed. 340; Harris v. Rosenberger, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 456.

Congress knew that it could not arbitrarily select a district or districts in defiance of the Constitution. It had already, in the charging part of the act, linked the unlawful act of rebating inseparably with the act of transportation. It intended by that portion of the act, and by the section providing for the place of prosecution, to stamp the crime as a continuing one, which should live and might be punished in every judicial district through which the transportation was conducted.

Davis v. United States, 43 C. C. A. 448, 104 Fed. 136.

The offense of giving or receiving rebates or concessions may be considered to have arrived at such a stage as to be susceptible of prosecution whenever the transportation has started by the delivery of the property to the carrier, and the offense continues and is ever present until that transportation is completed.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104.

The doctrine of a continuing offense is not a new one, nor is the practice of prosecution in more districts than one an anomaly under the Constitution.

State v. Smith, 66 Mo. 61; State v. McGraw, 87 Mo. 161; State v. Hatch, 91 Mo. 568, 4 S. W. 502; Re Richter, 100 Fed. 298; Com. v. Parker, 165 Mass. 526, 43 N. E. 499; State v. Bailey, 50 Ohio St. 636, 36 N. E. 233; Com. v. Macloon, 101 Mass. 6, 100 Am. Dec. 89.

The purpose of Congress in making the offense cognizable in any district through which the transportation passes was to relieve the prosecution from embarrassment because of uncertainty as to the district in which the concession was granted, or in which the money was actually paid.

Burton v. United States, 196 U. S. 283, 303, 49 L. ed. 482, 488, 25 Sup. Ct. Rep. 243.

Congress has complete power over the subject of commerce between citizens of the United States and foreign nations or the subjects of foreign nations.

Gibbons v. Ogden, 9 Wheat. 1, 193, 6 L. ed. 23, 69; Brown v. Maryland, 12 Wheat. 421, 446, 6 L. ed. 679, 688; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 214, 20 L. ed. 370, 373; United States v. Holliday, 3 Wall. 407, 417, 18 L. ed. 182, 185; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

Congress, in the interstate commerce act and the various acts amendatory thereto, has undertaken to regulate such commerce.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The discretion was with Congress, and with Congress alone, and the courts cannot do otherwise than enforce the plain provisions of the legislative act.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation, to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions, and to prevent undue or unreasonable preferences to persons, corporations, or localities.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

The Interstate Commerce Commission, in Re Tariffs on Export & Import Traffic, 10 Inters. Com. Rep. 55, held that the act requires the publication of import and export tariffs, and, in a very complete and well-considered opinion, gives its reasons therefor.

The Commission had theretofore repeatedly held that export and import rates should be published.

New York Produce Exchange v. New York C. & H. R. R. Co. 2 Inters. Com. Rep. 553, 3 I. C. C. Rep. 137; New Orleans Cotton Exchange v. Louisville, N. O. & T. R. Co. 3 Inters. Com. Rep. 523, 4 I. C. C. Rep. 694.

The constitutional prohibition respecting taxes or duties on exports has to do entirely with the taxing power.

Pace v. Burgess, 92 U. S. 374–376, 23 L. ed. 658, 659; Cornell v. Coyne, 192 U. S. 419, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; Passenger Cases, 7 How. 414, 501, 12 L. ed. 757, 793.

The prohibition can extend only to such burdens, and those by way of tax or duty, as have the general purpose and object, either directly or indirectly, to affect exportation; not to such as, having no such purpose, may result in mere incidental inconvenience to some isolated shipments.

Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 433, 15 L. ed. 435, 438.

It is a well-settled rule that courts will not declare legislative enactments void by reason of their repugnance to the Constitution, state or Federal, except when the judicial mind is clearly convinced of such repugnancy.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Burrow-Giles Lithographic Co. v.

Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279.

The question whether a law be void for its repugnancy to the Constitution should seldom, if ever, be decided in the affirmative in a doubtful case. It is not on slight implication and vague conjecture that a legislature is to be pronounced to have transcended its power, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Passenger Cases, 7 How. 414, 496, 12 L. ed. 757, 791.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

Mann v. Illinois, 94 U. S. 113, 24 L. ed. 77.

The constitutional prohibition against preferring ports had its origin in state jealousy, and its application is confined to the ports of one state as distinguished from the ports of another state, and to legislation which is intended to give, and which has the effect of giving, a preference to ports by reason of their location in some particular state.

Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 434, 15 L. ed. 435, 438.

The prohibition of such a preference does not extend to acts which may indirectly benefit the ports of one state, and only incidentally injuriously affect those of another,—such as the improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce.

South Carolina v. Georgia, 93 U. S. 13, 23 L. ed. 784.

Regulations of states respecting pilots, having special application to certain ports, have been held to be constitutional as not in general granting a preference to the ports of one state over those of another. So also the acts of Congress delegating to states the right to regulate pilots.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996.

The clause of the Constitution is a limitation upon the power of Congress to regulate commerce, for the purpose of producing entire commercial equality within the United States.

Norris v. Boston, 7 How. 414, 12 L. ed. 757.

All that Congress can do is to guarantee that each shipper and each carrier similarly situated shall at the same hour of the same day, as nearly as may be, stand upon the same footing; that no underhanded, arbitrary discriminations shall be made.

Brewer v. Central R. Co. 84 Fed. 258.

Since the passage of the Elkins amendment the shipper is liable, equally with the carrier, for a departure from the filed and published rate; and the mere soliciting, accepting, or receiving of a concession or rebate is an offense. No intent is necessary to the completion of that offense. Where the intent is not essential, a mistake or ignorance of fact is quite as immaterial as mistake or ignorance of law.

United States v. Leathers, 6 Sawy. 17, Fed. Cas. No. 15,581; State v. Griffith, 67 Mo. 287; Beckham v. Nacke, 56 Mo. 546.

To these decisions may be added the many Federal cases applicable to the violations of the internal revenue laws, depending merely upon the act done, and not upon the criminal intent of the party doing the act.

People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; Com. v. Boynton, 2 Allen, 160; Com. v. Wentworth, 118 Mass. 441; People v. Kibler, 106 N. Y. 321, 12 N. E. 795.

The contract between the Burlington company and the packers, even if valid as between carrier and shipper after August 7, 1905, cannot avail either carrier or shipper as a defense to a departure from the filed and published rate in force after that date.

Southern R. Co. v. Harrison, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; United States v. Standard Oil Co. 155 Fed. 309.

All the decisions which hold, even indirectly, that notice to a shipper should be proved, or that a contract in contravention of a law enjoining adherence to the published rate may be upheld in favor of the shipper, in a civil action between himself and the railroad company, antedate the passage of the Elkins amendment.

Church v. Minneapolis & St. L. R. Co. 14 S. D. 443, 85 N. W. 1001; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 52; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

The law stood upon the statute books when this contract was made. Both parties contracted with reference to that law and what subsequently might be done under it, even to the extent, as has been held, that the law itself might be changed, because the power to regulate and legislate respecting such commerce is reserved in Congress.

Fitzgerald v. Grand Trunk R. Co. 63 Vt. 173, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; McGowan v. Wilmington & W. R. Co. 95 N. C. 417; Clarenden v. Rutland

R. Co. 75 Vt. 6, 52 Atl. 1057; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 372, 42 L. ed. 505, 18 Sup. Ct. Rep. 157.

Even though it be a fact that the right of contract respecting rates is curtailed by the interstate commerce act, nevertheless the rights of the individual must yield to the paramount right of society, under this law enacted by Congress under powers conferred by the Constitution of equal dignity with those guarantying the right of contract.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 399, 50 L. ed. 524, 26 Sup. Ct. Rep. 272.

Nowhere in the evidence does it appear that the shippers would have suffered in the matter of their ocean rates, or in the matter of their foreign contracts for the sale of their products, by observing the published schedule. The shippers were simply seeking concessions in the matter of rates, and the railroad was seeking tonnage, without reference to the mandate of the law.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 398, 50 L. ed. 524, 26 Sup. Ct. Rep. 272.

The indictment is sufficient.

United States v. Simmons, 96 U. S. 360, 362, 24 L. ed. 819, 820.

Neither an objection to the introduction of evidence, nor proceedings subsequent to verdict, sufficiently challenge the indictment.

United States v. Harmon, 45 Fed. 415; United States v. Dimmick, 112 Fed. 352.

The matter, if a substantial one, should have been brought to the attention of the court by demurrer or appropriate motion. Nothing of the sort was filed by the defendants in these cases, and the defect, if defect it be, was waived.

Kentucky Life & Acci. Ins. Co. v. Hamilton, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 102; Connors v. United States, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; Ledbetter v. United States, 170 U. S. 606, 611, 42 L. ed. 1162, 1163, 18 Sup. Ct. Rep. 774.

The term "device," as used in the law in such connections, is nothing more than any project, course of business, or form of dealing as may render more feasible and readily effected the object aimed at.

Horman v. United States, 53 C. C. A. 570, 116 Fed. 350; Miller v. United States, 66 C. C. A. 399, 133 Fed. 337; Fairfield Floral Co. v. Bradbury, 89 Fed. 393.

Error favorable to the defendant in giving an instruction outside the issues is harmless.

Miller v. Root, 77 Iowa, 545, 42 N. W. 502; 11 Enc. Pl. & Pr. p. 180.

The packing companies knew what they were doing. They are conclusively presumed to have intended to do what they did, and they are bound by the legal consequences of their acts. That is the only intent necessarily involved in these cases.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 396–398, 50 L. ed. 515, 523, 524, 26 Sup. Ct. Rep. 272; United States v. Standard Oil Co. 155 Fed. 313; Interstate Commerce Commission v. Reichmann, 145 Fed. 237; United States v. Chicago & A. R. Co. 148 Fed. 648; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 257; United States v. Wood, 145 Fed. 410; United States v. American Sugar Ref. Co. (C. C. S. D. N. Y.).

Mr. Justice Day delivered the opinion of the court:

These cases are here upon writs of certiorari to the United States circuit court of appeals for the eighth circuit. By stipulation there was a single petition for certiorari, and the cases in the circuit court of appeals were considered together on the record in the Armour Packing Company Case, and, as it is conceded in the brief of the learned counsel for the petitioners that the differences in the cases are unsubstantial, the same course may be followed here.

Each of the petitioners was convicted in the district court of the United States, western district of Missouri, for violation of the so-called Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), in obtaining from the Chicago, Burlington, & Quincy Railway Company an unlawful concession of 12 cents per 100 pounds from the published and filed rate on that portion of the route between the Mississippi river and New York, for transportation upon a shipment made August 17, 1905, for carriage by rail of certain packing-house products from Kansas City, Kansas, to New York for export. Upon writs of error from the circuit court of appeals of the eighth circuit the sentences of conviction were affirmed. 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 1.

The facts in the Armour Case are briefly these: From May 9 to August 6, 1905, the Chicago, Burlington, & Quincy Railway Company, with its connecting railroads east of the Mississippi river, under joint traffic arrangements, had filed, published, and posted in accordance with the acts of Congress the *rates of shipment of the character **[67]** in question, and showing that the proportionate part thereof from points on the Mississippi river to New York was 23 cents per 100 pounds. Upon June 16, 1905, the packing company contracted with the Wilson Steamship line for space upon boats sailing in August for certain shipments, and notified the Burlington Company thereof, giving it a copy of the contract. On June 17, 1905, the Burlington Company contracted with the packing company to carry export shipments from Kansas City, Kansas, of products named, until December 31, 1905, at a rate the proportionate part of which from the Mississippi river to New York City was 23 cents per 100 pounds, as aforesaid. Upon August 6, 1905, the tariff was amended and duly published and filed, showing that the proportionate part from the Mississippi river to New York City was 35 cents instead of 23 cents per 100 pounds. One of the connecting railroads then objected to the carrying of the freight at the contract rate hereinbefore stated, and a controversy arose between it and the Burlington Company as to whether such contract should apply, the Burlington Company claiming that it should, the connecting carrier denying this contention. Upon August 17, 1905, the packing company delivered at Kansas City, Kansas, to the Burlington Company, 67 tierces of oleo oil, property of the character covered by the contract, for export to Christiania, Norway, and upon receipt thereof at Kansas City, Kansas, the Burlington Company issued and delivered a bill of lading, agreeing to carry the same to the point of destination for a through rate, which included the carriage by, and the rate of, the steamship line, which bill of lading was, according to the ordinary course of business, delivered to the Traders Despatch, one of the connecting carriers, which took the same up and issued a through bill of lading for the goods at the through rate. The bill was in triplicate, one copy thereof being delivered to and accepted by the steamship company. The packing company paid to the Burlington Company, as the initial carrier, the full [68] through rate for the *carriage over the line of the Burlington Company and its connecting carriers and that of the steamship line, and, from the time of the delivery of the freight to the railway company at Kansas City, Kansas, until it was delivered at the export destination, it was exclusively handled by the carriers, rail and steamship, the shipper having nothing to do with it. The Burlington Company did, with connecting lines, transport the property from Kansas City, Kansas, through the western district of Missouri and other states and districts to New York City, where the same was delivered to the steamship line. The full rate for the through carriage thus paid was made up so that the proportional part of the railroad carriage east of the Mississippi river was 23 cents per 100 pounds, instead of 35 cents per 100 pounds, fixed by the amended and published rate. The packing company, at the time of making the shipment and paying the freight, knew of the filing and publishing of the amended tariff of August 5, 1905, but did not know how the rate was apportioned or divided, or made up among the respective carriers or points, except that it knew the steamship rate as named in the contract with the steamship owners.

At the time aforesaid the Burlington Company was a common carrier, engaged in the transportation of property by railway under contract agreements and traffic arrangements with certain other lines, extending from Kansas City, Kansas, east to the city of New York and other seaboard points. There were no fixed contract agreements or traffic arrangements with the steamship lines, which were conducted as hereinafter set forth. The ocean rate is variable, depending upon the season, weather, and other matters. The steamship must sail at a given date and has a certain amount of space to be filled, so that space may be at one time quoted to one person at one price and at another time to another person at a different price. The question of such rates varies from hour to hour, as well as from day to day. For these, among other reasons, there was no contract agreement or traffic arrangements between the railroads and export steamship lines. The reservation of *space upon [69] an ocean steamer in advance is an important thing, so that the packing company can be certain that its shipment can go on the boats sailing at specified times. The packing company has houses in different parts of the United States, so that it cannot always, at the time of the contract for space, know from what particular point and over what road the shipments will go.

Before August 6, 1905, shipments were made according to the terms of the contract aforesaid, which were carried under the terms thereof. The Armour Company contended and insisted that the amendment increasing the tariff rate did not and could not abrogate or impair the term of its contract.

These prosecutions were under the Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), and the first question argued concerns the construction of that act, as to what constitutes a crime on the part of the shippers so far as obtaining a shipment by some manner of device is concerned, it being the contention of the petitioners that, in order to work conviction, the shipper must be guilty of some bad faith or fraudulent conduct in the use of the device, or obtain the rebate by some intentionally dishonest or underhanded method, concession, or discrimination denounced by the act. The history of the act in this feature may be of service in interpreting the meaning of Congress. The act of February 4, 1887, made no provision for criminal offenses against the shippers, but it was provided (§ 2, 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3155), that if the common carrier should, directly or indirectly, by any special rate, rebate, or other device, demand, collect, or receive, through any person or persons, a greater or less compensation for any service rendered or to be rendered in the transportation of property subject to the provisions of the act, than it charges, demands, collects, or receives, etc., from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially the same circumstances, such common carrier shall be deemed guilty of unjust discrimina-[70]tion, which by the *act was prohibited and made unlawful. And it was made unlawful for a common carrier to deviate from the published schedule of rates, fares, and charges. 24 Stat. at L. § 6, p. 381, chap. 104, U. S. Comp. Stat. 1901, p. 3156.

By the act of March 2, 1889 (25 Stat. at L. 857, § 2, chap. 382, U. S. Comp. Stat. 1901, p. 3161), the shipper was brought within certain criminal provisions of the law, and one who should knowingly and wilfully, by false billing, false classifying, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, with or without the consent or connivance of the carrier, obtain or dispose of property at less than the regular rate established and in force, should be deemed guilty of fraud.

It will be noticed that, in these statutes, the term "device" is associated with other words indicative of its meaning, and, in the act of March 2, 1889, the shipper, for falsely acting as to weighing, billing, classifying, or obtaining the transportation of property at less than the regular rate, or by any other device, was deemed guilty of fraud. In this act the term "device," as one of the means of consummating a fraud, shows the sense in which the term is used by Congress. It was only fraudulent conduct in obtaining transportation at less rates than others, which was denounced by the act, and the imposition aimed at was principally such as might be practised by the shippers upon the carriers in order to procure the preference.

When we come to the Elkins act we find the following provisions (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880):

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or *discrimination in respect of [71] the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised. Every person or corporation which shall offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession, or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practised. And we find the word "device" disassociated from any such words as "fraudulent conduct, scheme, or contrivance," but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

[72] *This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.

The views of this court, speaking through Mr. Justice White, in New York, N. H. & H. R. Co. v. Interstate Commerce Commission. 200 U. S. 361. 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272, 277, are apposite here:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs. and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

The Elkins act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike. and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established. published. and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

It is next contended that there is no [73]jurisdiction to prosecute *the offense named, because the alleged offense. if any, was not committed in the western district of Missouri, where the prosecution was had, but the same was complete in Kansas City, in the state of Kansas; and it is contended in this connection that if the act can be construed to include prosecutions in other districts it is unconstitutional within the provisions of the 6th Amendment of the Constitution of the United States, which provides that the accused shall have the right to be tried by an impartial jury of the state and district wherein the crime shall have been committed. Art. 3, § 2, 6th Amendment.

As to the construction of the act. in addition to the section of the act above quoted, it is further provided in the Elkins law (32 Stat. at L. 847. chap. 708, U. S. Comp. Stat. Supp. 1907. p. 880), as to jurisdiction:

Prosecution—Jurisdiction. "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined. and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

In this case the indictment charges the actual transportation of the property from Kansas City, Kansas. to New York City, the course of transportation being through the western district of Missouri. in which the prosecution was had.

We are not now concerned with the construction of the act in making provision for punishing the carrier or shipper for offering, granting, or giving, or soliciting, accepting, or receiving, rebates, concessions. or discriminations. irrespective of actual transportation, for it is specifically made an offense to receive any rebate or concession *whereby any such property is, by any device whatever, transported* at a less rate than that named, published, and filed by the carrier; and jurisdiction is given to prosecute in any criminal court of the United States *in the district *through which the*[74] *transportation may have been conducted.*

Having in view the offense charged in this case, we think it is clearly within the terms of the act making it penal to procure the actual transportation, by any of the means denounced in the act. of goods at a less rate than that named in the tariffs. It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. Wherever such transportation is received, there the offense is to be deemed to have been committed. Why may this not be so? In this feature of the statute, the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed.

Congress also embraced in § 1 of the Elkins act offenses not depending upon actual transportation through districts; and, as to the trial of such, it also made provisions in the venue section.

For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting, or receiving of rebates, concessions, or discriminations, "whereby any other advantage is given or discrimination is practised" in respect of interstate transportation.

Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation — actual carriage — was made an essential element might continue through several districts; and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act. It is at least certain that these sections, construed together, make an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district [75] through which it *is had. That is the offense of which the accused is charged in this case, and such is the district in which it was tried.

It is contended that the contrary was held in the case of Davis v. United States, 43 C. C. A. 448, 104 Fed. 136, decided in the circuit court of appeals for the sixth circuit. In that case the prosecution was for false billing by the shipper, under § 2 of the act of 1889, wherein the statute provided punishment for the offense in a single district, and it was there held that the crime was complete in the district in which the false billing was made and the goods delivered to the carrier for transportation, and that its actual carriage was not an essential element of the offense; and that a prosecution in Texas for goods falsely billed and delivered to the carrier in Ohio could not be maintained.

Under the amended act, transportation with a rebate, or at a concession from the established rates, is made an offense as to the shipper as well as the carrier, thereby differentiating the Elkins act from § 2 of the act of 1889, as construed in the Davis Case. In the Davis Case it was specifically said:

"Such transportation may be through a number of districts, but Congress has given jurisdiction for punishment of the crime in the district in which the offense is committed. It must have been in the contemplation of Congress that the fraudulent representations may be made in one place, and the transportation, in the sense of actual carriage, obtained as a result thereof, may be to a state or district remote from the place of delivery, and through a number of districts of the United States. If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress, in passing this act, and providing for the place of trial and punishment in a single district, evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper and the delivery for transportation takes place."

*But it is said this construction of the act [76] is in violation of the 6th Amendment of the Constitution of the United States, which requires crimes to be prosecuted and punished in the state or district where the same are committed, and that, as the transportation was had, at least in part, in Kansas, the offense was there completed and could not be prosecuted elsewhere. But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense, and not the personal presence of the offender. Re Palliser (Palliser v. United States) 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034; Burton v. United States, 202 U. S. 344, 387, 50 L. ed. 1057, 1073, 26 Sup. Ct. Rep. 688. This doctrine finds illustration in Palliser's Case, supra, in which a person was prosecuted in Connecticut for mailing a letter in New York, addressed to the postmaster in the former state, to induce him to violate his official duty, and it was therein argued that the offense was complete in New York when the letter was mailed, and that only in the New York district could the prosecution be constitutionally had; but this court, speaking through Mr. Justice Gray, said: "There can be no doubt at all, if any offense was committed in New York, the offense was continuing to be committed when the letter reached the postmaster in Connecticut."

In that case the offender had done no act out of New York, and the acts performed by him were complete when the letter was delivered at the postoffice in that state; but this court held the crime to be a continuing one. We think the doctrine for stronger reason applies in the present case, for transportation is an essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled route, and during transportation the crime is being constantly committed. It does not follow, from this view of the character of the offense, that a single transportation of goods can be made [77]the basis of repeated separate *criminal charges in each of the districts through which the transportation at an illegal rate is had. Take the present case. The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi river and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

To say that this construction may work serious hardship in permitting prosecutions in places distant from the home and remote from the vicinage of the accused is to state an objection to the policy of the law, not to the power of Congress to pass it. Hyde v. Shine, 199 U. S. 62, 78, 50 L. ed. 90, 95, 25 Sup. Ct. Rep. 760. But this is a large country, and the offense under consideration is one which may be constantly committed through its length and breadth. This situation arises from modern facilities for transportation and intercommunication in interstate transportation, and considerations of convenience and hardship, while they may appeal to the legislative branch of the government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce. We think there was jurisdiction to prosecute for the offense charged within the western district of Missouri.

It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the 1st section of the act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) interstate commerce; (b) commerce between the United States and an *adjacent* foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point [78]of transshipment; *(e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And it is contended that § 6, as amended (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of § 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. There is no attempt in the language of the act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment. This construction *is reinforced[79] by the broad provisions of § 6 of the act as to publishing schedules, showing rates, fares, and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission. Re Tariffs on Export & Import Traffic, 10 Inters. Com. Rep. 55.

It is contended that the act, as construed by the circuit court of appeals, makes it conflict with art. 1, § 9, par. 5, of the Constitution, which provides: "No tax or duty shall be laid on any articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

The petitioner contends that to permit a statute to have such application to articles intended for foreign export is to place a burden on the exercise of this right, because, before the shipper can lawfully send his goods abroad, and before the carrier can lawfully accept them, there must be a compliance with the established rate on file with the Interstate Commerce Commission. This rate is subject only to be changed as provided by law; and this can be done without notice to the exporter and regardless of his power to comply with the legal rate and meet the competition at the seaport and the conditions of foreign markets. These things, it is said, place a distinct burden upon export trade, and therefore come within the constitutional prohibition. But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition. Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383.

The regulations of interstate commerce provided by the statute now under consideration are within the acknowledged power of Congress under the interstate com- [80] merce clause of *the Constitution. There is no attempt to levy duties on goods to be exported, and the mere incidental effect in the legal regulation of interstate commerce upon such exportations does not come within this constitutional prohibition.

Nor do we think there is any more force in the contention that this legislation amounts to a preference of ports of one state over those of another within the meaning of the constitutional provision under consideration. This provision was intended to prevent legislation intended to give, and having the effect of giving, preference to the ports of one state over those of another state. It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one state more than those of another, cannot be construed as a violation of this constitutional provision. South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. ed. 782, 784; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 433, 15 L. ed. 435, 438.

It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

In the Elkins act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three *days' notice. Sec. 6, 25 Stat. [81] at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158. There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion, in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law.

It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of [82] which *contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the government. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 399, 50 L. ed. 524, 26 Sup. Ct. Rep. 272. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.

If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law.

The right to charge other than the published rate because of a contract alleged to have provided for the rate in force at the time, but, owing to changed conditions, subsequently becoming inadequate to provide for the payment of the published rate, was dealt with by this court in New York, N. H. & H. R. Co. v. Interstate Commerce Commission, supra, where a contract for the purchase and carriage of coal at its inception produced the established rate to the carrier, which it subsequently failed to do. This court, speaking through Mr. Justice White, said:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of *rates would have [83] been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity, stipulating for the payment of a fixed price in the future, and thereby acquiring the power, during the life of the contract, to continue to execute it, although a violation of the act to regulate commerce might arise from doing so."

It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that, in statutory offenses, every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars. *United States [84] v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934. But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

And in Ledbetter v. United States, 170 U.

S. 606, 612, 42 L. ed. 1162, 1164, 18 Sup. Ct. Rep. 774, 776, Mr. Justice Brown, speaking for the court, said:

"Notwithstanding the cases above cited from our reports, the general rule still holds good that, upon an indictment for a statutory offense, the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense."

In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.

Had it been made by demurrer or motion, and overruled, it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720; Connors v. United States, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951.

There can be no doubt that the accused was fully advised of, and understood, the precise facts which were alleged to be a violation of the statute.

As we interpret this law, it is intended, among other things, to prohibit and punish the receiving of a concession for the transportation of goods from the duly filed and published rate. Each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, are distinctly charged in the indictment, and include the fixing of the published rate at 23 cents per 100 pounds; the changing of the rate and the new publication at 35 cents per 100 pounds; the knowledge of this change on the part of the shipper, and the carriage of the goods over a described route at a concession of the difference between the published and the contract rate,—all these [85] *facts being stated, the indictment is clearly sufficient. Whether it was necessary to charge actual knowledge of the change of rate on the shipper's part is a question not involved in this case, as the indictment charges such knowledge, and the facts stipulated show that the shipper knew of the establishing of the new rate when the goods described in the indictment were shipped.

It is again contended that the submission in the trial court of the question of whether there was a device to avoid the operation of the act and to obtain the transportation at the less rate was prejudicial to the petitioners, as such issue was not within the agreed facts upon which the case was tried.

It is true, as we have held in another part of this opinion, that no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense outlined in the statute, and that any means by which transportation by a concession from the established rate was had is sufficient to work a conviction. Hence this charge was not prejudicial to the petitioner.

It is contended by the petitioner that there is nothing in the facts found in this case to show any intentional violation of the law; that, on the contrary, the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the interstate commerce act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case. While intent is, in a certain sense, essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are *liable under [86] the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided, because not arising on this record. The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. 1 Bishop, Crim. Law, 5th ed. § 343. A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles. Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

Finding no error in the judgments of the Circuit Court of Appeals, the same are affirmed.

Mr. Justice **Moody** took no part in the disposition of this case.

Mr. Justice **Brewer**, dissenting:

I dissent from the opinion and judgment in this case, and, without noticing other objections, I rest that dissent upon this single ground: On June 17, 1905, the Burlington Railway Company made a contract with the petitioner, the Armour Packing Company, for the transportation of certain products from Kansas City, Kansas, to New York, this contract to remain in force until December 31, 1905. No objection is made to the reasonableness of this contract or the rates named. The time during which it was to run was brief, less than seven months, and but for the legislation of Congress there would be no question of its validity, or that it could be enforced without subjecting either party thereto to any liability, civil or criminal. On August 6 the Burlington Company and its connecting carriers filed with the Interstate Commerce Commission an amendment to their tariffs, which was duly posted and published, and by which the rate from Kansas City, Kansas, to New York, was increased.

On August 17, 1905, the Armour Packing [87]Company delivered *to the Burlington Company, under its contract, 67 tierces of oleo oil for transportation to New York. The railway company accepted the shipment, issued a through bill of lading, and received pay upon the basis of the rates fixed by the contract of June 17. Now, because the packing company insisted upon compliance by the railway company with its contract of transportation,—and the railway company (recognizing the binding force of the contract) accepted the transportation and received payment at the rates named therein,—the packing company is adjudged a criminal and fined the sum of $15,000.

I want to emphasize this matter. The railway company and the packing company entered into a fair and reasonable contract for transportation. Independently of the statute, it was valid in all respects, and could have been enforced by the packing company against the railway company, but, according to the ruling of the court, the railway company was authorized arbitrarily to break the contract, raise the amount to be paid for transportation, thus unsettling the business of the shipper, even, it may be, to the extent of wholly destroying it. Sustaining under those circumstances the power of the carrier and punishing the shipper shocks my sense of justice, and I cannot impute to Congress an intent by its legislation to make possible such a result.

It has been one of the boasts of our jurisprudence that it upholds the sacredness of contracts. By constitutional provision a state is estopped from passing a law impairing the obligation of a contract, and again and again has this court stricken down legislation having such effect. While there is no such restriction upon the power of Congress, yet Congress has in this case broken no contract. It has simply, as held by the court, given permission to a carrier, arbitrarily and without inquiry or decision by any tribunal, to repudiate its contract.

Again, we have held that in "enacting the statutes establishing the Interstate Commerce Commission the purpose of Congress was to facilitate and promote commerce." Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 198, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. *But to deny to parties the power [88] of agreeing upon rates of transportation for a reasonable time tends to destroy, and not promote, commerce. One of the conditions of successful business—one of the things which induces new industries—is the ability to provide in advance for certainty of expenditures, including among them the cost of transportation. Who will engage in any new enterprise or invest money in a manufacturing industry when he knows that he cannot make a definite contract for rates of transportation to and from his factory, but is advised that whatever contract he makes may, at the whim of the carrier, upon ten days' notice, be set aside and a higher rate imposed?

Further, it seems to be implied that Congress has given express authority to the carrier to raise its rates, but this is not so. The single provision is that it shall not raise its rates without giving ten days' notice. It is a limitation upon power instead of a grant of authority.

It may be said that the remedy of the shipper is to pay the increased rates and then sue the carrier for the excess. But upon what ground can such an action be maintained? If the contract is no longer valid, if it has been destroyed by the mere action of the carrier in publishing a new tariff, and the rates of the latter are in themselves reasonable, although in excess of the contract provisions, how can a shipper recover damages? The contract is gone, has ceased to be valid, the new rates are reasonable, and the shipper must abide by the consequences of the arbitrary act of the carrier.

But it may be said that prescribing the limitation of ten days' notice of an increase in rates is an implied authority to the carrier to make such a raise, providing the new rates are reasonable. To my mind it seems more in accordance with the spirit and purpose of the interstate commerce act to hold that, there being no express authority given to raise rates, the fact that the railway company has made a contract to operate for a reasonable time should be construed as an inhibition upon its right to make such a raise, and that the rates as fixed by its

[89]*contract should continue for all shippers until the termination of the period named therein.

Obviously, from the tone of the opinion of the court, the wrong done to the shipper is recognized, and the argument is only that the responsibility for the wrong rests upon Congress. In other words, the court has unloaded upon Congress the injustice which the construction placed by it upon the statute accomplishes. To my mind a better way would be to enforce the contract and thus secure justice in this case, leaving to Congress the enactment of additional legislation, if deemed necessary, to prevent the possibilities of secret arrangements between carrier and shipper.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice **Peckham**, concur in this dissent. They are also of the opinion that the trial court, the district court of the western district of Missouri, had no jurisdiction of the alleged offense, but that such jurisdiction was vested in the district court of Kansas, holding that when goods are delivered to the carrier, and the shipper has solicited, accepted, or received any rebate, concession, or discrimination from such carrier, "in respect to the transportation" of the goods, the crime is then complete, at least, so far as regards the shipper, and it cannot be made a continuing crime in each district through which the goods pass in their transportation. The Constitution has made provision for the venue of criminal actions or prosecutions, and their nature cannot be altered by legislative enactment, so as to embrace the whole country in one vast district. A provision in a statute of this nature, by which it is possible to find an indictment and to have a trial at the most remote point from the actual commission of the offense, ought not to be approved as a compliance with the Constitution.

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[90]*CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 90.)

This case is governed by the decision in Armour Packing Company v. United States, ante, 681.

[No. 552.]

Decided March 16, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a conviction in the District Court for the Western District of Missouri, for accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates. Affirmed.

See same case below, 157 Fed. 830.

Messrs. O. H. Dean, W. D. McLeod, H. C. Timmonds, and O. M. Spencer for petitioner.

Solicitor General Hoyt and Assistant Attorney General Purdy for respondent.

Mr. Justice **Day** delivered the opinion of the court:

The counsel for the petitioner and the Solicitor General for the United States having filed a stipulation in writing in this cause, agreeing to abide the result of the Packing Company Cases, just decided (Nos. 467, 468, 469, and 470), [209 U. S. 56, ante, 681, 28 Sup. Ct. Rep. 428], it is hereby ordered that the judgment of the Circuit Court of Appeals in this case be affirmed.

Mr. Justice **Moody** took no part in the disposition of this case.

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*JUAN GARCIA BOSQUE, Plff. in Err., [91]
v.
UNITED STATES.

(See S. C. Reporter's ed. 91–101.)

International law — cessions — change of allegiance.

1. The absence of a Spanish subject from the Philippine Islands during the entire period allowed by the treaty of peace with Spain of Dec. 10, 1898 (30 Stat. at L. 1759), art. 9, for making a declaration of his intention to preserve his allegiance to the Crown of Spain, prevents the loss of his Spanish nationality by reason of his failure to make such declaration.

International law — cessions — preservation of private rights.

2. Laws enacted by the new sovereignty, and not the Spanish laws, were meant by the provision of the treaty of peace with Spain of Dec. 10, 1898, art. 9, that Spanish subjects in the Philippine Islands shall have the right to carry on their industry, commerce, and professions, being subject in respect thereof to "such laws as are applicable to other foreigners."

Attorneys — admission to practice — Spanish subject.

3. A Spanish lawyer who had previously been denied permission to practise law by the supreme court of the Philippine Islands, upon the ground that he did not possess the political qualifications required by law, was not entitled to such permission by virtue of the provisions of the Philippine Islands Code of Civil Procedure, § 13, for the admission to practice of those "not specially

declared ineligible," who have been duly licensed under the laws and orders of the islands, under the sovereignty of Spain or of the United States, and are "in good and regular standing as members of the bar of the Philippine Islands at the time of the adoption of this Code."

Attorneys — admission to practice — Spanish subject.

4. A Spanish lawyer may be denied permission to practise by the supreme court of the Philippine Islands because he did not possess the political qualifications required by law, although this is not one of the grounds recognized by the Code of Civil Procedure for depriving a lawyer of the right to practise, since these grounds relate solely to the removal or suspension from the bar of attorneys already practising.

International law — cessions — preservation of private rights.

5. The right to practise law was not embraced in the provision of the treaty of peace with Spain of Dec. 10, 1898, art. 8, that the cession of sovereignty cannot, in any respect, impair the property rights which, by law, belong to the peaceful possession of property of all kinds.

[No. 147.]

Submitted January 29, 1908. Decided March 23, 1908.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment denying permission to a Spanish lawyer to practise in the Philippine courts. Affirmed.

See same case below, 1 Philippine, 88.

Statement by Mr. Chief Justice **Fuller**:

Plaintiff in error applied to the supreme court of the Philippine Islands in February, 1901, to be admitted to practise law in the Philippine courts. His petition was supported by various certificates as to professional qualifications and good character, and set forth that petitioner was a graduate of the University of Manila, and practised law in the Philippine Islands from 1892 until the cessation of the Spanish courts; "that he is of good character, and has not been inscribed in the record of Spanish nationality, in consequence whereof I have lost this, in accordance with the provisions of the treaty of Paris, and therefore I am neither a subject nor citizen of any foreign government, and consequently, in my opinion, have the condition required by general order No. 29, July 19, 1899, of the United States military government in these islands, for continuing the practice of my profession."

July 27, 1901, the petition was denied by the supreme court, without opinion, on the [92] ground that the applicant "does not *possess the political qualifications required by law for the practice of his profession in the Philippine archipelago."

Plaintiff subsequently filed a petition for rehearing, accompanied by additional certificates and affidavits as to his professional and personal reputation. In this petition he claimed to be entitled to practise his profession under article 9 of the treaty of Paris [30 Stat. at L. 1759], and under § 13 of the Code of Civil Procedure, which had been enacted since the date of his first petition.

The petition for rehearing was denied by the court in an opinion rendered by the chief justice (1 Philippine, 88), which held that petitioner had not lost his Spanish nationality, but was a Spanish subject upon an equal footing with other foreign residents who were not entitled to practise the legal profession under the law, either prior or subsequent to the treaty of Paris.

In January, 1906, plaintiff in error presented to the court the following motion:

"Appears Juan Garcia Bosque and asks that the honorable supreme court be pleased to declare that the petitioner has a right to practise as an attorney at law in the Philippines before all courts. This motion is founded upon the accompanying affidavit."

The affidavit referred to stated that the affiant, on April 10, 1899, and for eight years immediately prior thereto, had practised law continuously before the courts of the islands. The supreme court overruled the motion, and thereupon plaintiff sued out this writ of error.

Mr. **Edgar W. Camp** submitted the cause for plaintiff in error:

Not only are foreigners not prohibited from practising law in Spain and its ultramarine possessions, but they are given, and since the year 1836 have been given, every encouragement by the Spanish government to do so.

Plan of Studies (Plan de Estudios) of 1836, art. 56; 5 Diccionario de Alcubilla, pp. 423, 428; 6 Diccionario de Alcubilla, pp. 798, 873, 999, 1135, 1136; 1 Diccionario de Berriz (1888) p. 1341; 3 Diccionario de Alcubilla, pp. 348, 357; 2 Diccionario de Alcubilla, p. 566.

The right of plaintiff in error to practise his profession is a vested right, of which he may be deprived only by due process of law. For the proper exercise and enjoyment of this right, the recognition by the insular supreme court, in the manner and form herein prayed, is essential.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Ely v. United States, 171 U. S. 220–223, 43 L. ed. 142, 143, 18 Sup. Ct. Rep. 840; Smith v. United States, 10 Pet.

330, 9 L. ed. 443; Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; Strother v. Lucas, 12 Pet. 411, 9 L. ed. 1137; Bryan v. Kennett, 113 U. S. 179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407.

Citizenship is not required for the practice of law under the United States government, any more than it is required under the Spanish government.

Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442.

Practical equality between alien and citizen has resulted from the entire freedom of intercourse that exists between civilized nations, so that it may be stated as a general rule applicable to all such nations, that the elective franchise and the right to hold public office are almost the only advantages possessed by the citizen that are not enjoyed by the alien.

Webster, Citizenship, p. 49.

Solicitor General Hoyt submitted the cause for defendant in error:

Aliens were not permitted to practise law in Spain and her colonies.

5 Diccionario de Alcubilla, pp. 423, 428; 6 Diccionario de Alcubilla, pp. 798, 873, 1135, 1136.

The right claimed by plaintiff in error is not a vested right.

Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Bradwell v. Illinois, 16 Wall. 130, 142, 21 L. ed. 442, 446; Languille v. State, 4 Tex. App. 312; State v. Gazlay, 5 Ohio, 14; Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62; Goldthwaite v. Montgomery, 50 Ala. 486; McCaskell v. State, 53 Ala. 510; Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197; Re Admission to Bar, 61 Neb. 58, 84 N. W. 611.

Citizenship is not required as a prerequisite to the practice of law under the Federal government; but in most of the states the statutes and rules of court require that an applicant for admission be a citizen of the state.

1 Johns. 528; Re O'Neill, 90 N. Y. 584; Re Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; Re Ashford, 4 Haw. 614; Re Admission to Bar, supra; Ex parte Thompson, 10 N. C. (3 Hawks) 355.

The requirement that lawyers should not be aliens is not harsh or unreasonable, but is based on wise and sound principles of public policy, which take into consideration the close connection of the practice of law with the administration of justice and the other branches of the government.

Ex parte Thompson, supra.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff in error contends: (1) That his right to practise law in the Philippine Islands was expressly guaranteed by article 9 of the treaty of Paris and recognized by § 13 *of the Philippine Code of Civil Procedure: [96] (2) that the supreme court of the Philippine Islands had no power, jurisdiction, or authority to deny or deprive a lawyer of his right to practise his profession, except for the reasons and in the manner provided in the Civil Code; (3) that plaintiff in error's right so to practise was a vested right, of which he could be deprived only by due process of law.

Article 9 of the treaty of Paris (30 Stat. at L. 1754) provided:

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain, by the present treaty, relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining, in either event, all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

The record shows that plaintiff in error left the Philippines for Europe on May 30, 1899, and remained away until January 11, 1901. In the affidavit accompanying his petition for rehearing he states that the reasons for his departure from the islands were the unsettled conditions prevailing there and the state of his health; that while abroad he lived in France and Spain, residing for the most part in Barcelona; that he did not return sooner to the Philippines because of newspaper reports as to personal unsafety in Manila. In his first petition he *claims to have lost his Spanish nationality [97] because he had not made the necessary declaration of intention to preserve his allegiance to Spain; but that requirement was meant only for those who remained in the territory, and was not necessary in his case, since he removed from the islands.

In the opinion of the Philippine supreme court he carried his Spanish nationality with him on his departure, and it could only be lost by continuous residence in the islands and failure to declare his intention of retaining it within the time specified. But plaintiff was absent from the Philippines during the whole of the period allowed for making such declaration, and remained away several months after its expiration. It follows that he did not become a citizen of the islands under the new sovereignty, but that he continued to remain a Spaniard. The fact that he intended to return does not affect this conclusion. It was not necessary, in order to retain his Spanish nationality, that he should remain away permanently, and he was absent for more than a year and a half.

The question whether aliens were permitted to practise law in Spain and her colonies is elaborately argued. but it is quite unnecessary to pass upon it, since it is manifest that the words in article 9 of the treaty, "such laws as are applicable to other foreigners," referred not to the Spanish law, but to the laws enacted by the new sovereignty. Spaniards only became "foreigners" after the cession of the islands; and it is obvious that the words meant such laws as shall be applicable to other foreigners.

We think it evident that plaintiff, under the laws and regulations on the subject put in force in the Philippines, first by the military and then by the civil authorities, was not entitled to the privilege which he sought.

On July 19, 1899, the military governor promulgated, in respect to the admission of lawyers, certain regulations, known as "general orders No. 29, series of 1899," § 2 of which provides as follows:

"Any resident of the Philippine Islands, [98] *not a subject* or **citizen of any foreign government*, of the age of twenty-three years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all of the courts of these islands."

By § 3 every applicant is required to produce satisfactory testimonials of good moral character and to undergo a strict examination in open court by the justices of the supreme court. If, upon examination, he is found qualified, he shall be admitted to practice in all the courts of the Philippine Islands, and a certificate of the record of the court's order to that effect shall be given him, which certificate shall be his license. (Sec. 4.) Section 5 is as follows:

"Every resident of these islands, *not a citizen* or *subject of any foreign government*, who has been admitted to practise law in the Supreme Court of the United States, or in any circuit court of appeals, circuit court, or district court thereof, or in the highest court of any state or territory of the United States, may be admitted to practise in the courts of these islands upon the production of his license. Likewise all persons duly accredited as lawyers in the Philippine Islands on the 31st day of January, 1899, who are residents of said islands, *and not subjects or citizens of another government*, may be admitted as attorneys and counselors in all the courts of the islands: Provided, That all applicants under this section shall furnish satisfactory evidence of good moral character and professional standing and take the prescribed oath: And provided further, That the court may, if it deems advisable, examine the applicant as to his qualifications."

Every person, upon admission, must take an oath of allegiance to the United States. (Sec. 6.)

It is conceded that plaintiff did not become a member of the bar under the provisions of this law.

General orders No. 29 was followed by act No. 190 of the Philippine Commission, being the Code of Civil Procedure for the Philippine Islands (1 Pub. Laws, p. 378), § 13 of which is as follows:

*"The following persons, *if not specially* [99] *declared ineligible*, are entitled to practise law in the courts of the Philippine Islands:

"1. Those who have been duly licensed under the laws and orders of the islands under the sovereignty of Spain or of the United States, and are in good and regular standing as members of the bar of the Philippine Islands at the time of the adoption of this Code.

"2. Those who are hereafter licensed in the manner herein prescribed."

It will be perceived that the applicants must be "in good and regular standing as members of the bar of the Philippine Islands *at the time of the adoption of this Code.*" This description does not apply to plaintiff in error. The Civil Code was enacted August 7, 1901, to take effect September 1, 1901. He had been denied permission to practise law by the supreme court of the Philippines on July 27, 1901. upon the ground that he did not possess the political qualifications required by law. He was not, therefore, at the date of the adoption of the Code, in good and regular standing as a member of the bar.

It is true § 13 declares "those who have been duly licensed under the laws and orders of the islands, under the sovereignty of Spain," etc., are entitled to practise law, but that applies only to persons "not specially declared ineligible;" and plaintiff in error was declared ineligible because a citizen or subject of a foreign government.

Reference may well be made in this connection to § 14 of the act, which reads:

"Any resident of the Philippine Islands, *not a subject or citizen of any foreign government*, of the age of twenty-three years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as a member of the bar of the islands, and to practise as such in all their courts."

Section 19 provides for the admission without examination of any resident, *not a citizen or subject of any foreign government*, [100] *who has been admitted to practise in any of the courts of the United States.

It seems clear from the provisions of general orders No. 29, and of the Code, that the intention was, and has been from the first, to require all members of the bar to be either citizens of the United States or those enjoying the status of natives of the Philippines, and to exclude all foreigners from the legal profession in the islands.

If it be conceded that plaintiff in error possessed the privilege of practising his profession in the islands at the time Spain surrendered her sovereignty over them, the enjoyment of that privilege ceased by virtue of the stipulations of the treaty of Paris and the subsequent laws and regulations of the new sovereignty inconsistent therewith; and the effect of the decision in the present instance was not to deprive plaintiff in error of that privilege. Counsel for plaintiff in error cite various sections of the Code which prescribe the grounds upon which a lawyer may be deprived of the right to practise, but they relate to the removal or suspension from the bar of attorneys already practising, and have no application to the case of one who has been denied admission to practice at all.

The 8th article of the treaty of Paris declares that the cession of sovereignty "cannot in any respect impair the property or rights which, by law, belong to the peaceful possession of property of all kinds," etc., but that stipulation does not relate to the rights connected with trades and professions. The word "propiedad" used in the Spanish text is defined by Escriche as the right to enjoy and dispose freely of one's things in so far as the laws do not prohibit it. 4 Escriche, 736. The same word appears in article 9, providing that Spanish subjects may retain, whether they remain or remove from the territory, "all their rights of property, including the right to sell or dispose of such property or of its proceeds." Clearly, the right to practise law was not referred to as "property" there, and they are followed by the words "and they shall also have the right to carry on their industry, commerce, and professions, *being subject in respect thereof to such laws [101] as are applicable to other foreigners."

We concur with the conclusions of the Supreme Court of the Philippines, and its judgment is affirmed.

SIMEON HALLOWELL
v.
UNITED STATES.

(See S. C. Reporter's ed. 101–107.)

Cases certified — by circuit court of appeals — questions of mixed law and fact.

Mixed questions of law and fact which require the construction of various acts of Congress and the determination, in the light of all the testimony in a criminal case, of the question of whether or not the accused can be held guilty of any offense legally punishable by the United States, cannot be certified by a circuit court of appeals, under the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, to the Federal Supreme Court for decision.

[No. 175.]

Argued March 12, 1908. Decided March 23, 1908.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting questions respecting the introduction of intoxicating liquors into the Indian country. Dismissed.

Statement by Mr. Justice **Harlan**:

This case is here upon certified questions by the judges of the circuit court of appeals.

The certified questions and the statement of the case which precedes them are as follows:

"The indictment was returned November 16, 1905, and charged that the defendant, on August 1, 1905, in the district of Nebraska, introduced whisky and other intoxicating liquors into the Indian country, 'to wit, into and upon the Omaha Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Omaha Indians.' The defendant entered a plea of not guilty, and the case was submitted to a jury upon the following agreed statement:

*" 'That the defendant, Simeon Hallowell, [102] an Omaha Indian, is and was, on the 1st

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NOTE.—As to definiteness of question to be certified—see note to Wako Water & Light Co. v. Wako, 31 L.R.A. 392.

day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston county, Nebraska; that the allotment so made to him was made under the provisions of the act of Congress of August 7, 1882 (22 Stat. at L. 341, chap. 434); that the first or trust patent was issued to him in the year 1884, and that the twenty-five-year period of the trust limitation has not yet expired; and that the fee title of the allotment so made to him is still held by the United States.

"'That the defendant, Simeon Hallowell, on the 1st of August, 1905, procured at a point outside the said reservation one-half gallon of whisky, which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited, and which allotment was made under the provisions of the act of Congress of August 7, 1882, and the title of which is held by the government, as the twenty-five-year trust period has not expired. That he took the said whisky into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whisky, and did give some of it to his friends or visitors to drink.

"'That the said Omaha Indian Reservation has been allotted practically in whole, and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the act of Congress of May 27, 1902 (32 Stat. at L. 245, 275, chap. 888); that within the original boundary limits of the Omaha Indian Reservation, there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent, without restriction upon alienation, had been issued to the allottee.

"'That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

"'That the Omaha Indian Reservation is [103] within and a *physical part of the organized territory of the state of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whisky. That the Omaha Indians exercise the rights of citizenship, and participate in the county and state government extending over the said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been, on frequent occasions, a judge and clerk of election, a justice of the peace, and assessor, and a director of the public school district in which he lives. That Omaha Indians have taken part in the state and county government, extending over the reservation, and have held the following offices in said county of Thurston, state of Nebraska: County coroner, county attorney, county judge, justice of the peace, constable, road overseer, election officers; and have also served as jurors in the county and district courts. Defendant is self-supporting, as are most of said Indians. Some of them are engaged in business and most of them engaged in farming.'

"Over the defendant's objection that the matters recited in the agreed statement did not constitute or show an offense against laws of the United States, the court instructed the jury that, if the matters so recited were true, the defendant was guilty of the offense charged. The defendant reserved an exception to this ruling. The jury found him guilty.

"And the circuit court of appeals for the eighth circuit further certifies that the following questions of law are presented to it in said cause; that their decision is indispensable to a decision of the cause; and that, to the end that such court may properly decide the issues of law so presented, it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

"1. After the allotment in severalty to the Omaha Indians of practically all of the lands in the Omaha Indian Reservation in the state of Nebraska, and the issuance to the several allottees of the first, or trust, patents, under the act of August 7, *1882 [104] (22 Stat. at L. 341, chap. 434), and after the provisions of § 7 of that act and of § 6 of the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), had become effective as to such allottees, did Congress retain or possess the power to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the title to the same should be held in trust by the United States, or while the same should remain inalienable by the allottee without the consent of the United States?

"2. Do the facts that the tribal relation of these Indians is still maintained, and that part of the lands in said reservation are unallotted, and are held by the United States for the use and benefit of the said tribe, as provided in § 8 of the said act of August 7, 1882, enable Congress, consistently with the provisions and effect of § 7 of that act and of § 6 of the said act of February 8, 1887, to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the same shall be held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States?

"3. As applied to allotments in severalty to Indians of lands in a state, when the land is to be held in trust for the allottee for a stated period, and is then to be conveyed to him or his heirs in fee, and is to remain inalienable by him during such trust period without the consent of the United States, and when the effect of the allotment is to give to the allottee the benefit of and to subject him to the laws, both civil and criminal, of the state, and to make him a citizen of the United States, and to entitle him to all the rights, privileges, and immunities of such citizens, is that portion of the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), which purports to regulate the introduction of intoxicating liquors upon such allotments, while the title to the same shall be held by the United States or while the same shall remain inalienable by the allottee without the consent of the United States, a valid exercise of the power of Congress to legislate in respect of Indians or Indian lands?

[105] *"4. Where, as shown by the stipulated facts, the defendant, Simeon Hallowell, an Omaha Indian, is an allottee of lands granted to him on the Omaha Indian Reservation, in Thurston county, state of Nebraska, which allotment was made to him under the provisions of the act of Congress of August 7, 1882 (22 Stat. at L. 341, chap. 434), and the first patent was issued to him in the year 1884, and the twenty-five years' period of the trust limitation fixed by said act has not expired, and the fee title of the allotment so made to him is still held by the United States; and where 'the said Omaha Indian Reservation has been allotted practically in whole, and many of the allotments of deceased Omaha Indians have been sold to white people under the provisions of the act of Congress of May 27, 1902 (32 Stat. at L. 245, 275, chap. 888);' and within the original boundary limits of the Omaha Indian Reservation many tracts of lands were hitherto sold under the provisions of said act to white persons, who are the sole owners thereof, and to whom the full title to such lands has passed to the purchaser, the same as if the final patent, without restriction upon alienation, had been issued to the allottee; and where all of the Omaha Indians, living in the year 1884, entitled to such allotments, have received the same; and where said Omaha Indian Reservation is within and a physical part of the organized territory of the state of Nebraska, as also the allotment hereinbefore referred to; and the said Omaha Indians, including the defendant, are citizens of the United States, and exercise the rights of citizenship, participating in the county and state governments extending over said Omaha Indian Reservation, and over the allotments aforesaid, the said defendant, Simeon Hallowell, having, on frequent occasions prior to 1905, held and exercised the office of judge, and justice of the peace, and assessor in said county; where said Omaha Indians have taken part in the state and the county government extending over the reservation; and where the defendant is self-supporting,—is he liable to indictment and punishment under the act of Congress of January 30, 1897 (29 Stat. at L. 506, chap. 109), for introducing *intoxicating liquor, as into an Indian country, where he procured one-half gallon of whisky at a point outside of said reservation, on the 1st day of August, 1905, which he took into and upon his allotment, within the limits of the Omaha Indian Reservation, which allotment he inherited, and which was made under the provisions of said act of August 7, 1882, the fee title to which is held by the government, as the twenty-five years' trust period has not expired, the said whisky having been so taken upon his allotment for the purpose of drinking and using the same himself, which he drank, giving some of it to his friends and visitors to drink?" [106]

Mr. **Thomas L. Sloan** argued the cause and filed a brief for Hallowell.

Solicitor General **Hoyt** argued the cause and filed a brief for the United States.

Mr. Justice **Harlan** delivered the opinion of the court:

In Chicago, B. & Q. R. Co. v. Williams, 205 U. S. 444, 454, 51 L. ed. 875, 879, 27 Sup. Ct. Rep. 559, 563, we had occasion to consider the scope and meaning of the 6th section of the judiciary act of March 3d, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], authorizing a circuit court of appeals, in every case within its jurisdiction, to certify questions or propositions of law concerning which it desires instruction for the proper decision of the case. The court there reaffirmed the rule, announced in previous cases, that the authority to certify such questions could not be used for the purpose of sending to this court the whole case, with all its circumstances, for consideration and decision. Jewell v. Knight, 123 U. S. 426, 31 L. ed. 190, 8 Sup. Ct. Rep. 193; Waterville v. Van Slyke, 116 U. S. 699, 29 L. ed. 772, 6 Sup. Ct. Rep. 622; United States v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; United States v. Union P. R. Co. 168 U. S. 505, 42 L. ed. 559, 18 Sup. Ct. Rep. 167. Upon a review of the adjudged cases we used this language in reference to the certificate of questions in that case: "The present certificate brings to us a question of mixed law and fact and, substantially, all [107] the circumstances connected *with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the circuit court of appeals, depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question, and we are, in effect, asked to indicate what, under all the facts stated, should be the final judgment. It is, obviously, as if the court had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case." 205 U. S. 444, 454.

The certificate in the present case is objectionable upon the ground that it does not set forth propositions of law, clearly stated, which may be answered without reference to all the facts, but mixed questions of law and fact which require us to construe various acts of Congress, and, in the light of all the testimony in the case, determine whether the accused could be held guilty of any offense legally punishable by the United States. It is as if the court were asked what, upon the whole case as sent up, should have been the verdict and judgment in the trial court. The certificate is defective and must be dismissed, because not in conformity to the statute.

It is so ordered.

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[108]*INTERSTATE COMMERCE COMMISSION, Appt.,
v.
CHICAGO GREAT WESTERN RAILWAY COMPANY et al., Appellees.

(See S. C. Reporter's ed. 108–123.)

Carriers — contracts with shippers — rates.

1. Railway companies may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided in the interstate commerce act.

Carriers — rates — competition.

2. Railway companies, in fixing their rates, may take into account competition with other carriers, provided that such competition is genuine.

Evidence — presumption — change of rate by carrier.

3. There is no presumption of wrong arising from a change of rates by a carrier.

Carriers — rates — discrimination.

4. The cost of carriage, the risk of injury, and the larger amount which the railway companies are called upon to pay out in damages for losses, may excuse a higher freight rate on live stock than on dressed meats and packing-house products.

Carriers — rates — discrimination.

5. A reduction of freight rates for dressed meats and packing-house products from Missouri river points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not directly influence or injure shippers of live stock.

Carriers — rates — discrimination — competition.

6. A genuine competition which results in a reduction of freight rates negatives any unlawful intent on the part of the carrier, and leaves open only the question as to whether the rates, as established, work an undue preference or discrimination.

[No. 73.]

Argued April 16, 17, 1907. Decided March 23, 1908.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing proceedings begun by the Interstate Commerce Commission against a railway company, charging discrimination in rates. Affirmed.

See same case below, 141 Fed. 1003.

Statement by Mr. Justice **Brewer**:

Certain proceedings were had before the Interstate Commerce Commission. They were commenced by the filing of a petition by the Chicago Live Stock Exchange in April, 1902, charging the defendants, who are now the appellees, with the violation of §§ 1 and 3 of the interstate commerce act of February 4, 1887. [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.] The specific offense stated was that the defendants were charging higher rates of freight upon live stock shipped from Missouri river points, and other points *similarly [109] situated, to Chicago, than upon dressed meats and the prepared products known as packing-house products. It was contended that this higher rate of freight was an unlawful discrimination against shippers of live stock to Chicago, and gave to shippers of packing-house products an undue and unreasonable preference and advantage over the former; that it subjected the Chicago Live Stock Exchange and its members, who were engaged in the business of selling live stock on commission, as well as the owners of live stock and the shippers thereof, to an unreasonable prejudice and disadvantage. The several defendants, with one or two exceptions, answered, denying the allegations of the complaint. After a hearing, the Interstate Commerce Commission, on January 7, 1905, filed its report and opinion, including findings of fact, and made an order, which is the foundation of this suit. The order is in these words:

Order of Commission.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:

It is ordered that, in accordance with said report and opinion, the present relation of rates maintained and enforced by defendants [naming them all, eighteen in number], whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago, in the state of Illinois, from points on the Missouri river, Sioux City, in the state of Iowa, to Kansas City, in the state of Missouri, inclusive, and from South St. Paul, in the state of Minnesota, or from points in the territory between the Missouri river or South St. Paul and Chi-**[110]**cago, constitutes wrongful prejudice *and discrimination, in violation of the provisions of the act to regulate commerce; and that said defendants be, and each of them is hereby, notified and required to cease and desist, on or before the 15th day of February, 1905, from maintaining or enforcing the said unlawful relation of rates, and from further continuing said unlawful prejudice and discrimination.

And it is further ordered that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of § 15 of the act to regulate commerce.

The defendants not complying with this order, the Interstate Commerce Commission caused this suit to be commenced in the circuit court of the United States for the northern district of Illinois, seeking to compel compliance. The defendants answered, admitting service of the order and refusal to comply therewith, denying that it was legal or binding, but, on the contrary, claiming that it was in violation of their rights. After the filing of the petition to enforce the order of the Commission, and the answers thereto, and in August, 1905, the Commission also commenced an original proceeding under and by virtue of the act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), known as the Elkins act, charging substantially the same discrimination. These cases were consolidated and heard before the circuit court, an enormous volume of additional testimony being taken, and on November 20, 1905, that court announced its opinion, stated its findings of fact and conclusions of law, and ordered that the bill should be dismissed. A decree accordingly was so entered. 141 Fed. 1003. The findings of fact were as follows:

"First. That the live-stock rates are reasonable in themselves. All live stock from points west, southwest, and northwest of the Missouri river and St. Paul are shipped on a proportional rate from the Missouri river or St. Paul to Chicago. These rates are equal to or less than the rates on dressed meats *and packing-house products between **[111]** the same points. There can be, and is, no complaint as to such traffic. The local rates from the Missouri river and St. Paul, and from 150 miles east, to Chicago, are as shown in above schedule. These rates gradually decrease until the Mississippi river is reached, and the average Iowa rate is 21 cents. The great weight of evidence indicates that these rates are at least reasonably low.

"Second. That the cost of carrying live stock is greater than that of carrying dressed meats and packing-house products.

"Third. That the value of the service of carriage is greater to the packers, because of the higher price of a car of dressed meats or packing-house products. Dressed meats and packing-house products are in value worth nearly twice as much as live stock. This factor is important, in ordinary cases, however, in part, because of the greater risk of carriage of high-priced commodities. In these cases, as to the particular commodities in question, the evidence shows that the defendant railroad companies pay out a much larger amount of damages for losses arising from the carriage of live stock than they do for losses arising from the carriage of dressed meats and packing-house products, in proportion to the value of the products carried, and more in damages per car regardless of the value. This makes the risk of carriage greater for live stock. The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases.

"Fourth. That the rates in question given to the packers at Missouri river and St. Paul were the result of competition. The product of the packers at these points was large in quantity, was certain and continuous in amount, was in the hands of a few people, and for years before the Federal injunction of March, 1902, had been competed for so strenuously by the railroads reaching and passing through these points, as to cause the cutting of rates and the giving of secret rebates in large amounts. Four of the de-[112]fendant companies, the Chicago, *Milwaukee, & St. Paul Railroad Company, the Chicago & Northwestern Railway Company, the Chicago, Rock Island, & Pacific Railway Company, and the Chicago, Burlington, & Quincy Railroad Company, passed through these points into the territory west of the Missouri river and St. Paul. Four other of the defendant companies, the Chicago Great Western Railway Company, the Chicago & Alton Railway Company, the Illinois Central Railroad Company, and the Wabash Railroad Company, reached the Missouri river points and St. Paul, competing for this business. Other railroads, running south to the Gulf of Mexico, also competed more or less for said business, including the Atchison, Topeka, & Santa Fé Railway. After said injunction was granted the defendant railroads (according to evidence herein) obeyed it, and until August of that year the said traffic was carried under competition between the defendants at the rate of 23½ cents from Missouri river points to Chicago, and 25 cents from St. Paul to Chicago, etc., as set out above. As a result of such competition, the Chicago Great Western Railway Company became dissatisfied with the proportion of the business it received, and, in order to get what it claimed as its share, cut the rate to 20 cents to Chicago and 18½ cents to the Indiana line for eastern business, and published the same. This it did under a contract with the packers running for seven years. The Chicago Great Western Railway Company was the longest route from Chicago to the Missouri river points. The other railroad defendants, to meet the rate made by the Chicago Great Western Railway Company, as a result of competition, met and published the same rate. These rates were not made voluntarily, but from necessity arising from competition; the necessity being that of carrying the goods at the lower rate or losing the business to which the officers of said companies thought they were entitled. This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition. That had existed legally since March, 1902, between defendant railroads and also between them and the Atchison, Topeka, & Santa Fé *Railway Company. There was not compe-[113]tition enough at said points to lower the rate as to live stock. There was little and different competition on rates as to live stock at points between the Missouri river and St. Paul and Chicago. The only places where the opportunities for competition existed as to live stock the same as to packing-house products were immediately at Missouri river points and St. Paul, and there only as to live stock driven in on foot from the surrounding country. There is comparatively a small amount of this stock. If it was exactly the same kind of a commodity as that furnished by the packers, there would be an opportunity for competition in this at these points alone.

"Fifth. That the competition in question did not result from agreement of the defendants, but was actual, genuine competition.

"Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri river and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri river and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.

"Seventh. That the rates for carrying packers' products and dressed meats were remunerative. They did not pay any portion of the fixed charges and interest of the railroad companies, nor its full share of the operating expenses, but they did pay more than its cost of movement and leave something to apply upon operating expenses.

"Eighth. That the welfare of the public, including the shippers, consumers, and all localities and markets, does not seem to be materially affected by the present rates.

"Ninth. That the usual custom is for railroads to charge a higher rate for the finished product than for the raw material, *and this, as a rule, has been applied to live [114] stock and its finished products. This is not universal, however. There are many commodities where the raw material is charged more for carriage than its finished product, as in the case of the raw material of cotton and the compressed cotton, straw, unbaled and baled, pig iron and its products, and many other commodities. It also appears that for sixteen years out of twenty-three, between Missouri river points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing-house products. Many witnesses testified that the ideal rate for the finished product would be higher than the raw material. This, however, was based on the presumption that competition or commercial necessity did not interfere, and that the cost of service and value of the products would be greater in case of the finished products than in that of the raw material."

Section 3 of the interstate commerce act, so far as it is material for this case, is as follows:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And § 3 of the Elkins act provides:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier . . . is committing any discriminations forbidden by law, a petition may be presented alleging such facts" (such discrimination), "to the circuit court of the United States sitting in equity having jurisdiction . . . and, upon being satisfied of the truth of the allegations of said petition, said court shall . . . require a discontinuance of such discrimination by proper orders, writs," etc.

Mr. **L. A. Shaver** argued the cause and filed a brief for appellant:

A proceeding by the Commission in court to enforce an order is an original and independent proceeding. The courts have the power to hear these cases upon other issues, pleadings, and facts than those presented to the Commission. Congress intended in these cases to vest in the courts a large discretion; and the courts are not confined to a mere examination of the matter as heard by the Commission, but may proceed to hear the complaint *de novo*, and it is their duty to do justice in the premises.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 332, 56 Fed. 935; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 5 Inters. Com. Rep. 131, 64 Fed. 985; Shinkle, W. & K. Co. v. Louisville & N. R. Co. 62 Fed. 693; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 175, 42 L. ed. 426, 18 Sup. Ct. Rep. 45; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 614.

The Commission had power to make the order.

Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 616; Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 94 Fed. 273.

A rate reasonable *per se* may be relatively unreasonable.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 277, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Boards of Trade Union v. Chicago, M. & St. P. R. Co. 1 Inters. Com. Rep. 608, 1 I. C. C. Rep. 215; Raymond v. Chicago, M. & St. P. R. Co. 1 Inters. Com. Rep. 627, 1 I. C. C. Rep. 230; Manufacturers' & Jobbers' Union v. Minneapolis & St. L. R. Co. 3 Inters. Com. Rep. 115, 4 I. C. C. Rep. 79; Daniels v. Chicago, R. I. & P. R. Co. 6 I. C. C. Rep. 458; Tileston Mill Co. v. Northern P. R. Co. 8 Inters. Com. Rep. 346; Marten v. Louisville & N. R. Co. 9 Inters. Com. Rep. 581; Re Chicago, St. P. & K. C. R. Co. 2 Inters. Com. Rep. 137, 2 I. C. C. Rep. 231.

Where an advance is made in previously existing rates, the advance will be held to be unjust unless satisfactorily explained; and the burden of explanation is upon the carrier.

17 Am. & Eng. Enc. Law, p. 133.

Competition cannot authorize violations of the law.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 674, 44 L. ed. 319, 20 Sup. Ct. Rep. 209.

Competition cannot authorize the reduction of a rate on one article to such an extent as to place a burden on other traffic.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

Competition cannot justify discriminations which are contrary to the public interests.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 167, 42 L. ed. 423, 18 Sup. Ct. Rep. 45; Smyth v. Ames, 169 U. S. 544, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 597, 41 L. ed. 566, 567, 17 Sup. Ct. Rep. 198.

A carrier may not promote its own interest by preferences.

Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 625; Harris v. Cockermouth & W. R. Co. 3 C. B. N. S. 693; Evershed v. London & N. W. R. Co. L. R. 2 Q. B. Div. 254.

Mr. **S. H. Cowan** also argued the cause, and, with Mr. L. A. Shaver, filed a brief for appellant.

Mr. **Ed. Baxter** argued the cause and filed a brief for appellees:

On a petition charging the exaction of unreasonable rates, the burden of proof is on the petitioner to sustain the charges by evidence which shows with reasonable certainty that they are in substance true.

Harding v. Chicago, St. P. M. & O. R. Co. 1 Inters. Com. Rep. 375; Brewer v. Louisville & N. R. Co. 7 Inters. Com. Rep. 234.

The order of the Commission concedes, in effect, that the rates upon live cattle and hogs are reasonably low, in and of themselves.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 23, 45 L. ed. 727, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 284, 47 L. ed. 1055, 23 Sup. Ct. Rep. 687.

The 2d section of the act to regulate commerce has no application to this case.

Wight v. United States, 167 U. S. 516, 518, 42 L. ed. 259, 17 Sup. Ct. Rep. 822.

The 3d section of the act to regulate commerce prohibits only such preferences as are unjust or unreasonable.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 277, 36 L. ed. 703, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Alabama Midland R. Co. 5 Inters. Com. Rep. 308, 69 Fed. 232; Commercial Club v. Chicago & N. W. R. Co. 7 I. C. C. Rep. 404; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 219, 220, 40 L. ed. 947, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 665, 44 L. ed. 315, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687.

No prejudice is undue unless it arises from the voluntary and wrongful act of a carrier; and no reduction of rates by a carrier is either voluntary or wrongful, if it be forced upon the carrier by actual competition affecting rates.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 18, 45 L. ed. 725, 21 Sup. Ct. Rep. 516.

The fact that appellees could, if they chose to do so, make the competition on live stock as severe as the competition on the product, is not material.

Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 283, 47 L. ed. 1055, 23 Sup. Ct. Rep. 687.

The prohibition of the 3d section, when that section is considered in its proper relation, is directed against undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carrier.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 18, 19, 45 L. ed. 725, 726, 21 Sup. Ct. Rep. 516.

A carrier may promote its own interest, provided it does not create an undue preference.

East Tennesse, V. & G. R. Co. v. Interstate Commerce Commission, supra; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 223, 224, 40 L. ed. 948, 949, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Harris v. Cockermouth & W. R. Co. 3 C. B. N. S. 693, is no authority that a carrier is not justified in reducing its rates to secure its proper share of a certain traffic, when the reduction is forced upon it by competition actually existing, such as that in the case at bar.

The Evershed Case is not now an authority in England except upon the English "equality clause," which is not in force in this country.

Pickering v. London & N. W. R. Co. 8 Railway & C. Traffic Cas. 108.

Competition which is real and substantial and exercises a potential influence on rates on a particular traffic brings into play the dissimilarity of circumstances and conditions provided for by the statute, and justifies the lesser charge on the more competitive traffic than on the less competitive traffic; and this right is not destroyed by the mere fact that incidentally the lesser charge on the more competitive traffic may seemingly give a preference to that traffic, and the greater rate on the less competitive traffic may apparently engender a discrimination against it.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, supra.

The practice of making rates on live stock the same as, or lower than, the rates on the products of live stock, is by no means universal.

The practice of making rates on raw material the same as, or lower than, the

rates on manufactured products, is by no means universal.

New Orleans Cotton Exchange v. Illinois C. R. Co. 2 Inters. Com. Rep. 791; Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 948.

The principle that rates on raw material should not exceed those on manufactured products cannot be enforced except where there is no competition.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 18, 45 L. ed. 725, 21 Sup. Ct. Rep. 516.

The cost of transportation cannot be used as a factor in making rates.

Re Southern R. & S. S. Asso. 1 Inters. Com. Rep. 282; 1 Ann. Rep. Inters. Com. Com. (1887) p. 30.

The value of the service is an important factor in making rates.

1 Ann. Rep. Inters. Com. Com. p. 31.

The court has no power to modify the order of the Commission.

Interstate Commerce Commission v. Lake Shore & M. S. R. Co. 134 Fed. 947; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 5 Inters. Com. Rep. 146, 64 Fed. 723; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 841.

In determining the question of undue preference, the interests of Chicago are not alone to be considered.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 218, 219, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The Commission has no power to make relative rates.

Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 12, 101 Fed. 785.

The Commission has the power to express its opinion as to whether the present relation between the rates on live stock and the rates on the product is undue or unreasonable; but it has no power to even express an opinion as to whether the present relation will in the future be undue or unreasonable; and that is precisely what the Commission assumed to do in this case.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 500, 42 L. ed. 253, 17 Sup. Ct. Rep. 896.

Even if it were true that the Missouri river packer or shipper of the prepared product has, under the present adjustment, some advantage over the shipper of live stock, such advantage or preference is not undue, because it is a mere incidental effect resulting from the reduction made by the Great Western Company in the product rates; which reduction was forced upon that company by the competition then existing, and which reduction was necessary to enable that company to secure what was considered to be its fair share of the product traffic.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 18, 19, 45 L. ed. 725, 726, 21 Sup. Ct. Rep. 516.

The Social Circle Case has, in effect, been overruled.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 673, 44 L. ed. 318, 20 Sup. Ct. Rep. 209.

Mr. **Cordenio A. Severance** also argued the cause, and, with Messrs. Frank B. Kellogg and Robert E. Olds, filed a brief for appellees:

Findings of fact by the circuit court should be accepted on appeal, as witnesses testified in open court.

Halsell v. Renfrow, 202 U. S. 291, 50 L. ed. 1035, 26 Sup. Ct. Rep. 610; Shappirio v. Goldberg, 192 U. S. 240, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; Beyer v. Le Fevre, 186 U. S. 119, 46 L. ed. 1082, 22 Sup. Ct. Rep. 765; Stuart v. Hayden, 169 U. S. 14, 42 L. ed. 643, 18 Sup. Ct. Rep. 274; Warren v. Keep, 155 U. S. 267, 39 L. ed. 145, 15 Sup. Ct. Rep. 83; Crawford v. Neal, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759; Evans v. State Nat. Bank, 141 U. S. 107, 35 L. ed. 654, 11 Sup. Ct. Rep. 885.

The contract between respondent Chicago Western Railway Company and various packers was a proper exercise of its right to compete for business.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Hopkins v. United States, 171 U. S. 600, 43 L. ed. 299, 19 Sup. Ct. Rep. 40; Delaware, L. & W. R. Co. v. Kutter, 77 C. C. A. 315, 147 Fed. 51; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

The rate on live-stock products, brought about by the Chicago Great Western contract, did not involve an undue preference or unjust discrimination within the meaning of the interstate commerce law.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; Interstate Commerce Commission v. Louisville & N.

R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Delaware, L. & W. R. Co. v. Kutter, and Interstate Commerce Commission v. Baltimore & O. R. Co. supra; Platt v. Le Cocq, 150 Fed. 391; Interstate Commerce Commission v. Western & A. R. Co. 35 C. C. A. 217, 93 Fed. 83; Judson, Interstate Commerce, §§ 175–183.

Neither the Commission nor the court had the right to ignore the relative cost of the service, in determining whether the apparent discrimination was undue or unreasonable.

Squire v. Michigan C. R. Co. 3 Inters. Com. Rep. 521.

The Commission, previous to the amendment of the law in 1906, had no power to fix rates, and hence no power to establish the relation between rates.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Interstate Commerce Commission v. Alabama Midland R. Co. supra; Southern P. Co. v. Colorado Fuel & Iron Co. 42 C. C. A. 12, 101 Fed. 779.

Mr. S. A. Lynde filed a brief for appellee the Chicago & Northwestern Railway Company.

Mr. **Charles A. Clark** argued the cause and filed a brief for intervener T. M. Sinclair & Company:

In an equity suit, findings of fact by the chancellor or a master are, on appeal, to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, such findings will be upheld.

Crawford v. Neal, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759; Barnett v. Denison, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Evans v. State Nat. Bank, 141 U. S. 107, 35 L. ed. 654, 11 Sup. Ct. Rep. 885; Callaghan v. Myers, 128 U. S. 666, 32 L. ed. 562, 9 Sup. Ct. Rep. 177; Towson v. Moore, 173 U. S. 24, 43 L. ed. 600, 19 Sup. Ct. Rep. 332.

The United States circuit courts of appeals apply the same rule to special findings of fact by the chancellor which is applied to the findings of a master of chancery; and this is obviously correct.

Snider v. Dobson, 21 C. C. A. 77, 40 U. S. App. 111, 74 Fed. 757; Metropolitan Nat. Bank v. Rogers, 3 C. C. A. 666, 3 U. S. App. 406, 53 Fed. 776.

Where the parties and witnesses are before the trial court, and the testimony is given orally, this is an additional circumstance of weight in support of special findings of fact by such court.

Wilson v. Wyoming Cattle & Invest. Co. 129 Iowa. 20, 105 N. W. 338; Wilcox v. Swecker, 129 Iowa, 153, 105 N. W. 392; Trow v. Berry, 113 Mass. 148; Richards v. Todd, 127 Mass. 172.

The court will take judicial notice of general and well-known business conditions and usages.

Gibson v. Stevens, 8 How. 399, 12 L. ed. 1129; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 435, 14 L. ed. 1005; Whitney v. United States, 167 U. S. 546, 42 L. ed. 269, 17 Sup. Ct. Rep. 857; Bank of Kentucky v. Adams' Exp. Co. 93 U. S. 185, 23 L. ed. 876; Nicol v. Ames, 173 U. S. 517, 43 L. ed. 792, 19 Sup. Ct. Rep. 522.

The Chicago Great Western Railway contract for packing-house products is found by the court below to have been the result of lawful competition. It cannot be annulled or declared void in this suit. There is, as to this, a defect of indispensable parties, *viz.*, the packing houses who are entitled to the benefit of the contract.

Coiron v. Millaudon, 19 How. 113, 15 L. ed. 575; Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828; Morgan v. Morgan, 2 Wheat. 298, 4 L. ed. 244; Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184; Finley v. Bank of United States, 11 Wheat. 304, 6 L. ed. 480; Riddle v. Mandeville, 5 Cranch, 322, 3 L. ed. 114; Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271; Conn. v. Penn. 5 Wheat. 424, 5 L. ed. 125; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20 L. ed. 82; Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832; Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 446, 21 L. ed. 367.

No substantial injury is shown as to the producer and shipper of live animals; none as to the Chicago packer; none as to Chicago as a locality; none as to live animals as a commodity. The question as to railroad rates on raw materials as against rates on the finished product is purely a moot question. This court does not sit to decide moot questions. The mere potentiality of an injury is not enough to induce its action.

Waite v. Dowley, 94 U. S. 534, 24 L. ed. 182; Williams v. Hagood, 98 U. S. 75, 25 L. ed. 51; Marye v. Parsons, 114 U. S. 330, 29 L. ed. 206, 5 Sup. Ct. Rep. 932, 962; Mills v. Green, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Kimball v. Kimball, 174 U. S. 161, 43 L. ed. 933, 19 Sup. Ct. Rep. 639; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 620, 36 L. ed. 285, 12 Sup. Ct. Rep. 479; California v. San Pablo & T. R. Co. 149 U. S. 314, 37 L. ed. 748, 13 Sup. Ct. Rep. 876.

Mr. **Frank T. Ransom** argued the cause and filed a brief for intervener the Union Stockyards Company of Omaha, Limited.

Messrs. Stephen S. Brown and John E. Dolman filed a brief in behalf of intervener the St. Joseph Stockyards Company.

Mr. Justice **Brewer** delivered the opinion of the court:

It is unnecessary to define the full scope and meaning of the prohibition found in § 3 of the interstate commerce act, or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally [118] be imposed *upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for congressional action, for, within any fair construction of the terms "undue or unreasonable," the findings of the circuit court place the action of the railroads outside the reach of condemnation.

The complainant, before the interstate commerce action, was an incorporated association. The purposes for which it was organized were, as stated in its charter, "to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." Its members were, as found by the Commerce Commission, "engaged in the purchase, shipment, and sale of live stock for themselves and upon commission." It was such an association, with members engaged in the business named, that initiated these proceedings and in whose behalf they were primarily prosecuted. While it may be that the proceedings are not to be narrowly limited to an inquiry whether this particular complainant has been in any way injured by the action of the railroad companies, yet that question must be regarded as the one which was the special object of inquiry and consideration. It is true that the Commission subsequently commenced, under the Elkins act, an independent suit in its own name, but it was practically to enforce the award made by the Commission after its inquiry into the controversy between the live-stock exchange and the railroad companies.

It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no *proper sense, is the public a general man- [119] ager. As said in Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45, 51, quoting from the opinion in 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the interstate commerce act (Armour Packing Co. v. United States, 209 U. S. 56, ante, 681, 28 Sup. Ct. Rep. 428), and also that, in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense (Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. supra; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687).

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly, when rates are changed, the carrier making the change must, [120] *when properly called upon, be able to give a good reason therefor; but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

The Commerce Commission did not find whether the rates were reasonable or unreasonable *per se.* Its omission may have been owing, partly at least, to the decision in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 506, 42 L. ed. 255, 17 Sup. Ct. Rep. 896, for this controversy arose before the amendment of June 29, 1906. 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892. On the other hand, the circuit court found specifically that the live-stock rates were reasonable, and also that the rates for carrying packers' products and dressed meats were remunerative. See findings 1 and 7. Obviously, shippers had, in the rates considered separately, no ground of challenge. But the burden of complaint is not that any rates, taken by themselves, were too high, but that the difference between those on live stock and those on dressed meats and packers' products worked an unjust discrimination.

It is insisted that "the making of the live-stock rate higher than the product rate is violative of the almost universal rule that the rates on raw material shall not be higher than on the manufactured product." This may be conceded, but that the rule is not universal the proposition itself recognizes, and the findings of the court give satisfactory reasons for the exception here shown. See findings 2, 3, and 9. The cost of carriage, the risk of injury, the larger amount which the companies are called upon to pay out in damages, make sufficient explanation. They do away with the idea that, in the relation established between the two kinds of charges, any undue or unreasonable preference was intended or secured.

Finding No. 6 is very persuasive. It reads:

"Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; 21] *that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri river and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri river and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock."

If the rates complained of have not materially affected any of the markets, prices, or shipments; if they are reasonably fair to Chicago and the shippers; if the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the present rates were made; and the lower rate given to the packers does not directly influence or injure the shippers of live stock,—it is difficult to see what foundation there can be for the claim of an undue and unreasonable preference. It would seem a fair inference from the findings that the real complaint was that the railroad companies did not so fix their rates as to help the Chicago packing industry; that they recognized the fact that along the Missouri river had been put up large packing houses, and, without any intent to injure Chicago, had fixed reasonable rates for the carrying of live stock to such packing houses and also to Chicago; that those packing houses, being nearer to the cattle fields, were able to engage in the packing industry as conveniently and successfully as the packing houses in Chicago. If we were at liberty to consider the mere question of sentiment, certainly to place packing houses close to the cattle fields, thus avoiding the necessity of long transportation of the living animals,—a transportation which cannot be accomplished without more or less suffering to them,—and to induce transportation to those nearer packing houses, would deserve to be commended rather than condemned.

With reference to competition, we have referred to the cases in this court in which that matter has been considered. According [122] *to the 4th finding, the rates in question given to the packers at the Missouri river and St. Paul were the result of competition. Without recapitulating all the facts disclosed in that finding, it is enough to say that the Chicago Great Western Railway Company, which had the longest line from Chicago to Missouri river points, made a reduction in the rates, and did this, as its president testified, "for the purpose of securing a greater proportion of the traffic in the products of live stock than it had been previously able to obtain." That is one of the facts inducing competition, and one of the results expected to flow from a reduction of rates. It certainly of itself deserves no condemnation. In order to secure to themselves what was likely to be transferred to the Great Western by virtue of its reduction of rates, the other companies also made a reduction, and, as shown by the 5th finding, the competition was not the result of agreement, but was an "actual, genuine competition." It may be true, as contended by counsel for the appellant, that even a genuine competition which results in a change of rates does not necessarily determine the question whether the rates as fixed work an undue preference or create an unlawful discrimination. Those rates fixed may make a preference or discrimination irrespective of the motives which caused the railway companies to adopt them, and yet the fact of a genuine competition does not make against the contention that the rates were intended to work injustice. An honest and fair motive was the cause of the change in rates,—honest and fair on the part of the Great Western in its effort to secure more business, and equally honest and fair on the part of the other railway companies in the effort to retain as much of the business as was possible. In other words, this competition eliminates from the case an intent to do an unlawful act, and leaves for consideration only the question whether the rates as established do work an undue preference or discrimination; and, as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, **[123]** or materially affect the business *of the original complainant, it would seem necessarily to result that the charge of an unlawful discrimination is not proved. In short, there was no intent on the part of the railway companies to do a wrongful act, and the act itself did not work any substantial injury to the rights of the complainant.

We have not attempted to review in detail the great mass of testimony, amounting to two enormous printed volumes. It is enough to say that an examination of it clearly shows sufficient reasons for the findings of fact made by the circuit court.

In short, the findings of the circuit court were warranted by the testimony, and those findings make it clear that there was no unlawful discrimination.

The decree of the Circuit Court is affirmed.

Mr. Justice **Moody** did not hear the argument nor take part in the decision in this case.

EX PARTE: EDWARD T. YOUNG, Petitioner.

(See S. C. Reporter's ed. 123–204.)

Pleading — suit by stockholders — allegation of reasons for.

1. A bill by stockholders of a railroad company to enjoin it from complying with a statute relating to rates sufficiently sets out the reason for their commencing it and making the company a party defendant by alleging that they had demanded of the corporate officers that they refuse obedience to the statute, and should institute suits to prevent its enforcement, but that the company and its officers had positively refused to do so, not because they considered the rates just, or that they would not be confiscatory, but because of the severity of the penalties provided for violation of the statute, to the ruinous consequences of which they would not subject themselves, and which no action by themselves, their stockholders or directors, could avoid.

Courts — jurisdiction of Federal circuit court — Federal question — railroad rates.

2. Whether or not the enforcement of a state statute providing for the establishment of rates for railroad transportation will take property of the railroad companies without due process of law raises a Federal question within the jurisdiction of a circuit court of the United States, if the requisite amount is involved, although its determination may incidentally involve a question of fact.

Courts — jurisdiction of Federal circuit court — Federal question — excessive penalties.

3. Whether or not a railroad company is deprived of the equal protection of the laws, and its property rendered liable to be taken without due process of law, by a state statute providing for the establishment of rates of transportation, because the penalties fixed for violation of the statute are so enormous as to require obedience to the law rather than risk the penalties in testing it, although such obedience might, in the end, result in confiscation of the railroad property, is a Federal question, within the jurisdiction of the circuit court of the United States.

Constitutional law — excessive penalties — equal protection of laws.

4. A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportu-

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NOTE.—As to reasonableness of state limitation of railroad rates—see note to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417.

As to suits against state—see notes to Beers v. Arkansas, 15 L. ed. U. S. 991. and Hans v. Louisiana, 33 L. ed. U. S. 842.

As to when remedy at law will prevent remedy in equity—see note to Tyler v. Savage, 36 L. ed. U. S. 83.

nity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws.

Courts — jurisdiction of Federal circuit court — injunction against.

5. The circuit court of the United States has jurisdiction at the suit of stockholders of a railroad company, to enjoin the company from putting in force transportation rates established by a state statute, which are so low as to be confiscatory of the company's property, and, as preliminary thereto, to institute an inquiry as to whether or not the rates are in fact too low.

States — immunity from suit.

6. The provision of the Federal Constitution that no suit shall be brought against any state by citizens of another state applies to a suit brought against a state by its own citizens as well as to one brought by a citizen of another state.

States — immunity from suit — enjoining state officers.

7. A Federal court may enjoin the attorney general of a state, whose general duty is to enforce the state statutes, from proceeding to enforce, against persons affected, a state statute which violates the Federal Constitution, such proceeding being not prohibited by the provision of the Federal Constitution forbidding the maintenance of actions against a state.

Officers — discretion — judicial interference.

8. The general discretion of the attorney general of a state, regarding the enforcement of the laws when and as he deems appropriate, is not interfered with by an injunction restraining him from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of a complainant.

States — immunity from suit — suit against state officer — enjoining enforcement of illegal act.

9. That the attorney general of a state must, to enforce a state statute, resort to mandamus, in which proceeding he ordinarily represents the state in its governmental capacity, does not prevent a Federal court from enjoining him from so doing, where the statute violates the Federal Constitution, since, in such case, his act in attempting, in the name of the state, to enforce a void enactment, is merely illegal, because in conflict with the superior authority of the Federal Constitution, and he is stripped of his official character, and the prohibition against his proceeding does not, therefore, affect the state in its governmental capacity.

Courts — conflict of jurisdiction — priority — enjoining criminal proceedings.

10. A Federal court, in which is first raised the question of the validity, under the Federal Constitution, of a state statute, has a right to decide that question to the exclusion of the state courts, and may enjoin criminal proceedings subsequently commenced under it in the state court until its duty is performed.

Parties — injunction against state statute — state officers.

11. The duty imposed upon the attorney general of a state by the common law and statutes, requiring him to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the state, and to enforce the railroad rate law at the instance of the railroad commission, sufficiently connects him with the enforcement of the statute to make him a proper party to a suit to enjoin its enforcement.

Courts — conflict of jurisdiction — enjoining criminal proceedings.

12. The power of a Federal court to enjoin state officials from enforcing a state statute the validity of which, under the Federal Constitution, has been questioned before it, does not extend to restraining a state court from acting in a case brought before it to enforce the statute, nor investigation or action by a grand jury under it.

Equity — remedy at law — delay.

13. The remedy at law of a railroad company to test the validity of a statute fixing rates for railroad transportation by disobeying the statute once and submitting to a criminal prosecution is not so adequate as to deprive equity of jurisdiction, where several years might elapse before a final determination of the question! pending which observance of the statute, if finally found to be invalid, would result in taking its property without due process of law, with no possibility of its recovery.

Equity — remedy at law — complicated questions — jury.

14. The question of the validity, under the provision of the Federal Constitution forbidding the taking of property without due process of law, of a state statute establishing rates for railroad transportation which are alleged to be so low as to be confiscatory, is not, because of its complication, a proper one for investigation by a jury.

Statutes — presumption of validity.

15. An act of a state legislature, fixing rates for either passenger or freight transportation, is to be regarded as prima facie valid, and the onus rests upon the carrier to prove its assertion to the contrary.

Courts — conflict of jurisdiction — injunction against enforcing state law — doubt.

16. No injunction ought to be awarded by a Federal court against the enforcement of a state railroad rate law which is alleged to

violate the Federal Constitution, unless the case is reasonably free from doubt.

[No. 10, Original.]

Argued December 2, 3, 1907. Decided March 23, 1908.

PETITION for writ of habeas corpus to secure release of petitioner from custody to which he had been committed by the Circuit Court of the United States for the District of Minnesota, for alleged contempt for disobeying an order enjoining him from instituting certain criminal proceedings under a state statute, and for a writ of certiorari to test the validity of the proceedings. Petition dismissed.

Statement by Mr. Justice **Peckham**:

An original application was made to this court for leave to file a petition for writs of habeas corpus and certiorari in behalf of Edward T. Young, petitioner, as attorney general of the state of Minnesota.

Leave was granted and a rule entered directing the United States marshal for the district of Minnesota, third division, who held the petitioner in his custody, to show cause why such petition should not be granted.

The marshal, upon the return of the order to show cause, justified his detention of the petitioner by virtue of an order of the circuit court of the United States for the district of Minnesota, which adjudged the petitioner guilty of contempt of that court, and directed that he be fined the sum of $100, and that he should dismiss the mandamus proceedings brought by him in the name and in behalf of the state, in the circuit court of the state, and that he should stand committed to the custody of the marshal until that order was obeyed. The case **[127]** *involves the validity of the order of the circuit court committing him for contempt.

The facts are these: The legislature of the state of Minnesota duly created a railroad and warehouse commission, and that commission, on the 6th of September, 1906, made an order fixing the rates for the various railroad companies for the carriage of merchandise between stations in that state of the kind and classes specified in what is known as the "Western Classification." These rates materially reduced those then existing, and were by the order to take effect November 15, 1906. In obedience to the order the railroads filed and published the schedules of rates, which have ever since that time been carried out by the companies.

At the time of the making of the above order it was provided by the Revised Laws of Minnesota, 1905 (§ 1987), that any common carrier who violated the provisions of that section or wilfully suffered any such unlawful act or omission, when no specific penalty is imposed therefor, "if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than $2,500. nor more than $5,000 for the first offense, and not less than $5.000 nor more than $10,000 for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall forfeit to the state for the first offense not less than $2,500 nor more than $5.000, and for each subsequent offense not less than $5,000 nor more than $10,000, to be recovered in a civil action."

This provision covered disobedience to the orders of the commission.

On the 4th of April, 1907, the legislature of the state of Minnesota passed an act fixing 2 cents a mile as the maximum passenger rate to be charged by railroads in Minnesota. (The rate had been theretofore 3 cents per mile.) The act was to take effect on the 1st of May, 1907, and was put into effect on that day by the railroad companies, and the same *has been observed by them up **[128]** to the present time. It was provided in the act that "any railroad company, or any officer, agent, or representative thereof, who shall violate any provision of this act, shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand ($5,000) dollars, or by imprisonment in the state prison for a period not exceeding five (5) years, or both such fine and imprisonment."

On the 18th of April, 1907, the legislature passed an act (chapter 232 of the laws of that year), which established rates for the transportation of certain commodities (not included in the Western Classification) between stations in that state. The act divided the commodities to which it referred into seven classes, and set forth a schedule of maximum rates for each class when transported in car-load lots, and established the minimum weight which constituted a car load of each class.

Section 5 provided that it should not affect the power or authority of the railroad and warehouse commission, except that no duty should rest upon that commission to enforce any rates specifically fixed by the act or any other statute of the state. The section further provided generally that the orders made by the railroad and warehouse commission prescribing rates should be the exclusive legal maximum rates for the transportation of the commodities enumerated in the act between points within that state.

Section 6 directed that every railroad company in the state should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager, or agent or employee of such railroad company should cause the adoption, publication, and use by such railroad company of rates not exceeding those specified in the act; "and any officer, director, or such agent or employee of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists, any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor [129] *in any county into which its railroad extends, and in which it has a station, and, upon a conviction thereof, be punished by imprisonment in the county jail for a period not exceeding ninety days." The act was to take effect June 1, 1907.

The railroad companies did not obey the provisions of this act so far as concerned the adoption and publication of rates as specified therein.

On the 31st of May, 1907, the day before the act was to take effect, nine suits in equity were commenced in the circuit court of the United States for the district of Minnesota, third division, each suit being brought by stockholders of the particular railroad mentioned in the bill, and in each case the defendants named were the railroad company of which the complainants were, respectively, stockholders, and the members of the railroad and warehouse commission, and the attorney general of the state, Edward T. Young, and individual defendants, representing the shippers of freight upon the railroad.

The order punishing Mr. Young for contempt was made in the suit in which Charles E. Perkins, a citizen of the state of Iowa, and David C. Shepard, a citizen of the state of Minnesota, were complainants, and the Northern Pacific Railway Company, a corporation organized under the laws of the state of Wisconsin, Edward T. Young, petitioner herein, and others, were parties defendant. All of the defendants, except the railway company, are citizens and residents of the state of Minnesota.

It was averred in the bill that the suit was not a collusive one to confer on the court jurisdiction of a case of which it could not otherwise have cognizance, but that the objects and purposes of the suit were to enjoin the railway company from publishing or adopting (or continuing to observe, if already adopted) the rates and tariffs prescribed and set forth in the two acts of the legislature above mentioned and in the orders of the railroad and warehouse commission, and also to enjoin the other defendants from attempting to enforce such provisions, or from instituting any action or proceeding against *the defendant [130] railway company, its officers, etc., on account of any violation thereof, for the reason that the said acts and orders were and each of them was violative of the Constitution of the United States.

The bill also alleged that the orders of the railroad commission of September 6, 1906, May 3, 1907, the passenger-rate act of April 4, 1907, and the act of April 18, 1907, reducing the tariffs and charges which the railway company had theretofore been permitted to make, were each and all of them unjust, unreasonable, and confiscatory, in that they each of them would, and will if enforced, deprive complainants and the railway company of their property without due process of law, and deprive them and it of the equal protection of the laws, contrary to and in violation of the Constitution of the United States and the amendments thereof. It was also averred that the complainants had demanded of the president and managing directors of the railway company that they should cease obedience to the orders of the commission dated September 6, 1906, and May 3, 1907, and to the acts already mentioned, and that the rates prescribed in such orders and acts should not be put into effect, and that the said corporation, its officers and directors, should institute proper suit or suits to prevent said rates (named in the orders and in the acts of the legislature) from continuing or becoming effective, as the case might be, and to have the same declared illegal; but the said corporation, its president and directors, had positively declined and refused to do so, not because they considered the rates a fair and just return upon the capital invested, or that they would not be confiscatory, but because of the severity of the penalties provided for the violation of such acts and orders, and therefore they could not subject themselves to the ruinous consequences which would inevitably result from failure on their part to obey the said laws and orders,—a result which no action by themselves, their stockholders or directors, could possibly prevent.

The bill further alleged that the orders of the commission *of September, 1906, and [131] May, 1907, and the acts of April 4, 1907, and April 18, 1907, were, in the penalties prescribed for their violation, so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents, and employees. For this reason the complainants alleged that the above-mentioned orders and acts, and each of them, denied to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprived it and them of their property without due process of law, and that each of them was, for that reason, unconstitutional and void.

The bill also contained an averment that if the railway company should fail to continue to observe and keep in force, or to observe and put in force, the orders of the commission and the acts of April 4, 1907, and April 18, 1907, such failure might result in an action against the company or criminal proceedings against its officers, directors, agents, or employees, subjecting the company and such officers to an endless number of actions at law and criminal proceedings: that if the company should fail to obey the order of the commission or the acts of April 4, 1907, and April 18, 1907, the said Edward T. Young, as attorney general of the state of Minnesota, would, as complainants were advised and believed, institute proceedings by mandamus or otherwise against the railway company, its officers, directors, agents, or employees, to enforce said orders and all the provisions thereof, and that he threatened and would take other proceedings against the company, its officers, etc., to the same end and for the same purpose, and that he would, on such failure, institute mandamus or other proceedings for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof. Appropriate relief by injunction against the action of the defendant Young and the railroad commission was asked for.

[132] *A temporary restraining order was made by the circuit court, which only restrained the railway company from publishing the rates as provided for in the act of April 18, 1907, and from reducing its tariffs to the figures set forth in that act; the court refusing for the present to interfere by injunction with regard to the orders of the commission and the act of April 4, 1907, as the railroads had already put them in operation; but it restrained Edward T. Young, attorney general, from taking any steps against the railroads to enforce the remedies or penalties specified in the act of April 18, 1907.

Copies of the bill and the restraining order were served, among others, upon the defendant Mr. Edward T. Young, attorney general, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as attorney general; and he averred that the state of Minnesota had not consented, and did not consent, to the commencement of this suit against him as attorney general of the state, which suit was in truth and effect a suit against the said state of Minnesota, contrary to the 11th Amendment of the Constitution of the United States.

The attorney general also filed a demurrer to the bill, on the same ground stated in the motion to dismiss. The motion was denied and the demurrer overruled.

Thereupon, on the 23d of September, 1907, the court, after a hearing of all parties and taking proofs in regard to the issues involved, ordered a temporary injunction to issue against the railway company, restraining it, pending the final hearing of the cause, from putting into effect the tariffs, rates, or charges set forth in the act approved April 18, 1907. The court also enjoined the defendant Young, as attorney general of the state of Minnesota, pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience to that act, or compliance therewith, or any part thereof.

*As the court refused to grant any preliminary injunction restraining the enforcement of the rates fixed by the railroad and warehouse commission, or the passenger rates under the act of April 4, 1907, because the same had been accepted by the railroads and were in operation, the court stated that, in omitting the granting of such preliminary injunction, the necessity was obviated upon that hearing of determining whether the rates fixed by the commission, or the passenger rates, together or singly, were confiscatory and did not afford reasonable compensation for the service rendered and a proper allowance for the property employed, and for those reasons that question had not been considered; but inasmuch as the rates fixed by the act of April 18, 1907, had not gone into force, the court observed: "It seems to me, upon this evidence of the conditions before either of those new rates were put into effect (that is, the order of the commission of September, 1906, or the act of April 4, 1907) and the reductions made by those rates, that, if there is added the reduction which is attempted to be made by the commodity act (April 18, 1907), it will reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate return upon the property invested. And I think, on the whole, that a preliminary injunction should issue, in respect to the rates fixed by chapter 232 (act of April 18) talked of as the commodity rates, and that there should be no preliminary injunction as to the other rates, *although the matter as* [133] *to whether they are compensatory or not is a matter which may be determined in the final determination of the action.*"

The day after the granting of this preliminary injunction the attorney general, in violation of such injunction, filed a petition for an alternative writ of mandamus in one of the courts of the state. and obtained an order from that court September 24, 1907, directing the alternative writ to issue as prayed for in the petition. The writ was thereafter issued and served upon the [134] Northern Pacific Railway Company, *commanding the company, immediately after its receipt, "to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded, and maintained by you for the transportation of freight between stations in the state of Minnesota of the kind, character, and class named and specified in chapter 232 of the Session Laws of the state of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said chapter 232."

Upon an affidavit showing these facts the United States circuit court ordered Mr. Young to show cause why he should not be punished as for a contempt for his misconduct in violating the temporary injunction issued by that court in the case therein pending.

Upon the return of this order the attorney general filed his answer, in which he set up the same objections which he had made to the jurisdiction of the court in his motion to dismiss the bill, and in his demurrer; he disclaimed any intention to treat the court with disrespect in the commencement of the proceedings referred to, but believing that the decision of the court in the action, holding that it had jurisdiction to enjoin him, as attorney general, from performing his discretionary official duties, was in conflict with the 11th Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, he believed it to be his duty, as such attorney general, to commence the mandamus proceedings for and in behalf of the state, and it was in this belief that the proceedings were commenced solely for the purpose of enforcing the law of the state of Minnesota. The order adjudging him in contempt was then made.

Mr. **Herbert S. Hadley** argued the cause, and, with Mr. F. W. Lehman, filed a brief for petitioner:

The suit was one against the state of Minnesota, and therefore prohibited by the Federal Constitution.

Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Farmers' Nat. Bank v. Jones, 105 Fed. 459; Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616; Union Trust Co. v. Stearns, 119 Fed. 790; Morenci Copper Co. v. Freer, 127 Fed. 199; Western U. Teleg. Co. v. Andrews, 154 Fed. 95.

When an officer of a state proceeds to enforce a state law by formal judicial proceedings instituted, in the exercise of his executive discretion, in the courts of the state, his act is the act of the state. When it is sought to enjoin a state officer, as such, from instituting such a suit, an injunction is, in effect, asked for against the state.

Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; Hagood v. Southern, 117 U. S. 52, 69, 29 L. ed. 805, 810, 6 Sup. Ct. Rep. 608; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Sundry African Slaves v. Madrazo, 1 Pet. 110, 7 L. ed. 73; Re Ayers, 123 U. S. 497, 31 L. ed. 226, 8 Sup. Ct. Rep. 164; Carter v. Greenhow, 114 U. S. 317, 29 L. ed. 202, 5 Sup. Ct. Rep. 928, 962.

Mr. **Thomas D. O'Brien** also argued the cause, and, with Messrs. Royal A. Stone, George T. Simpson, and Charles S. Jelly, filed a brief for petitioner:

The adequacy or inadequacy of the rates was a question of fact, to be determined under the particular conditions involved, and not to any extent was there a controversy as to the costruction, meaning, or effect of the constitutional provision. The construction and effect of such provision are settled.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup.

Ct. Rep. 115; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636. 6 Sup. Ct. Rep. 334. 388. 1191; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841. 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Carson v. Dunham. 121 U. S. 421. 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Tennessee v. Davis. 100 U. S. 257. 25 L. ed. 648; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764. 14 Sup. Ct. Rep. 905; McCain v. Des Moines. 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Defiance Water Co. v. Defiance, 191 U. S. 184. 48 L. ed. 140, 24 Sup. Ct. Rep. 63; Hooker v. Los Angeles, 188 U. S. 314. 47 L. ed. 487, 63 L.R.A. 471. 23 Sup. Ct. Rep. 395; Shoshone Min. Co. v. Rutter. 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239. 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190. 23 Sup. Ct. Rep. 123; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936. 22 Sup. Ct. Rep. 691; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; St. Joseph & G. I. R. Co. v. Steele. 167 U. S. 659, 42 L. ed. 315. 17 Sup. Ct. Rep. 925; Wilson v. North Carolina. 169 U. S. 586, 42 L. ed. 865. 18 Sup. Ct. Rep. 435.

The circuit court exceeded its power and authority in making its order that the petitioner be enjoined, as attorney general, from taking appropriate legal proceedings to compel the railway companies to comply with the act.

Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1258; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; State ex rel. Young v. Robinson, 101 Minn. 277, 112 N. W. 269; State ex rel. Wetzel v. Tracy, 48 Minn. 497, 51 N. W. 613; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

The question of the validity of state laws which are claimed to be contrary to the limitations on state power contained in the Federal Constitution should first be passed upon by the courts of the state,—especially if they are police laws which the state, in its sovereign capacity, must enforce.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 506, 44 L. ed. 864, 865. 20 Sup. Ct. Rep. 726; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Chicago, M. & St. P. R. Co. v. Minnesota, supra; Robb v. Connolly. 111 U. S. 624, 28 L. ed. 542. 4 Sup. Ct. Rep. 544; New Orleans v. Benjamin, supra; St. Louis & S. F. R. Co. v. Gill. 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

Mr. **Edward T. Young**, *in propria persona*, also argued the cause for petitioner.

Mr. **Charles W. Bunn** argued the cause and filed a brief for respondent:

The application and effect of the Constitution is as much a Federal question as its interpretation.

Smyth v. Ames, 169 U. S. 466. 518. 42 L. ed. 819. 839. 18 Sup. Ct. Rep. 418; Hastings v. Ames. 15 C. C. A. 628, 32 U. S. App. 485. 68 Fed. 726; Osborn v. Bank of United States, 9 Wheat. 821–823, 6 L. ed. 224; Re Lennon. 166 U. S. 548, 41 L. ed. 1110. 17 Sup. Ct. Rep. 658; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335. 51 L. ed. 209. 27 Sup. Ct. Rep. 90; Stearns v. Minnesota. 179 U. S. 223, 232. 233. 45 L. ed. 162. 169, 170, 21 Sup. Ct. Rep. 73; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557. 41 L. ed. 1114. 17 Sup. Ct. Rep. 653; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368. 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Vicksburg Waterworks Co. v. Vicksburg. 185 U. S. 65. 46 L. ed. 808. 22 Sup. Ct. Rep. 585.

Petitioner had no discretion which the court could not control.

Board of Liquidation v. McComb. 92 U. S. 531, 541. 23 L. ed. 623. 628; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273. 292, 50 L. ed. 477. 487. 26 Sup. Ct. Rep. 252; Prout v. Starr, 188 U. S. 544. 545. 47 L. ed. 587, 588. 23 Sup. Ct. Rep. 398; Julian v. Central Trust Co. 193 U. S. 112. 48 L. ed. 639, 24 Sup. Ct. Rep. 399; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387. 36 Fed. 337; Wallace v. McConnell, 13 Pet. 143, 151, 10 L. ed. 98, 102; Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287, 290.

Mr. **Jared How** also argued the cause, and, with Messrs. Pierce Butler and William D. Mitchell, filed a brief for respondent:

The prescribed rates are confiscatory, and the orders and acts prescribing them are violative of the 14th Amendment. and the Federal courts have jurisdiction.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep.

653; Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

If the acts and orders are unconstitutional, they are not laws of the state.

Poindexter v. Greenhow, 114 U. S. 288, 29 L. ed. 192, 5 Sup. Ct. Rep. 903, 962.

There can be no ministerial duty or discretionary power to enforce a law which does not exist.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; New Orleans v. Paine, 147 U. S. 261, 37 L. ed. 162, 13 Sup. Ct. Rep. 303; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

Mr. **J. F. McGee** also argued the cause, and, with Mr. William Lancaster, filed a brief for respondent:

Excessive penalties rendered the act unconstitutional.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Ex parte Wood, 155 Fed. 190; Southern R. Co. v. McNeill, 155 Fed. 756; Consolidated Gas Co. v. Mayer, 146 Fed. 150.

The suit was not and is not a suit against the state.

Osborn v. Bank of United States, 9 Wheat. 751, 6 L. ed. 207; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Pennoyer v. McConnaughy, 140 U. S. 10, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Scott v. Donald, 165 U. S. 112, 41 L. ed. 653, 17 Sup. Ct. Rep. 262; Tindal v. Wesley, 167 U. S. 205, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Pacific Steam Whaling Co. v. United States, 187 U. S. 447, 47 L. ed. 253, 23 Sup. Ct. Rep. 154; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 291, 50 L. ed. 486, 26 Sup. Ct. Rep. 252; McNeill v. Southern R. Co. 202 U. S. 559, 50 L. ed. 1147, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962.

Messrs. Frank B. Kellogg, Cordenio A. Severance, Robert E. Olds, and Stiles W. Burr also filed a brief for respondent:

Neither the suit itself, nor the injunction against petitioner, is within the prohibition of the 11th Amendment.

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Starr v. Chicago, R. I. & P. R. Co. 110 Fed. 3; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 284, 50 L. ed. 477, 483, 26 Sup. Ct. Rep. 252; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 340, 51 L. ed. 209, 211, 27 Sup. Ct. Rep. 90.

Mr. Walker D. Hines also filed a brief for respondent.

Messrs. Edward B. Whitney and Abel E. Blackmar filed a brief as *amici curiæ*.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

We recognize and appreciate to the fullest extent the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of the courts of justice throughout the land, both Federal and state, and in the proper exercise of the jurisdiction of the Federal courts, as limited and controlled by the Federal Constitution and the laws of Congress.

That there has been room for difference of opinion with regard to such limitations the reported cases in this court bear conclusive testimony. It cannot be stated that the case before us is entirely free from any possible doubt, nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide.

The question of jurisdiction, whether of the circuit court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the circuit court is the assertion that the suit is, in effect, against one of the states of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 264-404, 5 L. ed. 257-291, is most apposite. In that case he said:

[143] *"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty."

Coming to a consideration of the case, we find that the complainants in the suit commenced in the circuit court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; equity rule 94, Supreme Court.

It is primarily asserted on the part of the petitioner that jurisdiction did not exist in the circuit court because there was not the requisite diversity of citizenship, and there was no question arising under the Constitution or laws of the United States to otherwise give jurisdiction to that court. There is no claim made here of jurisdiction on the ground of diversity of citizenship, and the claim, if made, would be unfounded in fact. If no other ground exists, then the order of the circuit court, assuming to punish petitioner for contempt, was an unlawful order, made by a court without jurisdiction. In such case this court, upon proper application, will discharge the person from imprisonment. Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Re Ayers, 123 U. S. 443, 485, 31 L. ed. 216, 223, 8 Sup. Ct. Rep. 164. But an examination of the record before us shows that there are Federal questions in this case.

It is insisted by the petitioner that there is no Federal question *presented under the **[144]** 14th Amendment, because there is no dispute as to the meaning of the Constitution, where it provides that no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and whatever dispute there may be in this case is one of fact simply, whether the freight or passenger rates, as fixed by the legislature or by the railroad commission, are so low as to be confiscatory; and that is not a Federal question.

Jurisdiction is given to the circuit court in suits involving the requisite amount, arising under the Constitution or laws of the United States (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), and the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution, nevertheless, is one which raises a Federal question. See Hastings v. Ames (C. C. App. 8th C.) 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726. The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 369-399, 38 L. ed. 1014-1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466–522, 42 L. ed. 819–840, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only [145] allowed a hearing upon the claim of *the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation.

Still another Federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.

We conclude that the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.

Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents, and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger-rate act renders the party guilty of a felony and subject to a fine not exceeding $5,000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some *agent or employee to disobey them at [146] the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question, made by Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 99, 100, 102, 46 L. ed. 92, 105, 106, 22 Sup. Ct. Rep. 30, 38–40, are very apt. At page 100 he stated: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?" Again, at page 102, he says: "It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents, or employees of the company, the risk of imprisonment for years as a common felon. See also Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 529–543; Louisville & N. R. Co. v. McChord, 103 Fed. 216–223; *Con- [147] solidated Gas Co. v. Mayer, 146 Fed. 150–153. In McGahey v. Virginia, 135 U. S. 662–694, 34 L. ed. 304–314, 10 Sup. Ct. Rep. 972, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy; and, when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given. See also Bronson v. Kinzie, 1 How. 311, 317, 11 L. ed. 143, 145; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. R. Co. v. Minnesota, supra. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not [148] now *necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the circuit court had jurisdiction under the cases already cited (and it was therefore its duty) to inquire whether the rates permitted by these acts or orders were too low and therefore confiscatory, and, if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

Various affidavits were received upon the hearing before the court prior to the granting of the temporary injunction, and the hearing itself was, as appears from the opinion, full and deliberate, and the fact was found that the rates fixed by the commodity act, under the circumstances existing with *reference to the passenger-rate act [149] and the orders of the commission, were not sufficient to be compensatory, and were in fact confiscatory, and the act was therefore unconstitutional. The injunction was thereupon granted with reference to the enforcement of the commodity act.

We have, therefore, upon this record, the case of an unconstitutional act of the state legislature and an intention by the attorney general of the state to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the circuit court,—the objection being that the suit is, in effect, one against the state of Minnesota, and that the injunction issued against the attorney general illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the state. This objection is to be considered with reference to the 11th and 14th Amendments to the Federal Constitution. The 11th Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The 14th Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

[150] *The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the 11th Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a state by one of its own citizens, as well as to a suit brought by a citizen of another state. Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504. It was adopted after the decision of this court in Chisholm v. Georgia (1793) 2 Dall. 419, 1 L. ed. 440, where it was held that a state might be sued by a citizen of another state. Since that time there have been many cases decided in this court involving the 11th Amendment, among them being Osborn v. Bank of United States (1824) 9 Wheat. 738, 846, 857, 6 L. ed. 204, 229, 232, which held that the Amendment applied only to those suits in which the state was a party on the record. In the subsequent case of Sundry African Slaves v. Madrazo (1828) 1 Pet. 110, 122, 123, 7 L. ed. 73, 79, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing Osborn v. Bank of United States, supra, said that where the claim was made, as in the case then before the court, against the governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the state and for slaves in possession of the state government), the state might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

Davis v. Gray, 16 Wall. 203, 220, 21 L. ed. 447, 453, reiterates the rule of Osborn v. Bank of United States, so far as concerns the right to enjoin a state officer from executing a state law in conflict with *the [151] Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

In Poindexter v. Greenhow, 114 U. S. 270, 296, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962, it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a taxpayer for nonpayment of his taxes, was a suit against him personally, as a wrongdoer, and not against the state.

Hagood v. Southern, 117 U. S. 52-67, 29 L. ed. 805-810, 6 Sup. Ct. Rep. 608, decided that the bill was, in substance, a bill for the specific performance of a contract between the complainants and the state of South Carolina; and, although the state was not in name made a party defendant, yet, being the actual party to the alleged contract the performance of which was sought, and the only party by whom it could be performed, the state was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which, when done, would constitute a performance of the alleged contract by the state.

The cases upon the subject were reviewed, and it was held (Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164), that a bill in equity brought against officers of a state, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the state, where the relief prayed for, if done, would constitute a performance by the state of the alleged contract of the state, was a suit against the state (page 504), following in this respect Hagood v. Southern, supra.

A suit of such a nature was simply an attempt to make the state itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The state alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the state.

On the other hand, United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct.

Rep. 240, determined that an individual in possession of real estate under the government of the United States, which claimed to [152] be *its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770, to the same effect.

In Pennoyer v. McConnaughy, 140 U. S. 1, 9, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699, a suit against land commissioners of the state was said not to be against the state, although the complainants sought to restrain the defendants, officials of the state, from violating, under an unconstitutional act, the complainants' contract with the state, and thereby working irreparable damage to the property rights of the complainants. Osborn v. Bank of United States, supra, was cited, and it was stated: "But the general doctrine of Osborn v Bank of United States, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from." The same principle is decided in Scott v. Donald, 165 U. S. 58-67, 41 L. ed. 632, 633, 17 Sup. Ct. Rep. 265. And see Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18.

The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the Ayers Case, 123 U. S., supra, was to restrain the state officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the name of the state and brought to *recover taxes for its use*, on the ground that, if such suits were commenced, they would be a breach of a contract with the state. The injunction was declared illegal because the suit itself could not be entertained, as it was one against the state, to enforce its alleged contract. It was said, however, that, if the court had power to entertain such a suit, it would have power to grant the re-[153]straining order *preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent, in some cases, to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047 (a rate case), was a suit against the members of a railroad commission (created under an act of the state of Texas) and the attorney general, all of whom were held suable, and that such suit was not one against the state. The commission was enjoined from enforcing the rates it had established under the act, and the attorney general was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commission under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis county, Texas, against the commission as defendant. This court held that such language permitted a suit in the United States circuit court for the western district of Texas, which embraced Travis county, but it also held that, irrespective of that consent, the suit was not in effect a suit against the state (although the attorney general was enjoined), and therefore not prohibited under the Amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not, in any fair sense, be considered a suit against the state (page 392), and the conclusion of the court was that the objection to the jurisdiction of the circuit court was not tenable, whether that jurisdiction was rested (page 393) "upon the provisions of the statute, or upon the general jurisdiction of the court, existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." Each of these grounds is effective and both are of equal force. *Union [154] P. R. Co. v. Mason City & Ft. D. R. Co. 199 U. S. 160-166, 50 L. ed. 134-137, 26 Sup. Ct. Rep. 19.

In Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the state, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment, to the injury of the rights of the plaintiff, was not a suit against a state, within the meaning of the Amendment. At page 518, in answer to the objection that the suit was really against the state. it was said: "It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment." The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the 14th Amendment.

There was no special provision in the statute as to rates, making it the duty of the attorney general to enforce it, but, under his general powers, he had authority to ask for a mandamus to enforce such or any other law. State ex rel. Board of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 35 N. W. 118.

The final decree enjoined the attorney general from bringing any suit (page 477) by way of injunction, mandamus, civil action, or indictment, for the purpose of enforcing the provisions of the act. The 5th section of the act provided that an action might be brought by a railroad company in the supreme court of the state of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a state, although brought against individual state officers, for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. Page 518.

[155] *This decision was reaffirmed in Prout v. Starr, 188 U. S. 537, 542, 47 L. ed. 584, 586, 23 Sup. Ct. Rep. 398.

Attention is also directed to the case of Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18. That was a suit brought in a state court of Missouri by the railroad commissioners of the state, who had the powers granted them by the statutes set forth in the report. Their suit was against the railway company, to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri river. The defendant sought to remove the case to the Federal court, which the plaintiffs resisted, and the state court refused to remove, on the ground that the real plaintiff was the state of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the state was not the real party plaintiff, and the case had therefore been properly removed from the state court, whose judgment was thereupon reversed.

Applying the same principles of construction to the removal act which had been applied to the 11th Amendment, it was said by this court that the state might be the real party plaintiff when the relief sought inures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

Although the case is one arising under the removal act, and does not involve the 11th Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that the state is not a party to a suit simply because the state railroad commission is such party.

The doctrine of Smyth v. Ames is also referred to and reiterated in Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 283, 50 L. ed. 477, 483, 26 Sup. Ct. Rep. 252. See also McNeill v. Southern R. Co. 202 U. S. 543-559, 50 L. ed. 1142-1147, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 340, 51 L. ed. 209, 211, 27 Sup. Ct. Rep. 90.

The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers *of [156] the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

It is objected, however, that Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, has somewhat limited this principle, and that, upon the authority of that case, it must be held that the state was a party to the suit in the United States circuit court, and the bill should have been dismissed as to the attorney general on that ground.

We do not think such contention is well founded. The doctrine of Smyth v. Ames was neither overruled nor doubted in the Fitts Case. In that case the Alabama legislature, by the act of 1895, fixed the tolls to be charged for crossing the bridge. The penalties for disobeying that act, by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the state had any official connection with the recovery of such penalties. The indictments mentioned were found under another state statute, set forth at page 520 of the report of the case, which provided a fine against an officer of a company for taking any greater rate of toll than was authorized by its charter, or, if the charter did not specify the amount, then the fine was imposed for charging any unreasonable toll, to be determined by a jury. This act was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls. As no state officer who was made a party bore any close official connection with the act fixing the tolls, the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done. A state superintendent of schools might as well have been made a party. In the light of this fact it was said in the opinion (page 530):

[157] *"In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

In the course of the opinion in the Fitts Case the Reagan and *Smyth Cases were [158] referred to (with others) as instances of state officers specially charged with the execution of a state enactment alleged to be unconstitutional, and who commit, under its authority, some specific wrong or trespass, to the injury of plaintiff's rights. In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the state.

The officers in the Fitts Case occupied the position of having no duty at all with regard to the act, and could not be properly made parties to the suit for the reason stated.

It is also objected that as the statute does not specifically make it the duty of the attorney general (assuming he has that general right) to enforce it, he has, under such circumstances, a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as attorney general in the exercise of his discretion.

In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. Board of Liquidation v. McComb, 92 U. S. 531–541, 23 L. ed. 623–628.

[159] *The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer

from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

It is also argued that the only proceeding which the attorney general could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state, in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, **[160]** comes into conflict with the *superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See Re Ayers, 123 U. S. 507, 31 L. ed. 230, 8 Sup. Ct. Rep. 164. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality, with reference, at least, to the Federal Constitution, be first raised in a Federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts.

The question remains whether the attorney general had, by the law of the state, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the injunction issued, at the risk of being found guilty of contempt by so doing.

The duties of the attorney general, as decided by the supreme court of the state of Minnesota, are created partly by statute and exist partly as at common law. State ex rel. Young v. Robinson (decided June 7, 1907) 101 Minn. 277, 112 N. W. 269. In the above-cited case it was held that the attorney general might institute, conduct, and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights, and that there were no statutory restrictions in that state limiting the duties of the attorney general in such case.

Section 3 of chapter 227 of the General Laws of Minnesota, 1905 (same law, § 58, Revised Laws of Minnesota, 1905), *imposes **[161]** the duty upon the attorney general to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the state. By § 1960 of the Revised Laws of 1905 it is also provided that the attorney general shall be *ex officio* attorney for the railroad commission, and it is made his duty to institute and prosecute all actions which the commission shall order brought, and shall render the commissioners all counsel and advice necessary for the proper performance of their duties.

It is said that the attorney general is only bound to act when the commission orders action to be brought, and that § 5 of the commodity act (April 18, 1907) expressly provides that no duty shall rest upon the commission to enforce the act, and hence no duty other than that which is discretionary rests upon the attorney general in that matter. The provision is somewhat unusual, but the reasons for its insertion in that act are not material, and neither require nor justify comment by this court.

It would seem to be clear that the attorney general, under his power existing at common law, and by virtue of the various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statute of the state, including, of course the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.

It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction [162] over the subject-matter, has *the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U. S. 537–542–544, 47 L. ed. 584–586, 587, 23 Sup. Ct. Rep. 398. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. 366–370, 21 L. ed. 287–290; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498. In Dobbins v. Los Angeles, 195 U. S. 223–241, 49 L. ed. 169–177, 25 Sup. Ct. Rep. 18, it is remarked by Mr. Justice Day, in delivering the opinion of the court, that "it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, distinctly enjoined the proceedings by indictment to compel obedience to the rate act.

These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. Re Sawyer, 124 U. S. 200, 211, 31 L. ed. 402, 406, 8 Sup. Ct. Rep. 482, is not to the contrary. That case holds that, in general, a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, "unless they are instituted by a party to the suit already pending before it, and to try the same right that is in issue there." Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States circuit court. The right to restrain proceedings by mandamus is based upon the same foundation and governed by the same principles.

*It is proper to add that the right to enjoin [163] an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

It is further objected that there is a plain and adequate remedy at law open to the complainants, and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey *the [164] law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger-rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and, upon conviction, to a fine of $5,000 and imprisonment for five years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

If, however, one should be found, and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings within the state from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations, and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment [165] *or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.

To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people, who are scattered over the whole country, from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property,—no more, no less. The courts having jurisdiction, Federal or state, should, at all times, be opened to them as well as to others, for the purpose of protecting their property and their legal rights.

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question.

An act of the legislature fixing rates, either for passengers or freight, is to be regarded as prima facie valid, and the onus rests upon the company to prove its assertion to the contrary. Under such circumstances it was stated by Mr. Justice Miller, *in his concurring opinion in Chicago, M. & [166] St. P. R. Co. v. Minnesota, 134 U. S. 418–460, 33 L. ed. 970–982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, that the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery, asserting its unreasonable character; and that until the decree of the court in such equity suit was obtained, it was not competent for each individual having dealings with a carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner. This remedy by bill in equity is referred to and approved by Mr. Justice Shiras, in delivering the opinion of the court in St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 659, 666, 39 L. ed. 567, 570, 573, 15 Sup. Ct. Rep. 484, although that question was not then directly before the court. Such remedy is undoubtedly the most convenient, the most comprehensive, and the most orderly way in which the rights of all parties can be properly, fairly, and adequately passed upon. It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected. The question of sufficiency of rates is important and controlling; and, being of a judicial nature, it ought to be settled at the earliest moment by some court, and when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other courts. This is all that is claimed, and this, we think, must be admitted.

Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free [167] from doubt. We *think such rule is, and will be, followed by all the judges of the Federal courts.

And, again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of Osborn v. Bank of United States up to the present; the only difference in regard to the case of Osborn and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the Osborn Case, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject-matter. In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the state, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States. See Re Ayers, 123 U. S. 507, 31 L. ed. 230, 8 Sup. Ct. Rep. 164.

This supreme authority, which arises from the specific provisions of the Constitution itself, is nowhere more fully illustrated than in the series of decisions under the Federal habeas *corpus statute (§ 753, U. S. [168] Rev. Stat. U. S. Comp. Stat. 1901, p. 592), in some of which cases persons in the custody of state officers for alleged crimes against the state have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion; but in others it has been granted, while the power has been fully recognized in all. Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Minnesota v. Brundage, 180 U. S. 499, 502, 45 L. ed. 639, 640, 21 Sup. Ct. Rep. 455; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; United States ex rel. Drury v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229; Re Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602.

It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the state by virtue of service of the writ on the state officer in whose custody he is found is not a suit against the state, and yet service of a writ on the attorney general, to prevent his enforcing an unconstitutional enactment of a state legislature, is a suit against the state.

There is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character.

The rule to show cause is discharged and the petition for writs of habeas corpus and certiorari is dismissed.

So ordered.

Mr. Justice **Harlan**, dissenting:

Although the history of this litigation is set forth in the opinion of the court, I deem it appropriate to restate the principal facts of the case in direct connection with my examination of the question upon which [169] the decision turns. *That question is whether the suit in the circuit court of the United States was, *as to the relief sought against the attorney general of Minnesota*, forbidden by the 11th Amendment of the Constitution of the United States, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." That examination, I may say at the outset, is entered upon with no little embarrassment, in view of the fact that the views expressed by me are not shared by my brethren. I may also frankly admit embarrassment arising from certain views stated in dissenting opinions heretofore delivered by me which did not, at the time, meet the approval of my brethren, and which I do not now myself entertain. What I shall say in this opinion will be in substantial accord with what the court has heretofore decided, while the opinion of the court departs, as I think, from principles previously announced by it upon full consideration. I propose to adhere to former decisions of the court, whatever may have been once my opinion as to certain aspects of this general question.

The plaintiffs in the suit referred to, Perkins and Shepard, were shareholders of the Northern Pacific Railway Company, and citizens, respectively, of Iowa and Minnesota. The defendants were the railway company, Edward T. Young, attorney general of Minnesota, the several members of the state railroad and warehouse commission, and certain persons who were shippers of freight over the lines of that railway.

The general object of the suit was to prevent compliance with the provisions of certain acts of the Minnesota legislature and certain orders of the state railroad and warehouse commission, indicating the rates which the state permits to be charged for the transportation of passengers and commodities upon railroads within its limits; also, to prevent shippers from bringing actions against the railway company to enforce those acts and orders.

[170] *The bill, among other things, prayed that Edward T. Young, "as attorney general of the state of Minnesota," and the members of the state railroad and warehouse commission (naming them) be enjoined from all attempts to compel the railway company to put in force the rates or any of them prescribed by said orders, and "from taking any action, step, or proceeding against said railway company, or any of its officers, directors, agents, or employees, to enforce any penalties or remedies for the violation by said railway company of said orders or either of them;" and that said Young, "as attorney general," be enjoined from taking any action, step, or proceeding against the railway company, its officers, agents, or employees, to enforce the penalties and remedies specified in those acts.

The court gave a temporary injunction, as prayed for. The attorney general of Minnesota appeared specially, and, without submitting to or acknowledging the jurisdiction of the court, moved to dismiss the suit as to him, upon the ground that the state had not consented to be sued, and also because the bill was exhibited against him "as, and only as, the attorney general of the state of Minnesota," to restrain him, by injunction, from exercising the discretion vested in him to commence appropriate actions, on behalf of the state, to enforce or to test the validity of its laws. He directly raised the question that the suit as to him, in his official capacity, was one against the state, in violation of the 11th Amendment.

In response to an order to show cause why the injunction asked for should not be granted, the attorney general also appeared specially and urged like objections to the suit against him in the circuit court.

After hearing the parties, the court made an order, September 23d, 1907, whereby the railway company, its officers, directors, agents, servants, and employees, were enjoined until the further order of the court from publishing, adopting, or putting into effect the tariffs, rates, or charges specified in the *act of April 18th, 1907. The [171] court likewise enjoined the defendant Young, "as attorney general of the state of Minnesota," from "taking or instituting any action, suit, step, or proceeding to enforce the penalties and remedies specified in said act or either thereof, or to compel obedience to said act or compliance therewith or any part thereof." A like injunction was granted against the defendant shippers.

On the next day, September 24th, 1907, the state of Minnesota, "on the relation of Edward T. Young, attorney general," commenced an action in one of its own courts against the Northern Pacific Railway Company, *the only relief sought* being a mandamus ordering the company to adopt, publish, keep for public inspection, and put into effect, as the rates and charges to be maintained for the transportation of freight between stations in Minnesota, those named and specified in what is known as chapter 232 of the Session Laws of Minnesota for

1907. That was the act which it was the object of the Perkins-Shepard suit in the Federal court to strike down and nullify. An alternative writ of mandamus, such as the state asked, was issued by the state court.

The institution, in the state court, by the state, on the relation of its attorney general, of the mandamus proceeding against the railway company, having been brought to the attention of the Federal circuit court, a rule was issued against the defendant Young to show cause why he should not be punished as for contempt. Answering that rule, he alleged, among other things, that the mandamus proceeding was brought by and on behalf of the state, through him as its attorney general; that in every way possible he had objected to such jurisdiction on the ground that the action was commenced against him solely as the attorney general for Minnesota, in order to prevent him from instituting in the proper courts civil actions for and in the name of the state, to enforce or test the validity of its laws; *that there is no other action or proceeding pending or contemplated by this defendant against said railway company, except said* **[172]** *proceedings in mandamus *hereinbefore referred to.* Defendant expressly disclaimed any intention to treat this court with disrespect in the commencement of the proceedings referred to, "but believing that the decision of this court in this action, holding that it had jurisdiction to enjoin this defendant, as such attorney general, from performing his discretionary official duties, was in conflict with the 11th Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, defendant believed it to be his duty as such attorney general to commence said mandamus proceedings for and in behalf of the state, and it was in this belief that said proceedings were commenced solely for the purpose of enforcing the said law of the state of Minnesota."

The rule was heard, and the attorney general was held to be in contempt, the order of the Federal court being: "Ordered further, that said Edward T. Young *forthwith dismiss or cause to be dismissed the suit of the state of Minnesota* on the Relation of Edward T. Young, Attorney General, Plaintiff, v. Northern Pacific Railway Company, Defendant, heretofore instituted by him in the district court of the county of Ramsey, second judicial district, state of Minnesota. Ordered further, that for his said contempt said Edward T. Young be fined the sum of $100 and *stand committed in the custody* of the marshal of this court until the same be paid, and until he purge himself of his contempt by dismissing, or causing to be dismissed, said suit last herein mentioned."

The present proceeding was commenced by an original application by Young to this court for a writ of habeas corpus. The petitioner, in his application, proceeds upon the ground that he is held in custody in violation of the Constitution of the United States. The petition set out all the steps taken in the suit in the Federal court, alleging, among other things: "That your petitioner's office as attorney general of the state of Minnesota is established and provided for by the Constitution of the said state, § 1 of article 5 thereof *providing as **[173]** follows, to wit: 'The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, and attorney general, who shall be chosen by the electors of the state.' That neither by statute nor otherwise is your petitioner charged with any special duty of a ministerial character in the doing or not doing of which said complainants in the said bill of complaint or the said Northern Pacific Railway Company had any legal right, and that whatever duties your petitioner had or has with respect to the several matters complained of in the said bill of complaint are of an executive and discretionary nature. That in no case could your petitioner, even though it was his intention so to do, which it was not, deprive the said complainants or the said Northern Pacific Railway Company, or either of them, of any property, nor could he trespass upon their rights in any particular, and that all he could do *as attorney general*, as aforesaid, and all that it was his duty to do in that capacity, and all that he intended to do or would do, *was to commence formal judicial proceedings in the appropriate court of Minnesota against the said Northern Pacific Railway Company, its officers, agents, and employees*, to compel the said company, its officers, agents, and servants, to adopt and put in force the schedule of freight rates, tariffs, and charges prescribed by said chapter 232, Laws 1907, of the state of Minnesota." He renewed the objection that the suit instituted by Perkins and Shepard, in so far as the same is against him, was a suit against the state, to prevent his commencing the proposed action in the name of the state, and was in restraint of the state itself, "and that the said suit is one against the said state, in violation of the 11th Amendment to the Constitution of the United States, and that therefore the same is and was, so far as your petitioner is concerned, beyond the jurisdiction of the said circuit court," etc.

This statement will sufficiently indicate the nature of the question to be now examined upon its merits.

Let it be observed that the suit instituted [174]by Perkins and *Shepard in the circuit court of the United States was, as to the defendant Young, one against him *as, and only because he was*, attorney general of Minnesota. No relief was sought against him individually, but only in his capacity *as* attorney general. And the manifest, indeed the avowed and admitted, object of seeking such relief, was *to tie the hands* of the *state* so that it could not in any manner or by any mode of proceeding, *in its own courts,* test the validity of the statutes and orders in question. It would therefore seem clear that, within the true meaning of the 11th Amendment, the suit brought in the Federal court was one, in legal effect, against the state,—as much so as if the state had been formally named on the record as a party,—and therefore it was a suit to which, under the Amendment, so far as the state or its attorney general was concerned, the judicial power of the United States did not and could not extend. If this proposition be sound it will follow,—indeed, it is conceded that if, so far as relief is sought against the attorney general of Minnesota, this be a suit against the state,—then, the order of the Federal court enjoining that officer from taking any action, suit, step, or proceeding to compel the railway company to obey the Minnesota statute was beyond the jurisdiction of that court and wholly void; in which case, that officer was at liberty to proceed in the discharge of his official duties as defined by the laws of the state, and the order adjudging him to be in contempt for bringing the mandamus proceeding in the state court was a nullity.

The fact that the Federal circuit court had, prior to the institution of the mandamus suit in the state court, preliminarily (but not finally) held the statutes of Minnesota and the orders of its railroad and warehouse commission in question to be in violation of the Constitution of the United States, was no reason why that court should have laid violent hands upon the attorney general of Minnesota, and by its orders have deprived the state of the services of its constitutional law officer in its own courts. Yet [175]that is what was done by *the Federal circuit court; for the intangible thing called a state, however extensive its powers, can never appear or be represented or known in any court in a litigated case, except by and through its officers. When, therefore, the Federal court forbade the defendant Young, as attorney general of Minnesota, from taking any action, suit, step, or proceeding whatever looking to the enforcement of the statutes in question, it said in effect to the state of Minnesota: "It is true that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to its people, and it is true that, under the Constitution, the judicial power of the United States does not extend to any suit brought against a state by a citizen of another state or by a citizen or subject of a foreign state, yet the Federal court adjudges that you, the state, although a sovereign for many important governmental purposes, shall not appear in your own courts, by your law officer, with the view of enforcing, or even for determining the validity of, the state enactments which the Federal court has, upon a preliminary hearing, declared to be in violation of the Constitution of the United States."

This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were "dependencies" or provinces. It would place the states of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the 11th Amendment was made a part of the supreme law of the land. I cannot suppose that the great men who framed the Constitution ever thought the time would come when a subordinate Federal court, having no power to compel a state, in its corporate capacity, to appear before it as a litigant, would yet assume to deprive a state of the right to be represented in its own courts by its *regular [176] law officer. That is what the court below did, as to Minnesota, when it adjudged that the appearance of the defendant Young *in the state court*, as the attorney general of Minnesota, representing his state as its chief law officer, was a contempt of the authority of the Federal court, punishable by fine and imprisonment. Too little consequence has been attached to the fact that the courts of the states are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the supreme law of the land, and to guard rights secured or guaranteed by that instrument. We must assume—a decent respect for the states requires us to assume—that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has a clear remedy for the protection of his rights; for he can come by writ of error, in an orderly, judicial way, from the highest court of the state to this tribunal for redress in respect of every right granted or secured by that instrument and denied by the state court. The state courts, it should be remembered, have jurisdiction concurrent with the courts of the United States of all suits of a civil nature, at common law or equity, involving a prescribed amount, arising under the Constitution or laws of the United States. 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508. And this court has said: "A state court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity arising under the Constitution or laws of the United States or involving rights dependent upon such Constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pur-**[177]**suance thereof, and all treaties *made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the state in which the question could be decided to this court for final and conclusive determination." Robb v. Connolly, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544, 551. So that an order of the Federal court preventing the state from having the services of its attorney general in one of its own courts, except at the risk of his being fined and arrested, cannot be justified upon the ground that the question of constitutional law, involved in the enforcement of the statutes in question, was beyond the competency of a state court to consider and determine, primarily, as between the parties before it in a suit brought by the state itself.

At the argument of this case counsel for the railway company insisted that the provisions of the act in question were so drastic that they could be enforced by the state in its own courts with such persistency and in such a manner as, in a very brief period, to have the railway officers and agents all in jail, the business of the company destroyed, and its property confiscated by heavy and successive penalties, before a final judicial decision as to the constitutionality of the act could be obtained. I infer from some language in the court's opinion that these apprehensions are shared by some of my brethren. And this supposed danger to the railway company and its shareholders seems to have been the basis of the action of the Federal circuit court when, by its order directed against the attorney general of Minnesota, it practically excluded the state from its own courts in respect of the issues here involved. But really no such question as to the state statute is here involved or need be now considered; for it cannot possibly arise on the hearing of the present application of that officer for discharge on habeas corpus. The only question now before this court is whether the suit by Perkins and Shepard in the Federal *court was not, **[178]** upon its face, *as to the relief sought against the attorney general of Minnesota*, a suit against the state. Stated in another form, the question is whether that court may, *by operating upon that officer in his official capacity*, by means of fine and imprisonment, prevent the state from being represented by its law officer in one of its own courts? If the Federal court could not thus put manacles upon the state so as to prevent it from being represented by its attorney general in its own court and from having the state court pass upon the validity of the state enactment in question in the Perkins-Shepard suit, that is an end to this habeas corpus proceeding, and the attorney general of Minnesota should be discharged by order of this court from custody.

It is to be observed that when the state was, in effect, prohibited by the order of the Federal court from appearing in its own courts, there was no danger, absolutely none whatever, from anything that the attorney general had ever done or proposed to do, that the property of the railway company would be confiscated and its officers and agents imprisoned, beyond the power of that company to stay any wrong done *by bringing to this court, in regular order, any final judgment of the state court, in the mandamus suit, which may have been in derogation of a Federal right.* When the attorney general instituted the mandamus proceeding in the state court against the railway company there was in force, it must not be forgotten, an order of injunction by the Federal court which prevented that company from obeying the state law. There was consequently no danger from that direction. Besides, the mandamus proceeding was not instituted for the recovery of any of the penalties prescribed by the state law, and therefore no judgment in that case could operate directly upon the property of the railway company or upon the persons of its officers or agents. The attorney general, in his response to the rule against him, assured the Federal court that he did not contemplate any proceeding whatever against the railway company except the one in man-[179]damus. Suppose the *mandamus case had been finally decided in the state court,—the way was open for the railway company to preserve any question it made as to its rights under the Constitution, and, in the event of a decision adverse to it in that court, at once to carry the case to the highest court of Minnesota, and thence, by a writ of error, bring it to this court. That course would have served to determine every question of constitutional law raised by the suit in the Federal court in an orderly way, without trampling upon the state, and without interfering, in the meantime, with the operation of the railway property in the accustomed way. Instead of adopting that course,—so manifestly consistent with the dignity and authority of both the Federal and state judicial tribunals,—the Federal court practically closed the state courts against the state itself when it adjudged that the attorney general, without regard to the wishes of the governor of Minnesota, and without reference to his duties as prescribed by the laws of that state, should stand in the custody of the marshal unless he dismissed the mandamus suit. If the Federal court could thus prohibit the law officer of the state from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota, and forbid them from bringing to the attention of grand juries and the state courts violations of the state act by the railway company? And if a grand jury was about to inquire into the acts of the railway company in respect of the matter of its rates, why may not the Federal court, proceeding upon the same grounds on which it has moved against the attorney general, enjoin the finding or returning of indictments against the railway company? If an indictment was returned against the railway company, and was about to be tried by a petit jury, why could not the Federal court, upon the principles now announced, forbid the jury to proceed against the railway company, and, if it did, punish every petit juryman as for contempt of court? Indeed, why may it not lay its hands on the governor of [180]the state and *forbid him from appealing to the courts of Minnesota in the name of the state, to test the validity of the act in question? And why may not the Federal court lay its hands even upon the judge of the state court itself, whenever it proceeds against the railway company under the state law?

The subject-matter of these questions has evidently been considered by this court, and the startling consequences that would result from an affirmative answer to them have not been overlooked; for, in its opinion, I find these observations: "It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation *of the whole scheme of our government.* If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only. and the court or jury can proceed without incurring any penalty on that account. The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former." If an order of the Federal court forbidding a state court or its grand jury from attempting to enforce a state enactment would be "a violation of the whole scheme of our government," it is difficult to perceive why an order of that court, forbidding the chief law officer and all the district attorneys of a state to represent it in the courts, in a particular case, and practically, in that way, closing the doors of the state court against the state, would not also be inconsistent with the whole scheme of our government, and, therefore, beyond the power of the court to make.

*Whether the Minnesota statutes are or [181] are not violative of the Constitution is not, as already suggested, a question in this habeas corpus proceeding. I do not, therefore, stop to consider whether those statutes are repugnant to the Constitution upon the ground that, by their necessary operation, when enforced, they will prevent the railway company from contesting their validity, or upon the ground that they are confiscatory and therefore obnoxious to the requirement of due process of law. While the argument at the bar in support of each of these propositions was confessedly of great force and persuasiveness, those points need not be now examined. I express no opinion about them. Their soundness may, however, be conceded for the purposes of this discussion. Indeed, it may be assumed for the purposes of this discussion that these state enactments are harsh and intemperate and, in some of their features, invalid. But those questions are wholly apart from the present proceeding. If we now consider them we must go out of our way in order to do so. We have no evidence in this proceeding as to the effect which the statutes, if enforced, would have upon the value either of the railway property or of the bonds or stocks of the railway company. The question of their validity has not been finally decided by the circuit court, and we have not before us even the evidence upon which its preliminary injunction was based. The essential and only question now before us or that need be decided is whether an order by the Federal court which prevents the state from being represented in its own courts, by its chief law officer, upon an issue involving the constitutional validity of certain state enactments, does not make a suit against the state within the meaning of the 11th Amendment. If it be a suit of that kind, then, it is conceded, the circuit court was without jurisdiction to fine and imprison the petitioner, and he must be discharged, whatever our views may be as to the validity of those state enactments. This must necessarily be so unless the Amendment has less force and a more restricted meaning now than it had at the time of its [182]adoption, *and unless a suit against the attorney general of a state, in his official capacity, is not one against a state under the 11th Amendment when its determination depends upon a question of constitutional power or right under the 14th Amendment. In that view I cannot concur. In my opinion the 11th Amendment has not been modified in the slightest degree as to its scope or meaning by the 14th Amendment, and a suit which, in its essence, is one against the state, remains one of that character and is forbidden even when brought to strike down a state statute alleged to be in violation of that clause of the 14th Amendment forbidding the deprivation by a state of life, liberty, or property without due process of law. If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error. But such right cannot be protected by means of a suit which, at the outset, is, directly or in legal effect, one against the state whose action is alleged to be illegal. That mode of redress is absolutely forbidden by the 11th Amendment, and cannot be made legal by mere construction, or by any consideration of the consequences that may follow from the operation of the statute. Parties cannot, in any case, obtain redress by a suit *against the state.* Such has been the uniform ruling in this court, and it is most unfortunate that it is now declared to be competent for a Federal circuit court, by exerting its authority over the chief law officer of the state, without the consent of the state, to exclude the state, in its sovereign capacity, from its own courts when seeking to have the ruling of those courts as to its powers under its own statutes. Surely, the right of a state to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a Federal court. The preservation of the dignity and sovereignty of the states, within the limits of their constitutional powers, *is of the last importance, and vital to the[183] preservation of our system of government. The courts should not permit themselves to be driven by the hardships, real or supposed, of particular cases, to accomplish results, even if they be just results, in a mode forbidden by the fundamental law. The country should never be allowed to think that the Constitution can, in any case, be evaded or amended by mere judicial interpretation, or that its behests may be nullified by an ingenious construction of its provisions.

The importance of the question under consideration is a sufficient justification for such a reference to the authorities as will indicate the precise grounds on which this court has oftentimes proceeded when determining what is and what is not a suit against a state within the meaning of the 11th Amendment. All the cases agree in declaring the incapacity of a Federal court to exercise jurisdiction over a state as a party. But assaults upon the 11th Amendment have oftenest been made in cases in which the effort has been, without making the state a formal party, to control the acts of its officers and agents, by such orders directed to them as will accomplish, by indirection, the same results that could be accomplished by a suit directly against the state, if such a suit were possible. It will be well to look at some of the principal adjudged cases.

The general question was examined in Cunningham v. Macon & B. R. Co. 109 U. S. 446-451, 27 L. ed. 992-994, 3 Sup. Ct. Rep. 292-296, 609, where the court said that it was conceded in all the cases, and "may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution." The court has not in any case departed from this constitutional principle. In Pennoyer v. Mc-

Connaughy, 140 U. S. 1, 9, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699, 701, it is said that "this immunity of a state from [184]suit is *absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself." In Cunningham v. Macon & B. R. Co., just cited, the distinction was drawn between a suit in which the state is the real party in interest, although not technically a party on the record, and one in which "an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government;" in which last case, the court observed, the defendant "is not sued *as, or because he is*, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer." Let it not be forgotten that the defendant Young was sued, not as an individual or because he had any personal interest in these matters, but *as, and solely because he is*, an officer of the state, charged with the performance of certain public duties.

In Hagood v. Southern, 117 U. S. 52, 67, 68, 29 L. ed. 805, 810, 6 Sup. Ct. Rep. 608, 615, 616, which involved the validity of certain scrip alleged to have been issued by the state of South Carolina, it appeared that the state, having denied its obligation to pay, the plaintiff sought relief by simply suing certain state officers, as such, without making the state a formal party. The court said: "These suits are accurately described as bills for the specific performance of a contract between the complainants and the state of South Carolina, who are the only parties to it. But to these bills the state is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to [185]perform the decree, and the only *party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending *only as representing the state*. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the 11th Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'" Again: "If this case is not within the class of those forbidden by the constitutional guaranty to the states of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the state is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a state could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the state according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the state itself. If not, it may well be asked, what would constitute such a proceeding? In the present cases the decrees were not only against the defendants *in their official capacity*, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office." Is it to be said that an order requiring the attorney general of a [186]*state to perform certain official functions on behalf of the state is a suit against the state, while an order forbidding him, *as attorney general*, to perform an official function on behalf of the state, is not a suit against the state?

The leading case upon the general subject, and one very similar in many important particulars to the present one, is Re Ayers, 123 U. S. 443, 496, 497, 505, 31 L. ed. 216, 226, 227, 229, 8 Sup. Ct. Rep. 164, 178, 183. The facts in that case were briefly these: The legislature of Virginia, in 1887, passed an act which holders of sundry bonds and tax-receivable coupons of that commonwealth alleged to be in violation of their rights under the Constitution of the United States. They instituted a suit in equity in the circuit court of the United States against the attorney general and auditor of Virginia, and against the treasurers and commonwealth attorneys of counties, cities, and towns in Virginia, the relief asked being a decree enjoining and restraining the said state officers, and each of them, from bringing or commencing any suit provided for by the above act of 1887, or from doing anything to put that act into operation. The circuit court entered an order. enjoining the attorney general of Virginia and each and all the state officers named "from bringing or commencing any suit against any person who has tendered the state of Virginia's tax-receivable coupons in payment of taxes due to said state, as provided for and directed by the act of the legislature of Virginia, approved May 12th, 1887." Subsequently the circuit court of the United States was informed that the attorney general of Virginia had disobeyed its order of injunction. Thereupon that officer was ruled to show cause why he should not be fined and imprisoned. He responded to the rule, admitting that after being served with the injunction he had instituted a suit, in the state circuit court, against the Baltimore & Ohio Railroad Company, to recover taxes due the state, and alleging "that he instituted the said suit because he was thereunto required by the act of the general assembly of Virginia, aforesaid, and because he believed this court had no jurisdiction whatever to award **[187]** the injunction *violated." He disclaimed any intention to treat the court with disrespect, and stated that he had been actuated alone by the desire to have the law properly administered. He was, nevertheless, adjudged guilty of contempt, was required forthwith to dismiss the suit he had brought, was fined $500 for contempt of court, and committed *to the custody of the marshal* until the fine was paid, and until he purged himself of his contempt *by dismissing the suit in the state court.* The attorney general then applied directly to this court for a writ of habeas corpus, which was granted, and upon hearing he was released by this court from custody. The order for his discharge recited that the suit in which the injunctions were granted was "in substance and in law a suit against the state of Virginia," and "within the prohibition of the 11th Amendment to the Constitution;" that it was one "to which the judicial power of the United States does not extend;" that the circuit court was without jurisdiction to entertain it; that all its proceedings in the exercise of jurisdiction were null and void; that it had no authority or power to adjudge the attorney general in contempt; and that his imprisonment was without authority of law. In the opinion in the Ayers Case the court said: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the circuit court, reduced to *the mere bringing of an action in the name of and for the state against taxpayers,* who, although they may have tendered tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers." Again: "The relief sought is against the defendants, not in their individual, but *in their representative, capacity as officers of the state of Virginia.* The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains,—supposing that such a suit could be maintained,—it would have been subjected *to the jurisdiction of the court by process **[188]** served upon its governor and attorney general, according to the precedents in such cases. New Jersey v. New York. 5 Pet. 284, 288, 290, 8 L. ed. 127–129; Kentucky v. Dennison, 24 How. 66, 96, 97, 16 L. ed. 717, 725, 726; rule 5 of 1884, 108 U. S. 574, 20 L. ed. 901, 3 Sup. Ct. Rep. vii. If a decree could have been rendered enjoining the state from bringing suits against its taxpayers, it would have operated upon the state *only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its attorney general, and the commonwealth's attorneys for the several counties.* For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else *can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?*" Further: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the members of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed [189]*by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but _those also against its officers, agents, and representatives where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates._ But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of _personal trespasses and wrongs,_ nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, _and the act to be done or omitted is purely ministerial,_ in the performance or omission of which the plaintiff has a legal interest."

It is said that the Ayers Case is not applicable here, because the orders made by the Federal circuit court had for their object to compel Virginia to perform its contract with bondholders, which is not this case. But that difference between the Ayers Case and this case cannot affect the principle involved. The proceeding against the attorney general of Virginia had for its object to compel, by indirection, the performance of the contract which that commonwealth was alleged to have made with bondholders,—such performance, on the part of the state, to be effected by means of orders in a Federal circuit court directly controlling the official action of that officer. The proceeding in the Perkins-Shepard suit against the attorney general of Minnesota had for its object, by means of orders in a Federal circuit court, directed to that officer, _to control the action of that state_ in reference to the enforcement of certain statutes by judicial proceedings commenced in its own courts. The relief sought in each case was to control the state _by controlling the conduct of its law officer_, [190]*_against its will._ I cannot conceive how the proceeding against the attorney general of Virginia could be deemed a suit against that state, and yet the proceeding against the attorney general of Minnesota is not to be deemed a suit against Minnesota, when the object and effect of the latter proceeding was, beyond all question, to shut that state entirely out of its own courts, and prevent it, through its law officer, from invoking their jurisdiction in a special matter of public concern, involving official duty, about which the state desired to know the views of its own judiciary. In my opinion the decision in the Ayers Case determines this case for the petitioner.

More directly in point, perhaps, for the petitioner Young, is the case of Fitts v. McGhee, 172 U. S. 516, 528–530, 43 L. ed. 535, 541, 542, 19 Sup. Ct. Rep. 269, 274, 275. That suit was brought by the receivers of a railroad company against the governor and attorney general of Alabama. Its object was to prevent the enforcement of the provisions of an Alabama statute prescribing the maximum rates of toll to be charged on a certain bridge across the Tennessee river. The statute imposed a penalty for each time that the owners, lessees, or operators of the bridge demanded or received any higher rate of toll than was prescribed by it. The relief asked was an injunction prohibiting the governor and attorney general of the state and all other persons from instituting any proceeding against the complainants, or either of them, to enforce the statute. An injunction, as prayed for, was granted. In the progress of the cause the solicitor of the district in which the case was pending was made a defendant and the injunction was extended to him. By amended pleadings it was made to appear that the toll-gate keepers at the public crossing of the bridge were indicted for collecting tolls in violation of the statute. In the progress of the cause the plaintiffs dismissed the case as to the state, and the cause was discontinued as to the governor. But the case was heard upon the motion to dismiss the bill upon the ground that the suit was one against the state, in violation of the Constitution of the United States.

*After stating the principles settled in the [191] Ayers Case and in other cases this court said: "If these principles be applied in the present case, there is no escape from the conclusion that, although the state of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. _As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings,_ in execution of the statute of February 9, 1895, _is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant_ *on the record.* If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed, they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. Tindal v. Wesley, 167 U. S. 204, 222, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770. No such case is before us." Again, in the same case: "It is to be observed that neither the attorney general of Alabama nor the solicitor of the eleventh judicial circuit of the state appear to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 388, 38 L. ed. 1014, 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; and Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. Upon examination it will be found that the defendants in each of those cases were officers of the state, especially charged with the execution of a [192]state enactment *alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit *some specific wrong or trespass,* to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a *suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.* In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and attorney general based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for. whatever the form of proceeding against him, he can make his defense upon the *ground that the statute is[193] unconstituional and void. And that question can be ultimately brought to this court for final determination." I am unable to distinguish that case, in principle, from the one now before us. The Fitts Case is not overruled, but is, I fear, frittered away or put out of sight by unwarranted distinctions.

Two cases in this court are much relied on to support the proposition that the Perkins-Shepard suit in the circuit court is not a suit against the state. I refer to Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, and Smyth v. Ames, 169 U. S. 466, 472, 42 L. ed. 819, 836, 18 Sup. Ct. Rep. 418, 422. But each of those cases differs in material respects from the one instituted by Perkins and Shepard in the court below. In the Reagan Case it appears that the very act under which the railroad commission proceeded, authorized the railroad company, or any interested party, if dissatisfied with the action of the commission in establishing rates, to bring suit against that commission in any court, in a named county, with right to appeal to a higher court. This court when combating the suggestion that only the state court had jurisdiction to proceed against the commission, and give relief in respect of the rates it established, said: "It may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suit for redress in its own courts. Give a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts. . . . It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit." The declaration of the court in the Reagan Case, that that suit was not, within the true [194] meaning of the 11th *Amendment, to be regarded as a suit against the state, must therefore be taken in connection with the declaration in the same case that the state having consented that the commission might be sued in one of its own courts, in respect of the rates established by the statute, must be taken to have waived its immunity from suit in the circuit court of the United States sitting in Texas. In Smyth v. Ames, above cited, which was a suit in a circuit court of the United States, involving the constitutional validity of certain rates established for railroads in Nebrasba, it appeared that the statute expressly authorized any railroad company claiming that the rates were unreasonable to bring an action *against the state* before the supreme court, in the name of the railroad company or companies bringing the same. Thus, the state of Nebraska waived its immunity from suit, and having authorized a suit against itself in one of its courts, in respect of the rates there in question, it could not, according to the decision in the Reagan Case, deny its liability to like suit in a court of the United States. It is true that this court, in its opinion in Smyth v. Ames, did not lay any special stress on the fact that Nebraska, by the statute, agreed that it might be sued, but it took especial care in its extended statement of the case to bring out that fact. Its silence on that point is not extraordinary, in view of the fact, as appears from the opinion of this court, that the question whether that suit was to be deemed one against the state was not discussed at the bar by the Nebraska state board. We there quoted from the Reagan Case these words: "Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." That the Reagan and Smyth Cases did not go as far as is now claimed for them is made clear by the later case of Fitts v. McGhee, already referred *to, in which the [195] doctrines of Re Ayers were reaffirmed and applied.

We may refer in this connection to Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 291, 50 L. ed. 477, 486, 26 Sup. Ct. Rep. 252, 259, in which case one of the points made was that the circuit court of the United States had no power to restrain the attorney general of South Carolina and the counsel associated with him from prosecuting in the state courts actions authorized by the laws of the state, and hence that the court erred in awarding an injunction against said officers. This court said: "Support for the proposition is rested upon the terms of the 11th Amendment and the provisions of § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in 1793, whilst the 11th Amendment was in process of formation in Congress for submission to the states, and long, therefore, before the ratification of that Amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result effectuated by the prohibitions of the 11th Amendment. Both the statute and the amendment relate to the power of courts of the United States to deal, against the will and consent of a state, with controversies between it and individuals. None of the prohibitions, therefore, of the Amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired *as a result of the voluntary action of the state in submitting its rights to judicial determination.* To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has *jurisdiction and its want [196] of authority to entertain a controversy as to which jurisdiction is not possessed."

Counsel for the railway company placed some reliance on Pennoyer v. McConnaughy, 140 U. S. 1, 18, 35 L. ed. 363, 368, 11 Sup. Ct. Rep. 699, 704, in which the previous cases on the general subject of suits against the states were classified. That case was a suit in equity against certain parties "who, under the Constitution of Oregon, as governor, secretary of state, and treasurer of state, comprised the board of land commissioners of that state, to restrain and enjoin them from selling and conveying a large amount of land in that state, to which the appellee asserted title." That suit, in view of the nature of the relief asked, and of the relations of the defendants to the matters involved, was held not to be one against the state within the meaning of the 11th Amendment. But after a review of the facts the court, *as explanatory of the conclusion reached by it,* took especial care to observe: "In this connection it must be borne in mind that this suit is not nominally against the governor, secretary of state, and treasurer, *as such officers,* but against them collectively, as the board of land commissioners." The present suit is, in terms, against Young "as attorney general of Minnesota," and the decree was sought against him as such officer; not against him individually, or as a mere administrative officer charged with certain duties.

One of the cases cited in support of the decision now rendered is Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 58, 59, 46 L. ed. 78, 83, 84, 22 Sup. Ct. Rep. 18, 20. But although that particular suit was held not to be one against the state, the case, in respect of the principles announced by the court, is in harmony with the views I have expressed. For the court there says: "Was the state the real party plaintiff? It was at an early day held by this court, construing the 11th Amendment, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204. But that technical construction has yielded to one more in **[197]** consonance with the *spirit of the Amendment, and in Re Ayers, supra, it was ruled upon full consideration that the Amendment covers not only suits against a state by name, *but those also against its officers, agents, and representatives where the state, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates.* And that construction of the Amendment has since been followed." In the present case, the state, although not named on the record as a party, is the real party whose action it is sought to control.

There are other cases in this court in which the scope and meaning of the 11th Amendment were under consideration, but they need not be cited, for they are well known. They are all cited in Re Ayers, 123 U. S. 443, 500, 31 L. ed. 216, 228, 8 Sup. Ct. Rep. 164, 180. "The vital principle in all such cases," this court said in the Ayers Case, "is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable," or cases in which the officer sued refused to perform a purely ministerial duty, about which he had no discretion and in the performance of which the plaintiff had a direct interest. The case before us is altogether different. The statutes in question did not impose upon the attorney general of Minnesota any special duty to see to their enforcement. In bringing the mandamus suit he acted under the general authority inhering in him as the chief law officer of his state. He could not become personally liable to the railway company *simply because of his bringing the mandamus suit.* The attorney general stated that all he did, or contemplated doing, was to bring the mandamus suit. The mere bringing of such a suit could not be alleged against him as an individual, in violation of any legal right of the railway company or its shareholders. Re Ayers, 123 U. S. 443, 496, 31 L. ed. 216, 226, 8 Sup. Ct. Rep. 164. The plaintiffs recognized this fact, and hence did not proceed in their suit upon the ground that the defendant was individually liable. They sued him only as attorney general, *and **[198]** sought a decree against him in his official capacity, not otherwise.

Some reference has been made to Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734, and other cases, that affirm the authority of a Federal court, under existing statutes, to discharge upon habeas corpus, from the custody of a state officer, one who is held in violation of the Federal Constitution for an alleged crime against a state. Those cases are not at all in point in the present discussion. Such a habeas corpus proceeding is *ex parte,* having for its object only to inquire whether the applicant for the writ is illegally restrained of his liberty. If he is, then the state officer holding him in custody is a trespasser, and cannot defend the wrong or tort committed by him, by pleading his official character. The power in a Federal court to discharge a person from the custody of a trespasser may well exist, and yet the court have no power in a suit before it, by an order directed against the attorney general of a state, as such, to prevent the state from being represented by that officer, as a litigant in one of its own courts. The former cases, it may be argued, come within the decisions which hold that a suit which only seeks to prevent or restrain a trespass upon property or person by one who happens to be a state officer, but is proceeding in violation of the Constitution of the United States, is not a suit against a state within the meaning of the 11th Amendment, but a suit against the trespasser or wrongdoer. But the authority of the Federal court to protect one against a trespass committed or about to be committed by a state officer, in violation of the Constitution of the United States, is very different from the power now asserted, and recognized by this court as existing, to shut out a sovereign state from its own courts by the device of forbidding its attorney general, under the penalty of fine and imprisonment, from appearing in such courts in its behalf. *The mere bringing of a suit on behalf of a state, by its attorney general,* cannot (this court has decided in the Ayers Case) make that officer a trespasser and individually liable to the *party [**199**] sued. To enjoin him from representing the state in such suit is therefore, for every practical or legal purpose, to enjoin the state itself. This court, in Re Debs, 158 U. S. 564, 584, 39 L. ed. 1092, 1102, 15 Sup. Ct. Rep. 900, 906, said: "Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court." If there be one power that a state possesses, which ought to be deemed beyond the control, in any mode, of the national government or of any of its courts, it is the power *by judicial proceedings* to appear in its own courts, by its law officer or by attorneys, and seek the guidance of those courts in respect of matters of a justiciable nature. If the state court, by its judgment, in such a suit, should disregard the injunctions of the Federal Constitution, that judgment would be subject to review by this court upon writ of error or appeal.

It will be well now to look at the course of decisions in other Federal courts.

Attention is first directed to Arbuckle v. Blackburn, 65 L.R.A. 864, 871, 51 C. C. A. 122, 130, 113 Fed. 616, 622, which was a suit in equity, one of the principal objects of which was to restrain the enforcement of an act of the Ohio legislature relating to food products, particularly of a named coffee in which the plaintiffs were interested. The circuit court of appeals held that the bill was properly dismissed, saying, among other things: "What, then, is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the state from bringing prosecutions for violations of an act which such officer *is expressly [**200**] charged to enforce in the only way he is authorized to proceed,—by bringing criminal prosecutions in the name of the state. This is virtually to enjoin the state from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the state, charged with the execution of the criminal laws of the state? While the state may not be sued, if the bill can be sustained against its officers, it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the state. This view of the case, in our judgment, is amply sustained by the cases above cited, and by the later case of Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. . . . In so far as this action seeks an injunction against the respondent from proceeding to enforce by prosecution the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the 11th Amendment to the Constitution."

In Union Trust Co. v. Stearns, 119 Fed. 790, 791, 792, 795, the circuit court of the United States for the district of Rhode Island had occasion to consider the scope of the 11th Amendment. The case related to a statute regulating the hours of labor of certain employees of street railways, and imposing a fine for a violation of its provisions. The court, upon an elaborate review of all the cases in this court, dismissed the action. The defendants Stearns and Greenough were, respectively, the attorney general and assistant attorney general of the state. They were not named in the act, nor charged with any special duty in connection therewith. The court said: "The purpose of the present bill, in substance and effect, is to enjoin the state of Rhode Island from the enforcement of a penal statute. Indictments under the act are brought in the name and on behalf of the state, for the protection of the state. These defendants, the attorney general and his assistant, merely represent the state in such proceedings. They are simply the officers [201]and agents of the state. It is not as *individuals, but solely by virtue of their holding such offices, that they prefer and prosecute indictments in the name of the state. A state can only act or be proceeded against through its officers. If a decree could be entered against the state of Rhode Island, enjoining prosecutions under this act, it could only operate against the state through enjoining these defendants. An order restraining the attorney general and his assistant from the enforcement of this statute is an order restraining the state itself. The present suit, therefore, is as much against the state of Rhode Island as if the state itself were named a party defendant." After referring to Re Ayers, and Fitts v. McGhee, and upon a review of the cases, the court proceeded: "The defendants Stearns and Greenough hold no special relation to the act of June 1, 1902. They are not specially charged with its execution. They are not thereby constituted a board or commission with administrative powers, nor are they, as individuals, and apart from the official authority under which they act, threatening to seize the property of the complainant, or to commit any wrong or trespass against its personal or property rights. They have no other connection with this statute than the institution of formal judicial proceedings for its enforcement in the courts of the state, in the name and behalf of the state. Upon reason and authority the present bill is a suit against the state of Rhode Island, within the meaning of the 11th Amendment to the Constitution of the United States."

In Morenci Copper Co. v. Freer, 127 Fed. 199, 205, which was an action in equity to restrain and inhibit the defendant, in his official capacity as attorney general of West Virginia, from proceeding to institute an action in the state court for forfeiture of the charter of the plaintiff corporation for a failure to pay a license tax imposed by a state statute, and which statute was alleged to be in violation of the Federal Constitution, the circuit court reviewed the decision of this court upon the question as to what were and what were not suits against the state. The circuit court held that it [202]had no jurisdiction *of the case, saying: "But it may be said, if the court holds that no remedy of this sort will lie in the circuit court of the United States to prevent this breach of a contract by the state of West Virginia by means of the machinery of a law violative of the Constitution of the United States, how are the rights of corporations to be preserved? The answer is that such alleged unconstitutionality is matter of defense to any suit brought for the forfeiture of complainant's charter, and could be set up as an answer and defense to any bill brought for that purpose; and, if the highest court of the state ruled adversely to that contention, appeal would lie to the Supreme Court of the United States. Or the case can be removed to the circuit court of the United States if it presents a case arising under the Constitution or laws of the United States."

A well-considered case is that of Western U. Teleg. Co. v. Andrews, 154 Fed. 95, 107. In that case the telegraph company sought by bill to enjoin the prosecuting attorneys of the various judicial circuits of Arkansas from instituting any proceeding for penalties for its failure or refusal to comply with the provisions of an act of the legislature of Arkansas relating to foreign corporations doing business in that state and fixing fees, etc. The bill charged that the various prosecuting attorneys would, unless restrained, institute numerous actions for the recovery of the penalties prescribed by the act, which was no less than $1,000 for each alleged violation. The defense was, among other things, that the action was one against the state, and, therefore, prohibited by the Constitution. After a careful review of the adjudged cases in this court and in the subordinate Federal courts, the circuit court held the action to be one against the state, forbidden by the 11th Amendment; saying, among other things: "The allegations in the bill show that this is an attempt to prevent the state of Arkansas, through its officers, who, by its laws, are merely its attorneys, to represent it in all legal actions in its favor or in which it is interested, from instituting and prosecuting suits for the recovery of penalties incurred for alleged *violation of [203] its laws,—actions which can only be instituted in the name of the state and for its use and benefit."

Upon the fullest consideration and after a careful examination of the authorities, my mind has been brought to the conclusion that no case heretofore determined by this court requires us to hold that the Federal circuit court had authority to forbid the attorney general of Minnesota from representing the state in the mandamus suit in the state court, or to adjudge that he was in contempt and liable to be fined and imprisoned simply because of his having, as attorney general, brought that suit for the state in one of its courts. On the contrary, my conviction is very strong that, if regard be had to former utterances of this court, the suit of Perkins and Shepard in the Federal court, in respect of the relief sought therein against Young, in his official capacity, as attorney general of Minnesota, is to be deemed—under the Ayers and Fitts Cases particularly—a suit against the state, of which the circuit court of the United States could not take cognizance without violating the 11th Amendment of the Constitution. Even if it were held that suits to restrain the instituting of actions directly to recover the prescribed penalties would not be suits against the state, it would not follow that we should go further and hold that a proceeding under which the state was, in effect, denied access, by its attorney general, to its own courts, would be consistent with the 11th Amendment. A different view means, as I think, that although the judicial power of the United States does not extend to any suit expressly brought against a state by a citizen of another state without its consent, or to any suit the legal effect of which is to tie the hands of the state, although not formally named as a party, yet a circuit court of the United States, in a suit brought against the attorney general of a state, may, by orders directed specifically against that officer, control, entirely control, by indirection, the action of the state itself in judicial proceedings in its own courts involving the constitutional validity of its statutes. This court has heretofore [204]held that *that could not be done, and that such a result would, for most purposes, practically obliterate the 11th Amendment, and place the states, in vital particulars, as absolutely under the control of the subordinate Federal courts, as if they were capable of being directly sued. I put the matter in this way, because to forbid the attorney general of a state (under the penalty of being punished as for contempt) from representing his state in suits of a particular kind, in its own courts, is to forbid the state itself from appearing and being heard in such suits. Neither the words nor the policy of the 11th Amendment will, under our former decisions, justify any order of a Federal court the necessary effect of which will be to exclude a state from its own courts. Such an order, attended by such results, cannot, I submit, be sustained consistently with the powers which the states, according to the uniform declarations of this court, possess under the Constitution. I am justified, by what this court has heretofore declared, in now saying that the men who framed the Constitution, and who caused the adoption of the 11th Amendment, would have been amazed by the suggestion that a state of the Union can be prevented, by an order of a subordinate Federal court, from being represented by its attorney general in a suit brought by it in one of its own courts; and that such an order would be inconsistent with the dignity of the states as involved in their constitutional immunity from the judicial process of the Federal courts (except in the limited cases in which they may constitutionally be made parties in this court), and would be attended by most pernicious results.

I dissent from the opinion and judgment.

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*THOMAS F. HUNTER, Sheriff of Bun-[205]combe County, State of North Carolina, Appt.,

v.

JAMES H. WOOD.

(See S. C. Reporter's ed. 205-211.)

Habeas corpus — in Federal courts.

A railway ticket agent, acting under and in obedience to an order of a Federal circuit court, enjoining, as being repugnant to the Federal Constitution, the enforcement by the state corporation commission and the attorney general of state legislation reducing rates, is entitled to his discharge on habeas corpus, under U. S. Rev. Stat. § 753, U. S. Comp. Stat. 1901, p. 592, from imprisonment under a conviction in a state court for disobeying such legislation.

[No. 474.]

Argued December 18, 19, 1907. Decided March 23, 1908.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina to review an order discharging, on habeas corpus, a person imprisoned under a conviction in the Police Justice's Court of the city of Asheville, in the county of Buncombe, in that state, for overcharging for a railroad ticket, in violation of the state law. Affirmed.

See same case below, 155 Fed. 190.

NOTE.—As to habeas corpus in Federal courts—see note to Tinsley v. Anderson, 43 L. ed. U. S. 92.

Statement by Mr. **Justice Peckham**:

James H. Wood, the appellee, being one of the ticket agents of the Southern Railway Company, was, on July 17, 1907, charged in the police justice's court of the city of Asheville, in the county of Buncombe, in the state of North Carolina, with unlawfully and wilfully overcharging one T. J. Harmon for a railroad ticket from Asheville, North Carolina, to Canton, North Carolina, in violation of the state law. He was arrested and brought before the court, and, on the trial, July 18, 1907, was convicted and sentenced by the court to imprisonment in the county jail of Buncombe county for the term of thirty days, to be worked on the public roads of that county for that time, and to pay all costs.

The appellee applied to the United States circuit judge in the western district of North Carolina for a writ of habeas corpus, to be directed to Hunter, appellant, **[206]** as sheriff of Buncombe *county, to inquire into the cause of his detention and to obtain his discharge. The writ was issued, and, after a hearing, the circuit judge discharged the appellee from imprisonment, and directed that a copy of the order of the discharge should be certified to the police justice's court of the city of Asheville and to the sheriff of Buncombe county, in whose custody the petitioner then was. Ex parte Wood, 155 Fed. 190.

It appeared that prior to the passage, in 1907, of the acts of the North Carolina legislature in relation to passenger and freight rates on railroads within the state, the Southern Railway Company was charging the rates then allowed by law. After the passage of the acts above mentioned, which greatly reduced the rates of compensation for the transportation of both passengers and freight, the Southern Railway Company commenced a suit in equity in the circuit court of the United States for the eastern district of North Carolina against the corporation commission and the attorney general and assistant attorney general of the state, to enjoin the taking of any proceedings or the commencement of any suits or actions to enforce the acts in question, or to recover penalties for the disobedience of such acts by the company. The bill alleged that the acts were unconstitutional, and that, if the rates were enforced, the result would be to prevent the company earning anything upon its investment, and deprive it of its property without due process of law, and deny it the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States. The bill also averred that a duty rested upon the corporation commission and the attorney general and assistant attorney general to take such proceedings as they might deem expedient for the enforcement of the acts, and that the corporation commission would, for the purpose of putting the acts into effect, do those things which it was provided should be done, and, in case of continuous refusal on the part of the company to charge only the rate specified, the attorney general and his assistant would proceed to enforce the same as prescribed in the acts.

*The circuit judge, upon this bill, granted **[207]** an interlocutory injunction, until the further order of the court, against the members of the corporation commission and the attorney general and assistant attorney general, restraining them from taking any proceedings towards the enforcement of the acts, or putting the acts in respect to freight charges or passenger rates, or any part or either of the acts, into effect, and from prosecuting any suit or action, civil or criminal, against the railway company, its officers, agents, or employees. The order also provided for the execution of a bond on the part of the railway company in the sum of $325,000, conditioned to pay into the registry of the court, from time to time, as the court might order, such sums of money as should be equal to the difference between the aggregate freight and passenger rates and excess baggage charges, charged and received by the company for intrastate service on its lines in the state of North Carolina, and what would have been the aggregate amounts for such service at the rates fixed in or under the acts of the assembly, above mentioned. The order provided a method of procedure by giving to each purchaser of a ticket a coupon for the payment of the difference stated, on presenting the coupon to the registry clerk, if the act should be finally held valid.

Section 4 of the act of the legislature, prescribing the maximum charges for the transportation of passengers in North Carolina, enacted that any railroad company violating the provisions of the act should be liable to a penalty of $500 for each violation, payable to the person aggrieved, recoverable in an action in his name in any court of competent jurisdiction in the state; and any agent, servant, or employee of a railroad company violating the act was declared guilty of a misdemeanor, and, upon conviction, was to be punished by fine or imprisonment, or both, in the discretion of the court. The act in relation to freight, by the 2d section, provided that, if the company should make charges for the shipment of freight in violation of the act, it should be guilty of a misdemeanor, and, upon conviction, fined not less than $100, *and the officer or agent should be fined or **[208]** imprisoned, or both, in the discretion of the court.

Upon the hearing of the motion for an injunction, after granting the same, the circuit judge wrote an opinion (Southern R. Co. v. McNeill, 155 Fed. 756), in which he reached the conclusion that § 4 of the act in regard to passenger rates was, on its face, unconstitutional and void.

Notwithstanding the fact that an injunction had been granted, proceedings were thereafter taken against the appellee, a ticket agent of the company, to punish him for not complying with the act in relation to the sale of tickets, resulting in his conviction, as already stated.

The sheriff of Buncombe county, in whose custody the appellee was restrained, duly appealed to this court from the order discharging the appellee from his custody.

Mr. **E. J. Justice** argued the cause and filed a brief for appellant:

There can be no question about the authority of the state, through its legislature, to fix maximum passenger rates upon the intrastate passenger business done within its boundaries.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Stone v. Farmer's Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970. 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

It is equally well settled that the state, in the exercise of its police power, may, by legislative enactment, constitute it a criminal offense for an agent of a common carrier or public-service corporation to sell tickets at a rate in excess of that allowed by law.

Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

The proposition presented by the ruling of the circuit court is not whether the court can declare unconstitutional an act of the legislature of North Carolina, but whether it can suspend the operation of an act presumably constitutional and valid.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 666, 39 L. ed. 573, 15 Sup. Ct. Rep. 484.

A court of equity cannot enjoin criminal proceedings.

Suess v. Noble, 31 Fed. 855; Hemsley v. Myers, 45 Fed. 283; High, Inj. ¶¶ 28, 30, 68; Holderstaffe v. Saunders, 6 Mod. 16; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Cohen v. Goldsboro, 77 N. C. 2; Busbee v. Lewis. 85 N. C. 332; Busbee v. Macy. 85 N. C. 329; Pearson v. Boyden. 86 N. C. 585; Wardens v. Washington, 109 N. C. 21, 13 S. E. 700; Scott v. Smith, 121 N. C. 94, 28 S. E. 64; Vickers v. Durham, 132 N. C. 880, 44 S. E. 685; Paul v. Washington, 134 N. C. 363, 65 L. R.A. 902, 47 S. E. 793; Wallace v. Society for Reformation, 67 N. Y. 28; 16 Am. & Eng. Enc. Law, 2d ed. p. 370.

The suit against the attorney general is a suit against the state, and is in violation of the 11th Amendment to the Constitution of the United States.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Fitts v. McGhee, supra.

The injunction issued by the United States court was issued upon the idea that the defendants in the equity suit had some particular duties imposed upon them by statutes of the state. This is clearly not so, but if it were, the extent to which the circuit judge has gone in discharging the appellee, Wood, is an assertion that the injunction reaches not only the defendants named in the bill, but the judges, grand juries, and all officers of the state courts who are not parties to the passenger rate suit, and are not even alleged to have any particular duties to perform with respect to the passenger rate act.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

The suit in equity pending in the circuit court of the United States for the eastern district of North Carolina falls in a class with Re Ayers and Fitts v. McGhee, supra; and not in a class with Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; and Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

See also United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820.

Even if a state court has not jurisdiction to try the party charged with crime,—in this case the appellee, Wood,—the United States judges and courts will not interfere and discharge the prisoner by means of writs of habeas corpus, except under certain conditions which are unusual; and this case does not come within any of the exceptions.

Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; United States v. Booth, 21 How. 513, 16 L. ed. 169; Ex parte Crouch, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96; Ex parte Fonda, 117

U. S. 516, 29 L. ed. 994, 6 Sup. Ct. Rep. 848; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Ayers, supra; New York v. Eno, 155 U. S. 90, 39 L. ed. 81, 15 Sup. Ct. Rep. 30; Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Pepke v. Cronan, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34; Andrews v. Swartz, 156 U. S. 273, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845. 15 Sup. Ct. Rep. 727; Re Belt, 159 U. S. 97, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; Whitten v. Tomlinson, 160 U. S. 234, 40 L. ed. 408, 16 Sup. Ct. Rep. 297; Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72; Reid v. Jones, 187 U. S. 153, 47 L. ed. 116, 23 Sup. Ct. Rep. 89; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459.

Messrs. **J. H. Merrimon** and **C. B. Aycock** also argued the cause for appellant.

Messrs. **Alfred P. Thom, Walker D. Hines,** and **Alexander Pope Humphrey** argued the cause and filed a brief for appellee:

The subject-matter of the rate suit was the protection of the railway from being subjected to public use without the just compensation secured by the Constitution; and this was a subject-matter within the jurisdiction of the Federal court.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336.

A long line of decisions of this court sustains jurisdiction in similar suits, against similar parties, and seeking similar relief.

Reagan v. Farmers' Loan & T. Co., Smyth v. Ames, and Chicago, M. & St. P. R. Co. v. Tompkins, supra; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

The jurisdiction of suits against similar defendants and for similar relief has become a settled principle of Federal jurisprudence, and for many years has been acted upon by the inferior Federal courts.

Mobile & O. R. Co. v. Sessions, 28 Fed. 592; Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. 849, 35 Fed. 885; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Chicago, B. & Q. R. Co. v. Dey, 38 Fed. 656; Southern P. Co. v. Railroad Comrs. 78 Fed. 236, 87 Fed. 31; Wilmington & W. R. Co. v. Railroad Comrs. 90 Fed. 33; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; Northern P. R. Co. v. Keyes, 91 Fed. 47; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; Wallace v. Arkansas C. R. Co. 55 C. C. A. 192, 118 Fed. 422; Louisville & N. R. Co. v. Brown, 123 Fed. 946; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Railroad Commission v. Texas & P. R. Co. 75 C. C. A. 226, 144 Fed. 68; Houston & T. C. R. Co. v. Storey, 149 Fed. 449.

The fact that the rate suit sought to prevent the institution of judicial proceedings by state officers did not defeat the jurisdiction; and this has been repeatedly held by this court.

Smyth v. Ames and Prout v. Starr, supra; Poindexter v. Greenhow, 114 U. S. 270, 288, 29 L. ed. 185, 192, 5 Sup. Ct. Rep. 903, 962; Mississippi R. Commission v. Illinois C. R. Co. supra.

The fact that the rate suit sought to prevent the institution of criminal proceedings on behalf of the state did not defeat the jurisdiction; and this has been repeatedly held by this court.

Reagan v. Farmers' Loan & T. Co., and Smyth v. Ames, supra; Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398; McNeill v. Southern R. Co. and Mississippi R. Commission v. Illinois C. R. Co. supra; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18.

The defendants in the rate suit were appropriate, and sufficient to give the court jurisdiction.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

The rate suit being against appropriate and sufficient defendants, the court had jurisdiction of, and could and must deal with, the entire subject-matter of the controversy.

Reagan v. Farmers' Loan & T. Co. 154

U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Prout v. Starr, supra; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 379, 380, 46 L. ed. 592, 604, 605, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 531, 48 L. ed. 1102, 1106, 24 Sup. Ct. Rep. 756; Cotting v. Kansas City Stock Yard Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The order of injunction was within the power of the court.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, Cotting v. Kansas City Stock Yards Co., and Prout v. Starr,—supra; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

Wood's act for which he was imprisoned was in pursuance of the order, and was an essential step in carrying out the judgment of the court.

Wood's release upon writ of habeas corpus was a lawful and essential step in carrying out the decision of the court and enforcing its jurisdiction.

United States ex rel. Spink, 19 Fed. 631; Re Houston, 94 Fed. 119; Anderson v. Elliott, 41 C. C. A. 521, 101 Fed. 609; West Virginia v. Laing, 66 C. C. A. 617, 133 Fed. 887.

The case of Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, is not opposed to any of the foregoing propositions.

The vital distinction between the cases of Reagan v. Farmers' Loan & T. Co., Smyth v. Ames, and Prout v. Starr, supra, on the one hand, and Fitts v. McGhee, supra, on the other, was that in the former three cases the officers sued were about to commit the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, while in Fitts v. McGhee, supra, the governor and attorney general could not, by any plausible pretense, be regarded as being about to commit any such wrong; and therefore the suit could not be viewed as a suit to prevent them personally from taking such official action to the injury of the complainants.

The question whether a legislative enactment fixing rates affords just compensation is a question for judicial determination.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 399, 38 L. ed. 1014, 1023, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 526, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

This question is essentially civil in its character, and has always been so treated.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 59, 46 L. ed. 78, 83, 22 Sup. Ct. Rep. 18; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

A suit in equity is the proper form of suit for the determination of this question.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 460, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

A circuit court of the United States sitting in equity is an appropriate tribunal to determine this question.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

Any device of a state statute which would prevent the determination of such a controversy by the Federal courts of equity would be inconsistent with the supremacy of the judicial power of the United States.

Such impairment of the judicial power of the United States would modify the effect of, and in cases like this would practically destroy, the Federal limitations upon the powers of the states.

Osborn v. Bank of United States, 9 Wheat. 738, 846–849, 6 L. ed. 204, 229, 230.

Unless the Federal court has jurisdiction of the rate suit, and can prevent the imposition of penalties for acts under the order of the court, the penal provisions of the passenger-rate statute are contrary to the Constitution of the United States.

The statute was simply a method of fixing reasonable compensation for a legitimate use of property.

The question whether the compensation

so fixed is reasonable is a question for judicial determination.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 399, 4 Inters. Com. Rep. 560, 38 L. ed. 1014, 1023, 1024, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336.

If the rate suit was not an appropriate and effective method of obtaining this judicial determination, then no method whatever was possible, except to disobey the statute and test the unreasonableness of the compensation fixed, in all proceedings, civil and criminal, seeking to enforce the statute.

If a judicial determination can be had only by disobeying the statute, it is unconstitutional to burden judicial review by the imposition, for such disobedience, of the penalties prescribed in the passenger-rate statute.

Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 543; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 394, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Louisville & N. R. Co. v. McChord, 103 Fed. 224; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 100-102, 46 L. ed. 92, 105, 106, 22 Sup. Ct. Rep. 30; Consolidated Gas Co. v. Mayer, 146 Fed. 154; Perkins v. Northern P. R. Co. 155 Fed. 449.

Even if the intimidation of the penalties were eliminated, it would be unconstitutional to restrict to a defense in such an action the assertion of the property right involved.

The company's right to judicial review would depend on the grace of the opposition.

Bank of Kentucky v. Stone, 88 Fed. 390.

To avoid the consequences of continued disobedience, the company, at least until final determination, would have to submit to a confiscatory rate.

Smyth v. Ames, 169 U. S. 543, 42 L. ed. 848, 18 Sup. Ct. Rep. 418.

The machinery of the court is wholly inadequate to try the complex question.

Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 692; Winsor Coal Co. v. Chicago & A. R. Co. 52 Fed. 720; Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 551; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 179, 44 L. ed. 417, 420, 422, 20 Sup. Ct. Rep. 336; Bronson v. Kinzie, 1 How. 311, 317, 11 L. ed. 143, 145.

Such a trial could have no element of finality, even as to the past. Such trial would be even more inconclusive as to the future. The restriction of an owner of property to such a remedy would be a denial of the equal protection of the laws.

The penal provisions of the passenger-rate statute being contrary to the Constitution of the United States, the order of discharge was proper.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; Re Ah Jow, 29 Fed. 181; Re Davenport, 102 Fed. 540.

The 14th Amendment to the Constitution of the United States prohibits the legislature of a state from either directly or indirectly so fixing the compensation which may be charged by a carrier as to deprive it of a just compensation for the use of its property. All laws and orders of this kind are void because they are in conflict with the constitution of the United States.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, supra; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

There is a right of judicial review.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Smyth v. Ames, 169 U. S. 527, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

As a state cannot cut off this judicial review directly, so it cannot do so indirectly. It cannot give a right of judicial review in form, and deny it in substance.

Cummings v. Missouri, 4 Wall. 277, 324, 18 L. ed. 356, 363.

The practice of suspending or holding in abeyance acts of the legislature is a most common and every-day practice of the courts.

Bank of Kentucky v. Stone, 88 Fed. 383; Pacific Exp. Co. v. Seibert, 44 Fed. 310; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The principle that state statutes may be suspended by temporary injunction has been frequently applied in the inferior Federal courts.

Louisiana v. Lagarde, 60 Fed. 186; Central Trust Co. v. Citizens' Street R. Co. 80 Fed. 226; Metropolitan L. Ins. Co. v. McNall, 81 Fed. 888; Cobb v. Clough, 83 Fed. 604; Fairfield Floral Co. v. Bradbury, 87 Fed. 415; Union P. R. Co. v. Alexander, 113 Fed. 347; The W. J. Hingston, 144 Fed. 560; Globe Elevator Co. v. Andrew, 144 Fed. 871; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Crescent Liquor Co. v. Platt, 148 Fed. 894.

Wherever an attempt is made, by means of a suit against a state officer, to coerce the state into a compliance with its contract, the suit is regarded as a suit against the state, the ultimate and substantial object of the suit being regarded by the court, and it being determined that the only effect of permitting the suit would be, either directly or indirectly, to require the specific performance by the state of its contractual obligations.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Where a state officer is attempting, or will attempt unless restrained by the court, to invade the property rights of a citizen, or to harrass him in respect to them, by seeking to enforce against him confiscatory charges, and thus to deprive him of reasonable compensation for his property, he has no right to interpose anything between himself and the obligation he owes to the Constitution and laws of the United States; for nothing can shield or defend him from their just authority, and in making an attempt to violate this supreme law he is stripped of his representative character. Therefore a suit against him is not a suit against the state.

Reagan v. Farmers' Loan & T. Co., Smyth v. Ames, Chicago, M. & St. P. R. Co. v. Tompkins, and Prout v. Starr, supra.

In Fitts v. McGhee. 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, the defendants were not attempting, and were not about, to invade the property rights of the complainant under the alleged authority of an unconstitutional statute. Nor was there any legislation on the part of the state of Alabama, shown to the court, that established such a special relation of these officers to the unconstitutional act, or that imposed upon them such positive duty in respect to it, as would justify the court in concluding that they would obey the positive mandate of the statute, and attempt to invade the property rights of the complainant. On the other hand, the cases which this court has considered suits against officers of a state, and not suits against the state, have been those in which either it was shown to the court that property rights were about to be invaded under the authority of an unconstitutional act, or in which there was such a positive mandate in the statutes of the state as would directly connect the defendants sued with, and justify the court in concluding that they were about to attempt, an invasion of the property rights of the complainant under the authority of an unconstitutional law.

Consolidated Gas. Co. v. Mayer, 146 Fed. 154; Smyth v. Ames, supra; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Northern P. R. Co. v. Keyes, 91 Fed. 47; Railroad Commission v. Texas & P. R. Co. 75 C. C. A. 226, 144 Fed. 68.

The circuit court of the United States having first taken jurisdiction of this controversy, it was not competent for the state courts of North Carolina thereafter to assume control of the same.

Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 354; Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287, 290; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; York v. Pilkington, 2 Atk. 302; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

To the general principle that a court of equity will not entertain a bill to restrain criminal prosecutions as such, recognized exceptions have been made.

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Re Sawyer, 124 U. S. 200, 211, 31 L. ed. 402, 406, 8 Sup. Ct. Rep. 482; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558; M. Schandler Bottling Co. v. Welch (C. C. D. Kan.) 42 Fed. 561; Central Trust Co. v. Citizens' Street R. Co. (C. C. D. Ind.) 80 Fed. 218; Los Angeles City Water Co. v. Los Angeles (C. C. S. D. Cal.) 103 Fed. 738; Southern Exp. Co. v. Ensley (C. C. N. D. Ala.) 116 Fed. 760; Gould v. Atlanta, 55 Ga. 678; Georgia R. & Bkg. Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; Platte & D. Canal & Mill. Co. v. Lee, 2 Colo. App. 184, 29 Pac. 1036; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; Manhattan Iron Works Co. v. French, 12 Abb. N. C. 446;

Wood v. Brooklyn, 14 Barb. 425; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Shinkle v. Covington, 83 Ky. 420; Rushville v. Rushville Natural Gas Co. 132 Ind. 575, 15 L.R.A. 321, 28 N. E. 853; Flaherty v. Fleming, 58 W. Va. 669, 3 L.R.A.(N.S.) 461, 52 S. E. 857; Camden Interstate R. Co. v. Catlettsburg, 129 Fed. 421.

At least four circuit courts have decided that these penal provisions are, in and of themselves, void, without regard to whether the rates fixed are reasonable or unreasonable.

Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 529; Louisville & N. R. Co. v. McChord, 103 Fed. 216; Consolidated Gas Co. v. Mayer, 146 Fed. 150; Ex parte Wood, 155 Fed. 190.

In other cases it has been held that the existence of these penalties is in itself a ground of equitable jurisdiction, the remedy at law in defense of the action for the penalties being obviously inadequate.

Smyth v. Ames, 169 U. S. 517, 42 L. ed. 838, 18 Sup. Ct. Rep. 418; Bank of Kentucky v. Stone, 88 Fed. 390; Pacific Exp. Co. v. Seibert, 44 Fed. 315; State v. Galveston, H. & S. A. R. Co. (Tex.) 97 S. W. 78; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 92, 46 L. ed. 102, 22 Sup. Ct. Rep. 30.

The remedy of habeas corpus was a proper one in this case by reason of its urgency.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; Ohio v. Thomas, 173 U. S. 276, 284, 43 L. ed. 699, 701, 19 Sup. Ct. Rep. 453.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

After the jurisdiction of the circuit court of the United States had attached by the filing of the bill of complaint in the case already mentioned, of the Southern R. Co. v. McNeill et al., members of the corporation commission, and after the issuing and service of the injunction, as above stated, the defendant Wood, acting under and in obedience to the provisions of such injunction, sold the railroad tickets at the usual price, and. at the same time, complied with the conditions contained in the injunction, by giving the coupons for the difference in price, and, while so complying with the terms of such injunction, was arrested and proceeded against criminally for disobedience of the act fixing rates. Being detained in custody by virtue of this conviction by one of the police courts of the state, he had the right to apply for a writ of habeas corpus to the United States circuit judge, and that judge had power to issue the writ and discharge the prisoner under § 753 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 592), as he was then in custody for an act done pursuant to an order, process, or decree of a court or judge of the United States. See Re Neagle (Cunningham v. Neagle) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658. The writ being properly issued, the judge had the right, and it was his duty, to examine into the facts, and had jurisdiction to discharge the petitioner under the circumstances stated.

The other questions raised herein have been sufficiently discussed in Ex parte Young, just decided [209 U. S. 123, ante, 714, 28 Sup. Ct. Rep. 441], and require no further attention.

*For the reasons given in that opinion, the [211] order appealed from herein must be affirmed.

Mr. Justice **Harlan**, dissenting:

In my judgment the appellee should have been put to his writ of error for the review of the judgment against him in the highest court of the state, competent under the state laws to re-examine that judgment, thence to this court to inquire whether any right belonging to him under the Federal Constitution had been violated. He should not have been discharged on habeas corpus. Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459; and authorities cited in each case.

Upon the question as to what is and what is not a suit against the state within the meaning of the 11th Amendment, my views are fully expressed in my dissenting opinion in Ex parte Young, just decided. For the reasons there stated I dissent from the opinion and judgment of the court in this case.

GENERAL OIL COMPANY, Plff. in Err.,
v.
JOHN H. CRAIN, Inspector of Coal Oil, Carbon Oil, Petroleum, Kerosene Oil, Gasolene, etc., for the County of Shelby and City of Memphis, Tenn.

(See S. C. Reporter's ed. 211–236.)

Error to state court — Federal question.

1. A decision of a state court dismissing,

on the ground that the suit was one against the state, and therefore not within its jurisdiction, a bill which seeks to enjoin a state oil inspector from enforcing a state inspection law, on the theory that such law, if applied to the oils in controversy, violates the commerce clause of the Federal Constitution, gives effect to such law, and is reviewable by the Supreme Court of the United States.

Commerce — state taxation — inspection fees — property in transit.

2. Oil shipped from Pennsylvania and Ohio, and destined ultimately for points in Arkansas, Louisiana, and Mississippi, is not property in interstate commerce, so as to be exempt from state tax or inspection laws while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels, and other receptacles, and from which it is forwarded to its final destination.

[No. 128.]

Argued and submitted January 23, 1908. Decided March 23, 1908.

IN ERROR to the Supreme Court of the State of Tennessee, which, reversing a decree of the Chancery Court of Shelby County, in that state, overruling a demurrer to a bill to enjoin the collection of inspection fees by a state oil inspector, sustained the demurrer and dismissed the bill. Affirmed.

See same case below, 117 Tenn. 82, 95 S. W. 824.

Statement by Mr. Justice **McKenna:**

Plaintiff in error, which was also plaintiff in the courts below, invokes the protection of the commerce clause of the Constitution of the United States against the collection of a tax for the inspection of certain of its oils in Tennessee. The bill prayed an injunction against the defendant,

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NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States, see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

When may the transit of goods, commenced in another state, be deemed to have been definitely interrupted or to have terminated, so as to subject the goods to local taxation.

Many of the decisions on the question stated are so fully reviewed in the opinion above reported that it is deemed sufficient for the purposes of this note merely to dismiss them with this reference, and to supplement them with the following cases:

In Myers v. Baltimore County, 83 Md. 385, 34 L.R.A. 309, 55 Am. St. Rep. 349, 35 Atl. 144, it is held that the average amount of live stock which cattle dealers have each week, although usually sold within one day after they are received, and most of them being brought from other states, constitutes property within the state which can be taxed; and, further, that the intent of the dealers to export part of the cattle, and the fact that they do export about two-thirds of all they handle, does not prevent the local taxation.

In Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, it is held that coal sent by the owners in Pennsylvania to their agents in New Orleans, to be there sold for their account, upon its arrival becomes a part of the general mass of property of Louisiana, subject to taxation in common with all other property and in precisely the same manner, and that the fact that some of it is subsequently sold for exportation does not alter the case.

In American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365, it is held that a state is not precluded by the commerce clause of the Federal Constitution from imposing a merchant's tax upon a nonresident manufacturing corporation, which has selected a city of that state as a distributing point, and has engaged a local transfer company to take charge of its products when shipped to that point, assort them, store them in the warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it or under general directions in favor of its recognized and approved customers whose names are furnished to the transfer company,—since under such circumstances the goods, when stored in the warehouse, are no longer in transit, but have reached their destination, and are held in the state for sale.

In accordance with the foregoing decision, it was held, *obiter*, in Meyer, J. & Co. v. Mobile, 147 Fed. 843, that dealers in beer brought from other states and sold in the original bottles were subject to a license tax imposed by a city ordinance, even if enacted under the city's power of taxation, and not as a police regulation,—the decision, however, being that such license tax was valid as a police regulation, and hence sustainable under the Wilson act.

In American Harrow Co. v. Shaffer, 5 Inters. Com. Rep. 336, 68 Fed. 750, it was held that where a manufacturer shipped harrows by car-load lots from Michigan into Virginia, deposited the goods in a warehouse in the latter state, and then, through its agents, loaded them on wagons and sent them through the country, selling and delivering them to purchasers from the wagons, such agents were not engaged in in-based on the following facts, summarized from the bill:

The plaintiff is a Tennessee corporation with its principal place of business in Memphis, Tennessee. It is engaged in the manufacture and sale of coal oil and other illuminating oils in the various states of the Union. Its wells and refining and manufacturing plants are all located in the states of Pennsylvania and Ohio, from which it ships its product to the states in which they are sold and used. On account of the tendency of the oils to leak and evaporate, and, under change of temperature, to burst the vessel in which they are contained, it is necessary to ship the oils in tank cars, and it is also necessary to have distributing points for such oils in various places in the United States, at which it may receive the oils so shipped, and place it in barrels or other smaller vessels suitable in size for filling orders, which vary in amounts from one barrel upward. It would be impracticable to carry on business in, or to have apparatus and *machinery for [213] the reception and delivery of, oil at every point at which plaintiff ships oil. For some years plaintiff has been engaged in business at Memphis, and has made that city not only a place of business at which to sell oil to the citizens and residents of Tennessee, but also has made it one of its distributing points to which its oils are shipped from Pennsylvania and Ohio in tank cars, from which cars the oils are unloaded into various tanks, barrels, and other receptacles, for the purpose of being forwarded to its customers in Arkansas, Louisiana, and Mississippi, in which states it has many regular customers, from whom it always has on hand many unfilled orders for oil, to be delivered as soon as possible or convenient.

At Memphis plaintiff has numerous tanks or receptacles for oil of various kinds and sizes, among which are the following: (1) A tank or vessel in which is kept oil for which orders have been received from the states above mentioned before its shipment

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terstate commerce, and were therefore subject to the payment of local license taxes.

In Price Co. v. Atlanta, 105 Ga. 358, 31 S. E. 619, it appeared that goods in large quantities were shipped from another state to a warehouse in Georgia, and at the latter point were divided and distributed among a number of customers, who were procured after the goods had been deposited in the warehouse, by a person who went from house to house, exhibiting samples and taking orders, which were filled from the warehouse or distributing point. It was held that sales so made did not, in any sense, constitute interstate commerce, and that the person so selling became liable as a canvasser to a license tax imposed by the municipality.

In Merchant's Transfer Co. v. Board of Review, 128 Iowa, 732, 2 L.R.A.(N.S.) 662, 105 N. W. 211, it was held that merchandise shipped by a nonresident manufacturer in bulk to a storage company, and stored by it, awaiting orders for its distribution to purchasers, was subject to local taxation, the court saying: "Whether these goods should ever be forwarded to the retail dealers, or should remain in the warehouse, or should be diverted to meet other demands of the trade, rested wholly in the will of the shipper. When the order to forward was finally given, and the designated goods were again put in course of transportation, there was, to all intents and purposes, a new and independent shipment. But, be this as it may, the answer to the question whether the sales had been consummated is by no means necessarily decisive of the inquiry whether the goods, at the date of the assessment, were actually in transit, and therefore protected against local taxation. For reason already sufficiently stated, we hold that when the shipments had reached the consignee, the transfer company, and had been stored in its warehouse, subject to the shipper's orders, they had arrived at their destination for the time being, and that the mental purpose of such shippers to have the goods thereafter distributed and sent out to their several customers could have no effect to make such property exempt from taxation, or clothe it with the peculiar immunities pertaining to interstate commerce."

In Lehigh & W. Coal Co. v. Junction (N. J. L.) 66 Atl. 923, it was held that coal shipped from another state and stored for an indefinite period awaiting orders for sale, when it was to be transhipped to the purchasers, completed its interstate transit upon reaching the place of storage and was taxable there.

In I. M. Darnell & Son Co. v. Memphis, 116 Tenn. 424, 95 S. W. 816, it was held that logs imported from another state, and while in the importer's mill yard awaiting manufacture into lumber, or already manufactured into lumber, were not protected from taxation by the commerce clause of the Federal Constitution, having become devested of any connection with commerce between the states, and mingled with and merged into the general mass of property of the taxing state.

A limitation upon the power of a state to tax property which has moved in the channels of interstate commerce, after it has completed its interstate transit, is established by the Supreme Court, to which the foregoing case was taken by writ of error, in 208 U. S. 113, ante, 413, 28 Sup. Ct. Rep. 247, in which it is held that a state cannot discriminate against such property, even after it has completed its interstate movement, by imposing upon it, on account of its foreign origin, a burden of taxation greater than that levied upon domestic property of a like nature.

from the manufacturing plants, and which is especially shipped to fill such orders. This oil is unloaded at Memphis only for the purpose of distribution in smaller vessels to meet the requirements of such orders, and is kept separate from oils for sale in Tennessee, in a tank plainly and conspicuously marked "Oil Already Sold in Arkansas, Louisiana, and Mississippi," and remains in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. (2) Another tank or vessel for oil to be sold in those states, but for which [there were] no orders at the time of shipment from the manufacturing plants. This tank is marked "Oil to be Sold in Arkansas, Louisiana, and Mississippi," and is kept separate and apart from all other oil until required to supply orders from plaintiff's customers in those states, and is never sold except upon the receipt of such orders.

The defendant, as inspector of oils, from time to time inspects plaintiff's oils at Memphis, and charges and collects for such inspection a regular fee of 25 cents per barrel, as provided in § 8 of the act of 1899 of the legislature of Tennessee, and the [214]plaintiff has fully *paid such charges up to the present time on all of its oils shipped into Tennessee, whether intended for sale in that state or other states. Until recently plaintiff has unloaded the greater portion of its oil from its tank cars to its stationary tanks without attempting to separate the oil sold or intended to be sold in the states above mentioned from that to be sold in the state of Tennessee, and paid the inspection charges upon all. Plaintiff, however, is now separating its oil in the manner above described, because it has been advised that the oil intended to be sold outside of Tennessee is not subject to inspection in that state if kept separate from the oil sold or intended to be sold in that state.

Defendant claims the right to inspect such oils, although he knows and admits no sales thereof are made in Tennessee, and claims that he is not only entitled, but that it is his duty, to inspect the same and collect the regular fees in such inspection.

Plaintiff is advised and shows that defendant has no right to inspect the oil or collect the fees, because the act of 1899 does not apply to them, for reasons which are elaborately set out; but it is alleged that, if the act should be construed to apply to them, the act is unconstitutional "in so far as it provides for or requires an inspection of any of the oil in said tanks, because such inspection would be a regulation of and interference with commerce between the states of Pennsylvania and Ohio, from which said oil was shipped, and the states of Arkansas, Louisiana, and Mississippi, to which the same was shipped, in violation of the Constitution and laws of the United States, and especially of the 3d clause of § 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'"

Plaintiff alleges that the act of 1899 and the inspection thereunder is not a valid exercise of the police power of the state, and to that extent the act is unconstitutional and void, because (1) none of the oil is manufactured in Tennessee, and the inspection, therefore, is not necessary for the protection either of *the residents and[215] citizens of Tennessee or the reputation of her manufactured products. (2) The fees are unreasonable and exorbitant for the service performed, and very much greater than necessary to provide for inspection, and that, after payment of the salaries and other expenses incident to inspection, there is a surplus of many thousands of dollars put into the treasury annually. (3) The act is void under the Constitution of the state of Tennessee, because the inspection is not necessary or conducive to the benefit of the state of Tennessee or the citizens thereof, and the act is therefore unnecessary, unreasonable, and not a valid exercise of the police power of the state, but a mere tax or charge imposed under the guise of a police regulation, and as such is in conflict with article 2, § 28, of the Constitution of Tennessee, which requires all property to be taxed according to its value, and that taxes be equal and uniform throughout the state.

It is alleged that the act provides in § 2 a heavy penalty, consisting of a fine from $20 to $50 for each offense, against any dealer or manufacturer who shall obstruct the inspector in the discharge of his duties, or refuse to permit him upon his premises for the performance thereof; and provides in § 4 that it shall be a misdemeanor for any person to sell any oil before having it inspected as provided in the act, and, on conviction, shall be fined $300, and the oil, if found to be rejected, shall be forfeited and sold. Plaintiff, therefore, it is alleged, on account of the severe penalties, could not afford to take the risk of selling any oil without inspection, or take the risk of refusing permission to inspect. That it is doubtful if plaintiff, if it paid the fees under protest, could recover the same, and if they could be recovered it would be necessary for plaintiff to bring suit every thirty days for the charges paid for the preceding thirty days, so that an indefinite number of suits would be necessary. Irreparable injury will therefore result, it is alleged, if the inspection against plaintiff's oils under the act of 1899 be not enjoined.

Defendant filed a demurrer which attacked **[216]** the bill for want *of equity, and also the jurisdiction of the court to hear and determine the cause, for the reason that it was a "suit against the state, or against an officer of the state, acting by authority of the state, with a view to reach the state, its treasury, funds, or property." By this ground of demurrer defendant attempted to avail himself of an act of the state of Tennessee, passed in 1873, being § 4507 of Shannon's Code, which provides as follows: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits now pending, or hereafter brought, should be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state."

The demurrer was overruled "as to that part of the bill in reference to the first tank mentioned in said bill." It was sustained "as to all that part of the bill in reference to the second tank mentioned in said bill." The ground of demurrer which went to the jurisdiction of the court was overruled "as to the oil in both tanks."

A preliminary injunction which had been granted was continued in force. Inspection, however, it was adjudged might proceed, the fees to be paid into court pending appeal to the supreme court of the state.

An appeal was taken, and the supreme court decided that the suit was one against the state, and reversed the decree of the chancery court. 117 Tenn. 82, 95 S. W. 824.

Mr. H. J. Livingston, Jr., argued the cause, and Mr. Thomas B. Turley filed a brief for plaintiff in error:

Actions against state officers to restrain them from the commission of wrongful acts to the prejudice of plaintiff's rights are not suits against the state.

Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Pennoyer v. McConnaughy, 140 U. S. 10, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Williams v. United States, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 457; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Scott v. Donald, 165 U. S. 58, 107, 41 L. ed. 632, 647, 17 Sup. Ct. Rep. 265; Belknap v. Schild, 161 U. S. 18, 40 L. ed. 601, 16 Sup. Ct. Rep. 443; Charles River Bridge v. Warren Bridge, 11 Pet. 572, 9 L. ed. 834; Western U. Teleg. Co. v. Henderson, 68 Fed. 590; Polack v. Mansfield, 44 Cal. 42, 13 Am. Rep. 151; King v. La Grange, 61 Cal. 228; Budd v. Houston, 36 La. Ann. 961; Blanton v. Southern Fertilizing Co. 77 Va. 337; Wilmington & W. R. Co. v. Reid. 13 Wall. 264, 20 L. ed. 568; Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 189; Charleston v. Branch, 15 Wall. 470, 21 L. ed. 193; Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; Washington University v. Rouse, 8 Wall. 439, 19 L. ed. 498; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 314, 29 L. ed. 200, 201, 5 Sup. Ct. Rep. 925, 962; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Tindal v. Wesley, 167 U. S. 220, 42 L. ed. 142, 17 Sup. Ct. Rep. 770; Lynn v. Polk, 8 Lea, 121; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

It is true that it has been frequently held that mandamus will not lie to compel a state officer to carry out a contract of the state. This would clearly be coercing the state, through her officers, by legal process.

Louisiana v. Jumel, 107 U. S. 756, 27 L. ed. 463, 2 Sup. Ct. Rep. 128; Hagood v. Southern, 117 U. S. 70, 29 L. ed. 811, 6 Sup. Ct. Rep. 608; Marye v. Parsons, 114 U. S. 336, 29 L. ed. 209, 5 Sup. Ct. Rep. 932, 962.

The distinction, however, between such proceedings and suits to enjoin unconstitutional aggression by state officers upon private property is obvious.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

A person about to sustain irreparable injury by the execution of an unconstitutional law may obtain relief by injunction against state officers charged with the execution thereof.

Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Board of Liquidation v. McComb, supra; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; McCullough v.

Virginia, 172 U. S. 111, 43 L. ed. 385, 19 Sup. Ct. Rep. 134; Pennoyer v. McConnaughy, 140 U. S. 9, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; Lynn v. Polk, supra.

When goods start on their journey from state to state they become interstate commerce, and are protected from interference or regulation by any state through which they may pass until they reach their ultimate destination, notwithstanding on the way they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or assortment, or distribution. or on account of any accident, or any other cause which may intervene to prevent the goods going directly from the initial point of shipment to the point of destination.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425; State, Lehigh & W. Coal Co. Prosecutor, v. Carrigan, 39 N. J. L. 35; The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The breaking of the original package has no bearing upon the question of interstate commerce involved in such a case as that at bar.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The authorities sustain the following propositions:

1. That the police power of a state, being identical with the right of self-defense. can be exercised only for the protection or benefit of the citizens of that state.

2. That the exercise of the police power can affect interstate commerce only so far as is absolutely necessary.

3. That inspection laws, being an exercise of the police power, must be intended for the protection or benefit of the citizens of the state enacting the same, and must have some substantial relation to their safety, happiness, or betterment.

4. If a so-called inspection law is not reasonably calculated to benefit the citizens of that state, it is void.

17 Am. & Eng. Enc. Law, 2d ed. pp. 56, 57, 75, 76, 79, 81, 83, 84; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36. 10 Sup. Ct. Rep. 681; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Scott v. Donald, 165 U. S. 91, 41 L. ed. 640, 17 Sup. Ct. Rep. 265; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. ed. 527, 531; Georgetown v. Davidson, 6 D. C. 278; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; People v. Edye, 11 Daly, 132; Grimes v. Eddy, 126 Mo. 168, 26 L.R.A. 638, 47 Am. St. Rep. 653, 28 S. W. 756; State v. Duckworth, 5 Idaho, 642, 39 L.R.A. 365. 95 Am. St. Rep. 199, 51 Pac. 456; 22 Am. & Eng. Enc. Law, 2d ed. pp. 918, 937, 939; Farris v. Henderson, 1 Okla. 384, 33 Pac. 380; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 171, 34 L.R.A. 725, 36 S. W. 1041; Harbison v. Knoxville Iron Co. 103 Tenn. 441, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955.

Since the inspection in the case at bar can serve no useful purpose, it is very evident that this act, as applied to the oil in question. can only serve the purpose of increasing the public revenues of the state of Tennessee.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; Passenger Cases, 7 How. 283. 12 L. ed. 702; Minnesota v. Barber. 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78. 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

Since interstate commerce can be burdened, even by valid inspection laws, only so far as is absolutely necessary, the courts may consider the alleged excessiveness of any inspection charge, and. from such excessiveness, reach the conclusion that the law is in fact a revenue law under the guise of an inspection law.

Patapsco Guano Co. v. Board of Agriculture, supra; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

Mr. Charles T. Cates, Jr., submitted the cause for defendant in error:

The construction placed by the supreme court of the state of Tennessee upon the act of 1873 and its application to the suit of plaintiff in error is conclusive upon this court.

Nobles v. Georgia, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Sioux City, Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34; Freeport Water Co. v. Freeport. 180 U. S. 587, 601, 45 L. ed. 679, 689, 21 Sup. Ct. Rep. 493.

Questions of practice and proceedings in the state courts are for the exclusive determination of the tribunals of the state where they may arise.

Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48; Tripp v. Santa Rosa Street R. Co. 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 655; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Loeber v. Schroeder, 149 U. S. 580-585, 37 L. ed. 856-859, 13 Sup. Ct. Rep. 934; Semple v. Hagar, 4 Wall. 431, 18 L. ed. 402; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Smith v. Adsit, 16 Wall. 185, 190, 21 L. ed. 310, 311; Callan v. Bransford, 139 U. S. 198, 35 L. ed. 144, 11 Sup. Ct. Rep. 519; Newman v. Gates, 204 U. S. 89, 95, 51 L. ed. 385, 389, 27 Sup. Ct. Rep. 220.

There is no claim made in the bill that the oil is sold elsewhere than at the place of business of plaintiff in error in Memphis. It is true that plaintiff in error brings all of the oil sold by it at its place of business in Memphis from its refineries in other states, but we submit that, when this oil has reached Memphis, and is there stored and at rest as a part of the general mass of property in the state, it becomes subject to inspection by the Tennessee authorities.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

The object of inspection laws is not only to protect the community, so far as they apply to domestic sales, from frauds and impositions, but, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.

Clintsman v. Northrop, 8 Cow. 46; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 356, 43 L. ed. 195, 18 Sup. Ct. Rep. 862.

Indirect schemes to evade state laws do not meet with favor in the courts.

Mitchell v. Leavenworth County, 91 U. S. 206, 23 L. ed. 302.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, sustained as a valid exercise of the police power the Kentucky inspection act of 1874, which provides that oils used for illuminating purposes, by whatever name called or wherever manufactured, shall be inspected before being sold or offered for sale. The provisions of the Kentucky statute are very similar to those of the statute under consideration in this case.

It is not every statute passed under the police power of the state that is void because it in some way affects commerce between the states. This court has repeatedly held that many agencies employed in interstate commerce are subject to the proper police power of the state. It has been held that a statute prohibiting the running of trains within the state on Sunday is not void as interfering with interstate commerce, but is a valid exercise of the police power, though in effect it prevents trains from and to adjacent states from passing through the state on Sunday.

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

So, a statute requiring railroads engaged in interstate and other commerce to stop their trains each way daily, Sundays excepted, has been upheld as a reasonable and valid police regulation.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

So, a state may require engineers and other persons engaged in the driving and management of railroad trains passing through the state to submit to an examination by local board as to their fitness for their positions.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 633, 42 L. ed. 885, 18 Sup. Ct. Rep. 488; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

So, a statute may require engineers and the heating of passenger cars engaged in interstate commerce.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

A regulation by a city of the speed of railroad trains within the city limits is not, as to interstate trains an unconstitutional regulation of interstate commerce.

Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819.

So, it is entirely within the power of a state to provide separate coaches for the accommodation of the white and colored races.

Louisville, N. O. & T. P. R. Co. v. Mississippi, 133 U. S. 589, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Smith v. State, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566.

In Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 600, 39 L. ed. 544, 548, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459, it was held that a state had power to provide for the appointment of one or more gaugers of coal and coke boats transporting coal from Pittsburg, over the waters of the Mississippi river, to New Orleans, and that such regulation was not in conflict with the commerce clause of the Federal Constitution.

Legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

The amount of the inspection fees does not render the act void.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38-55, 51 L. ed. 78-88, 27 Sup. Ct. Rep. 1.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

It is contended by defendant in error that this court is without jurisdiction because no matter sought to be litigated by plaintiff in error was determined by the supreme court of Tennessee. The court simply held, it is said, that, under the laws of the state, it had no jurisdiction to entertain the suit for any purpose. And it is insisted "that this holding involved no Federal question, but only the powers and jurisdiction of the courts of the state of Tennessee, in respect to which the supreme court of Tennessee is the final arbiter."

Opposing these contentions, plaintiff in error urges that whether a suit is one against a state cannot depend upon the declaration of a statute, but depends upon the essential nature of the suit, and that the supreme court recognized that the statute "added nothing to the axiomatic principle that the state, as a sovereign, is not subject to suit save by its own *con-[**221**] sent." And it is hence insisted that the court, by dismissing the bill, gave effect to the law which was attacked. It is further insisted that the bill undoubtedly presents rights under the Constitution of the United States and conditions which entitle plaintiff in error to an injunction for the protection of such rights, and that a statute of the state which operates to deny such rights, or such relief, "is itself in conflict with the Constitution of the United States."

Plaintiff in error, to sustain its contention that the suit is not one against the state, but one to restrain "unconstitutional aggression" by a state officer upon private property, cites many cases in this court. To these cases defendant in error makes no other reply than to say that they were cases in the Federal courts and within the acknowledged range of the jurisdiction of courts, while the question presented by the motion to dismiss is not the rights plaintiff in error may have, but what remedies it has, and the power of the state over those remedies so far as its own courts are concerned. The difference is urged as material, and the following cases are adduced: Semple v. Hagar, 4 Wall. 431, 18 L. ed. 402; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Smith v. Adsit, 16 Wall. 185, 190, 21 L. ed. 310, 311; Callan v. Bransford, 139 U. S. 198, 35 L. ed. 144, 11 Sup. Ct. Rep. 519; Freeport Water Co. v. Freeport, 180 U. S. 587, 601, 45 L. ed. 679, 689, 21 Sup. Ct. Rep. 493; Newman v. Gates, 204 U. S. 89, 95, 51 L. ed. 385, 389, 27 Sup. Ct. Rep. 220; Chambers v. Baltimore & O. R. Co. decided November 18 of this term [207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34].

A review of these cases becomes necessary. In Semple v. Hagar, Semple had a patent from the United States for a certain tract of land. He sued Hagar to quiet his title, alleging that Hagar claimed the land under a fraudulent Mexican grant, and a patent of the United States, issued in affirmance of the grant. Semple prayed that the grant be declared void "as issued upon false suggestion and without authority of law." Hagar demurred to the bill, on the ground, among others, that the court had no jurisdiction of the action. The demurrer was sustained and the case was brought to this court by writ of error. A motion to dismiss was made, which was granted. The court said: "We have here a very brief record, and, on the facts of *the case, we[**222**] cannot shut our eyes to the total want of jurisdiction under the 25th section or any other section of the judiciary act. It is plain that, if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the 25th section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the 25th section could apply to a judgment of a state court which did not decide that question, and refused to take jurisdiction of the case. The matter is too plain for argument." In other words, it was decided that the Federal question must be decided before it can be reviewed. Apparently there was no thought of considering whether the question of jurisdiction was rightly decided. That was seemingly considered out of the power of this court to inquire into.

Norton v. Shelby County was a writ to enforce the payment of certain bonds issued by the board of commissioners of Shelby county. One of the questions in the case was whether the board of commissioners was a legally constituted body. The supreme court of the state decided it was not, and this court accepted the decision as binding. "The determination made," we said, through Mr. Justice Field, "relates to the existence of an inferior tribunal of the state, and that depending upon the constitutional power of the legislature of the state to create it and supersede a pre-existing institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the state court." Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489, was cited.

Smith v. Adsit was a suit for equitable relief against a sale of land which a third party had undertaken to make, in violation of an act of Congress. A decree was entered against Adsit for $6,829 and dismissed as to other defendants. The decree was reversed by the supreme court of the state, and the bill dismissed for want of jurisdiction, and the case was brought to this court by writ of error. A motion to dis-[223]miss was granted, *Mr. Justice Strong, speaking for the court, saying: "In view of this [the action of the state court] we do not perceive that we have any authority to review the judgment of the state court." It was intimated in the opinion that a Federal question had been presented, but it was not decided. "As we have seen," Mr. Justice Strong said, "the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here." And, further: "It may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But, whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not is a question exclusively for the judgment of the state court."

In Callan v. Bransford a writ of error to the court of appeals of Virginia was dismissed on the ground that that court had disposed of the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the Constitution of the state. "This being so," this court said, "we are of opinion that the writs of error to that court must be dismissed."

In Freeport Water Co. v. Freeport, we said: "With what functions the circuit courts of the state [Illinois] may be invested may not be of Federal concern. It is also a matter of construction, in which we might be obliged to follow the state courts."

In Newman v. Gates the Federal right was asserted under that provision of the Constitution of the United States requiring due faith and credit to be given by each state to the public acts, records, and judicial proceedings of every other state. The supreme court of the state (Indiana) dismissed the appeal to it as not having been properly taken. The case was brought here, but dismissed. We said, through Mr. Justice White: "As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to *the review of a final[224] judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Chambers v. Baltimore & O. R. Co. involved a statute of Ohio giving an action for death caused by the wrongful act in another state only when the death was that of a citizen of Ohio. The statute was attacked on the ground that it violated that clause of the Constitution of the United States which entitles the citizens of each state to all the privileges and immunities of citizens in the several states. The statute was sustained by this court. Mr. Justice Moody, speaking for the court, said, p. 148:

"But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory action, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens, and withheld from the citizens of other states, is void, because in conflict with the supreme law of the land."

But in none of these cases was the same question presented that is presented here, nor were all of the cases cited by plaintiff in error to sustain the jurisdiction of this court cases in the Federal courts. Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, and Chaffin v. Taylor, 114 U. S. 309, 29 L. ed. 198, 5 Sup. Ct. Rep. 924, 962, were brought in the [225] state courts *of Virginia, and they involve questions very much like those in the case at bar. Poindexter v. Greenhow was an action of detinue for personal property distrained by Greenhow for delinquent taxes, in payment of which Poindexter had tendered coupons cut from bonds issued by the state of Virginia under act of the state passed in 1871. This act, it was held, constituted a contract between the holder of the coupons and the state that they should be received for taxes, which contract, it was further held, was impaired by the subsequent act under which Greenhow justified the distraint of Poindexter's property.

It was urged that the action could not be maintained because it was substantially an action against the state, to which it had not assented. It was further urged that the remedy was afforded of a right to recover back all the taxes after payment under protest, and that this constituted the sole remedy.

The first contention was discussed at length and rejected. The court said, in effect, that the defendant in the action was sued as a wrongdoer, and could only justify himself under a valid law. And it was said: "The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law. . . . *He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.*" (Italics ours.)

A distinction was made between the state and its government, and it was said that an officer representing and acting for the latter is not an agent of the former. That and other cases were reviewed in Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443, and Mr. Justice Gray, speaking for the court, said: "In a suit to which the state is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be restrained *by injunction, when the remedy at [226] law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the Constitution or laws of the United States." Cases were cited. And again: "But no injunction can be issued against officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party." The case and those cited expose the error, which appears with a kind of periodicity, varied in presentation, to accommodate the particular exigency, that a state is inevitably brought into court when the execution of its laws is arrested by a suit against its officers. It seems to be an obvious consequence that, as a state can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt, without its consent, in the state tribunals, and exempt by the 11th Amendment of the Constitution of the United States in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the

14th Amendment, which is directed at state action, could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the [227]*possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. See Ex parte Young [209 U. S. 123, ante, 714, 28 Sup. Ct. Rep. 441], where this subject is fully discussed and the cases reviewed.

The principles of the cases which we have cited were applied by the supreme court of Tennessee in Lynn v. Polk, 8 Lea, 121, where a suit against the funding board of the state was maintained against the contention that it was a suit against the state or against the officers of the state, within the meaning of the act of 1873, on the ground that an officer executing an unconstitutional statute is not acting by the authority of the state. The court, however, distinguishes that case from the one at bar by saying that plaintiff in error did not assail the inspection law for being void upon its face, but only on the ground "that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce." To enter into the inquiry involved in the contention, it was further said, "the court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce; and to do this we would be bound to hold, and proceed upon the theory, that the court had jurisdiction of the whole controversy." And that the court declared it was precluded from doing by the act of 1873. In other words, refused to consider that which might bring the oils under the protection of the Constitution of the United States.

A similar distinction was attempted to be made in Poindexter v. Greenhow, supra, and the court replied by saying: "It is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of [228]only because *its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a state, which, in their general and proper application, are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts, prohibited by the Constitution, or because, in some other way, they operate to deprive the party complaining of a right secured to him by the Constitution of the United States." And inquiries of fact may be necessary to exhibit the unconstitutionality of a statute, as in Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, and Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

We are brought, then, to consider whether the law would, if administered against the oils in controversy, violate any constitutional right of plaintiff in error.

As determining an affirmative answer to this question, it is contended that the oil in both tanks was in transit from the place of manufacture, Pennsylvania, to the place of sale, Arkansas. The delay at Memphis, it is urged, was merely for the purpose of separation, distribution, and reshipment, and was no longer than required by the nature of the business and the exigencies of transportation. The difference in the oil in tank No. 1 and that in tank No. 2, it is further said, is that the former was sold before shipment, and the latter was to be held in Tennessee for sale; but in neither case was the oil to be sold in Tennessee, and it is hence insisted that the interstate transit of the oil was never finally ended in Memphis, but was only temporarily interrupted there.

The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined *in [229] Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. The latter is defined to be, in Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425; State, Lehigh & W. Coal Co., Prosecutors, v. Carrigan, 39 N. J. L. 35; The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999.

In Pittsburg & S. Coal Co. v. Bates, 156

U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about 9 miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the state of Louisiana.

In Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266, logs in transit to a point without the state were held subject to taxation under a statute of the state, where they would "naturally leave the state in the ordinary course of transit."

In Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska, for the purpose of shipment by rail from the latter point, was held to be property engaged in interstate commerce, and exempt from taxation by Wyoming under the statute taxing all live stock brought into the state "for the purpose of being grazed." There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases, expressed in the following passage: "The substance of these cases is that, while the property is at rest for an indefinite time, awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But, if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment." Property, therefore, at an intermediate point between the [230] place of *shipment and ultimate destination, may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.

In State, Detnold, Prosecutor, v. Engle, supra,—coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale,—it was held that the property was not subject to taxation in New Jersey. The court said: "Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purposes of taxation." See also in State, Lehigh & W. Coal Co., Prosecutors, v. Carrigan, supra, where coal also shipped from Pennsylvania to a port in New Jersey, and remained there no longer than was necessary to obtain vessels to transport it to other places, was held to be in course of transportation, and not subject to the taxing power of the state. In Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254, the principle was recognized that property *in transitu* was not subject to the taxing power of a state, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi river, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was "kept at New Boston on account of the profit of the owners to keep it there;" and, further, that the company was engaged in business in the state, beneficial to itself, and its property was so located as to claim the protection of the laws of the state, and hence was liable to taxation.

Like comment is applicable to plaintiff in error and its oil. The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as [231] *in State, Detnold, Prosecutor, v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfil orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. "Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil."

This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 356, 43 L. ed. 195, 18 Sup. Ct. Rep. 862. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce.

As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the Supreme Court of Tennessee, and, for the reasons stated, its judgment is affirmed.

[232] *Mr. Justice **Harlan**, concurring:

The fundamental question before the state court of original jurisdiction was whether it had jurisdiction, under the Constitution and laws of Tennessee, of a suit like this. Manifestly, if that court was forbidden by the laws under which it was created to take cognizance of cases like this, it had no alternative but to dismiss this suit. The court overruled a demurrer to the bill, one of the grounds of demurrer being that the suit was one "against the state or against an officer of the state, acting by authority of the state, with a view to reach the state, its treasury, funds, or property." It thereby sustained its jurisdiction, and proceeded to a decree on the merits. The case being carried to the supreme court of Tennessee, that court reversed the judgment and held that no court of Tennessee could, *under its statutes*, take cognizance of this suit and give the decree asked. Upon that ground it did what it said the inferior state court should have done; namely, dismissed the suit for want of jurisdiction to give the relief asked.

The statute of Tennessee which the supreme court of that state construed and held to be prohibitory of this suit was an act passed in 1873. It provides: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the state, or any officer acting by the authority of the state, with a view to reach the state, its treasury, funds, or property; and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state."

The oil company seeks a reversal of the decree of the state court, contending that it was denied a right arising under the commerce clause of the Constitution. But back of any question of that kind was the question before the supreme court of Tennessee, whether the inferior state court, under the law of its organization, that is, under the law of Tennessee, could *enter-[233] tain jurisdiction of the suit. The question, we have seen, was determined adversely to jurisdiction. That certainly is a state, not a Federal, question. Surely, Tennessee has the right to say of what class of suits its own courts may take cognizance, and it was peculiarly the function of the supreme court of Tennessee to determine such a question. When, therefore, its highest court has declared that the Tennessee statute referred to in argument did not allow the inferior state court to take cognizance of a suit like this, that decision must be accepted as the interpretation to be placed on the local statute. Otherwise, this court will adjudge that the Tennessee court *shall* take jurisdiction of a suit of which the highest court of the state adjudges that it cannot do consistently with the laws of the state which created it and which established its jurisdiction. It seems to me that this court, accepting the decision of the highest court of Tennessee, as to the meaning of the Tennessee statute in question, as I think it must, has no alternative but to affirm the judgment, on the ground simply that the ground upon which it is placed is broad enough to support the judgment without reference to any question raised or discussed by counsel.

What is said in the opinion of the court about the 11th Amendment is, I submit, entirely irrelevant to any decision of the present case by this court. That Amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court under the Tennessee statute of 1873. In determining what relief this court can or should give, in respect of the judgment under review, we need not consider the scope and meaning of the 11th Amendment; for it was long ago settled that a writ of error to review the final judgment of a state court, even when a state is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment. Cohen v. Virginia, 6 Wheat. 264, 408, 409, 5 L. ed. 257, 292.

In my opinion, the decision of the supreme court of Tennessee, that the inferior state court was forbidden, by the law of [234]*its being, from taking cognizance of this suit, is conclusive here, and the judgment of that court should, therefore, be affirmed without reference to any other question raised or discussed.

Mr. Justice Moody, dissenting:

I am unable to agree to the judgment in this case, for the reason that the statute here in question, as it was enforced against the property of the plaintiff in error, in my opinion was an interference with interstate commerce, which was beyond the power of the state. It is to be observed that the court below did not construe the statute as applying to articles in the course of transportation between the states, and not destined for sale to consumers in the state, or, in other words, the court did not hold that the statute applied to the property here affected by it. On the contrary, the court expressly refrained from passing upon the merits of the controversy, and dismissed the bill for want of jurisdiction. We, however, have assumed jurisdiction of the controversy, for reasons given in the opinion of the court, in which I concur, and therefore cannot escape the duty of interpreting the meaning of the statute. I think we should, if it be possible, give to the statute a meaning which places its constitutionality beyond doubt. The law seems clearly to be designed to protect state manufacturers and consumers within the state. Its operation is limited by the words of the 1st section, which directs the governor to appoint inspectors for illuminating fluids "which may be manufactured or offered for sale in the state." Far from enlarging the meaning of these restrictive words, the other provisions of the law accord with and confirm them. The oil in tank No. 1, at least, which was neither manufactured in the state nor offered for sale in the state, is, by this interpretation, removed from the operation of the statute, and I think we ought so to decide.

But, if it be assumed that the oil in tank No. 1 is subjected to inspection by the law, in my opinion the law is unconstitutional. [235]*The law is not sustained by the judgment of the court as an inspection law, which it purports to be. Perhaps it could not be under the doctrine announced and applied in Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, and Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. I am therefore relieved from considering whether the law, because it is a mere cloak for exacting revenue from interstate commerce, is bad as an inspection law. The judgment of the court treats it as such, and it is sustained not as an inspection, but as a revenue, law. I do not dissent from such an interpretation of its effect. But, with unfeigned deference to the opinions of my brethren, I venture to think that the statute, as enforced in the case at bar, is bad as a taxing law. The case of American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365, holds that articles, before they have ceased to be the subjects of interstate commerce, may still be reached by the taxing power of the state. Accordingly it was held that the property of a citizen of another state, which had been brought into the state of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the state, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the state and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. The judgment here takes a step forward which I think ought not to be taken. The oil in that tank had been sold while in Pennsylvania and Ohio to purchasers in other states than Tennessee, before it started in the course of interstate transportation. It was shipped especially in pursuance of such sales. It was in Tennessee only momentarily ("a few days"), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment. It would no more seem to be the subject of state taxation than *a drove of[236] cattle, whose long interstate journey was interrupted, for humane reason, to give them a few days of rest and refreshment. With respect to this oil, no business whatever was done in the state except that which was required to conduct the transaction of interstate commerce begun in another state and to be completed in a third state. The single consideration that the property enjoys in Tennessee the protection of the laws of the state cannot be enough to justify state taxation. If that were so, all property in the course of interstate transportation would be subject to state tax in every state through which it should pass. I conclude that the oil in question was actually in the course of transportation between the states, was delayed in the state of Tennessee only for the purpose of conveniently continuing that transportation, and was therefore protected from state taxation by the commerce clause of the Constitution. Coe v. Errol, 116 U. S. 525, 29 L. ed. 718, 6 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of the property of the state; and in the latter class because it has come to rest as a part of the mass of the property of the state. Between those two points of time it is exempt from the taxing power of the state. In every case where the tax has been sustained there were facts present regarded as essential by the court, which are absent here. The property had either not begun its interstate journey, as in Coe v. Errol, ubi supra. and Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266, or it had ended that journey and was held for sale in common with other property in the state, as in Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; and American Steel & Wire Co. v. Speed, ubi supra.

Mr. Justice **Holmes** concurs.

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[237] *NAPOLEON B. DOTSON, Plff. in Err.,
v.
WILLIAM A. MILLIKEN.

(See S. C. Reporter's ed. 237-245.)

Appeal — review of instruction — general exception.

1. An objection that an instruction justifying a recovery of the agreed commission by a broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal lands, who had found a purchaser for 10,000 acres, where the sale failed through the fault of the owner, did not require or permit the jury to find that any particular land was agreed upon, is not available on appeal, especially upon a mere general exception, the point not having been raised in the trial court.

Brokers — right to commission — failure to complete sale.

2. A broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal land, is entitled to his agreed commission, where he finds a purchaser for 10,000 acres, and the sale fails because of the inaccuracy of the owner's representations to the broker that a railway company had consented or agreed to construct a branch railroad into such lands.

Trial — instructions — broker's right to commissions.

3. A finding that the owner and purchaser had agreed upon terms is presupposed in an instruction authorizing the recovery of agreed commissions by a broker employed to find a purchaser for the whole, or any considerable part, of a tract of coal lands, who had found a purchaser able, ready, and willing to purchase 10,000 acres of the said lands at the stipulated price, where the sale failed because of the inaccuracy of the owner's representations to the broker that a railway company had consented or agreed to construct a branch railroad into such lands.

Brokers — right to commissions — ability of purchaser.

4. The inability of the prospective purchaser to complete the purchase is not available as an afterthought to defeat the right of the broker employed to find a purchaser to recover his agreed commissions, where the sale failed wholly through the fault of the owner, who made no objection to the purchaser.

Brokers — right to commissions — failure to complete sale.

5. A binding agreement between vendor and purchaser is not necessary before a broker's commission can be earned, under an agreement by which such broker was employed to find a purchaser.

Brokers — right to commissions — failure to complete sale.

6. The failure of the prospective purchaser of coal lands to rely upon the owner s representations to the broker employed to find a purchaser, that a railway company had consented or agreed to construct a branch railroad into such lands, does not defeat the broker's right to his agreed commissions, where, relying upon such repre-

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NOTE.—As to when a broker selling real estate is entitled to commission—see note to McGavock v. Woodlief, 15 L. ed. U. S. 884.

As to effect of inability of principal to complete sale on broker's right to commission—see note to Brackenridge v. Claridge, 43 L.R.A. 603.

As to what constitutes sufficient performance by real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property—see note to Lunney v. Healey, 44 L.R.A. 593.

Right of broker to commissions where sale fails because of inaccuracy of owner's representations.

The following cases appear to support the statement as a general rule that the rights of a broker otherwise entitled to commissions are not affected where, having produced a purchaser able and willing to enter into a contract upon the terms proposed by the owner, the transaction is not consummated because of the inaccuracy of representations made by the owner to the sentations, he finds a purchaser, and the sale fails because of their inaccuracy.

[No. 48.]

Argued March 4, 5, 1908. Decided March 23, 1908.

IN ERROR to the Court of Appeals for the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, in favor of plaintiff in an action to recover a broker's commission. Affirmed.

See same case below, 27 App. D. C. 500.

The facts are stated in the opinion.

Messrs. **R. Burnham Moffat** and **A. S. Worthington** argued the cause and filed a brief for plaintiff in error:

The instruction which the trial court gave to the jury at the request of counsel for defendant in error was erroneous in that it authorized the jury to find a verdict in Milliken's favor if he had found a person who was able and willing to purchase 10,000 acres out of a tract of 124,000 acres, without any agreement between the purchaser and the seller as to where, in the larger tract, the 10,000 acres were to be located.

Nippolt v. Kammon, 39 Minn. 372, 40 N. W. 266; Brockway v. Frost, 40 Minn. 155.

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broker or prospective customer, and understood by the parties as material.

Thus, a broker was entitled to commissions though the purchaser found by him subsequently refused to carry out his contract on the ground of alleged false representations made by the owner's agent (Condict v. Cowdrey, 5 N. Y. Supp. 187); or where the purchaser refused to carry out his contract because the owner had made unfounded representations as to the house and the character of the partition walls (Glentworth v. Luther, 21 Barb. 145); or where the purchaser refused to carry out the contract, except on condition of the abatement of a certain amount of the purchase money for alleged misrepresentations by the owner's agent regarding the timber on the land (Hugill v. Weekley [W. Va.] 61 S. E. 360).

And in Hannan v. Moran, 71 Mich. 261, 38 N. W. 909, where the purchase fell through, owing to a misrepresentation on the part of the principal that a certain sewer privilege existed which in point of fact did not exist, and a bargain with a subsequent purchaser also fell through by reason of the principal's backing out of his offer, owing to his wife's having an interest in the property which he had not mentioned or disclosed, the court upheld the broker's claim for commissions.

A broker who, acting in good faith, and with no knowledge of the incorrectness of the owner's statement to him as to the number of feet frontage, found a prospective purchaser at the agreed price, was entitled to commissions, although such purchaser, upon discovering that the lot did not contain the number of feet frontage represented, refused to buy the property. Cohen v. Farley, 28 Misc. 168, 58 N. Y. Supp. 1102.

But in the absence of fraudulent representations a broker was not entitled to commissions where the failure of the prospective purchaser to buy the property was due to the discovery that it did not, in fact, have the frontage which the parties supposed it had. C. H. Diamond & Co. v. Hartley, 38 App. Div. 87, 55 N. Y. Supp. 994.

Nor where the owner, when asked to sell the property, upon inquiry as, to its dimensions, gave the broker the size of the plot called for by the deed conveying the property to him, without being informed that the statement was to be used for any particular purpose, and it was evident that such statement was not understood as a warranty. C. H. Diamond & Co. v. Hartley, 47 App. Div. 1, 61 N. Y. Supp. 1022.

Nor can a broker employed to obtain a loan which failed of consummation because of shortage in the property recover commissions, where he was aware that the owner was uncertain as to the exact dimensions of his property. Shropshire v. Frankel, 45 Misc. 616, 91 N. Y. Supp. 79.

A broker who procures a purchaser ready, able, and willing to buy on the owner's terms is entitled to commissions, though the sale falls through because the rental value of the property is less than that stated in the written authorization given the broker (Goodman v. Hess, 56 Misc. 482, 107 N. Y. Supp. 112; Compare Curtiss v. Mott, 90 Hun, 439, 35 N. Y. Supp. 983, infra); and he may recover commissions where the sale fails because of the owner's inability to give immediate possession, and he has stated in the written authorization given the broker that possession may be had at once (Putter v. Berger, 95 App. Div. 62, 88 N. Y. Supp. 462).

A broker who procures a prospective purchaser to whom the owner gives a preliminary memorandum of sale, but who declines to enter into a formal contract because a mortgage on the property does not run as long as was stipulated in the preliminary memorandum, is entitled to commissions. Seidman v. Rauner, 51 Misc. 10, 99 N. Y. Supp. 862; Frank v. Connor, 107 N. Y. Supp. 132.

A principal who represents that he owns and has a good title to real estate, and employs an agent to sell the same, cannot, in the absence of an agreement to that effect, deny to the agent compensation for his services in making a sale which is afterward defeated because the title proves defective. Roberts v. Kimmons, 65 Miss. 332, 3 So. 736; Davis v. Lawrence, 52 Kan. 383, 34 Pac. 1051; Conkling v. Krakauer, 70 Tex. 735, 11 S. W. 117; Smye v. Groesbeck (Tex. Civ. App.) 73 S. W. 972.

So, in a case in which the purchaser was ready and willing, and even anxious to

41 N. W. 411; Monk v. Parker, 180 Mass. 246, 63 N. E. 793; 1 Story, Eq. Jur. § 793.

This objection is available to plaintiff in error.

Watts v. Waddle, 6 Pet. 402, 8 L. ed. 442; Wiborg v. United States, 163 U. S. 658, 41 L. ed. 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Ward v. Cochran, 150 U. S. 597–604, 37 L. ed. 1195, 1196, 14 Sup. Ct. Rep. 230; Noonan v. Caledonia Gold Min. Co. 121 U. S. 393–400, 30 L. ed. 1061–1063, 7 Sup. Ct. Rep. 911; Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470; Gilbert v. Fay, 4 App. D. C. 38; Washington Gaslight Co. v. Poore, 3 App. D. C. 134; Roberts v. Bradfield, 12 App. D. C. 453; Capital Constr. Co. v. Holtzman, 27 App. D. C. 125; Smith v. Barstow, 2 Dougl. (Mich.) 155; Wallace v. Finch, 24 Mich. 255; Rockefeller v. Donnely, 8 Cow. 661; Bohm v. Metropolitan Elev. R. Co. (Somers v. Metropolitan Elev. R. Co.) 129 N. Y. 584, 14 L.R.A. 344, 29 N. E. 802; Mahony v. Clark, 1 App. Div. 196, 37 N. Y. Supp. 138; Savage v. Gerstner, 36 App. Div. 220, 55 N.

buy, but the principal was unable or unwilling to give a perfect title, and while the money was on deposit awaiting action on the principal's part he sold the land to another, and the principal had represented to the broker and to a person who desired to purchase that his title was perfect, but investigation and evidence showed that it was not, and the evidence failed to show that the broker was employed to procure a purchaser to take the property regardless of title,—it was held that he was entitled to his commissions upon the sale, which was never consummated. Sullivan v. Hampton (Tex. Civ. App.) 32 S. W. 235.

A broker who undertakes to procure a loan upon the assurance of his employer's attorney that his employer, who is acting as executor of an estate, has power to execute a mortgage thereon, is entitled to commissions where he finds one who is ready and willing to make the loan upon a valid mortgage, but who refuses to do so because he is not satisfied of the executor's authority to make the mortgage. Fullerton v. Carpenter, 97 Mo. App. 197, 71 S. W. 98.

In the following cases, although the sale failed because of misrepresentations upon the part of the owner, the broker's right to commissions appears to have been denied upon the ground that he had not found a purchaser to take the property at the owner's terms.

Thus, in Curtiss v. Mott, 90 Hun. 439, 35 N. Y. Supp. 983 (appeal dismissed in 158 N. Y. 663, 52 N. E. 1124), where the broker found a party ready, willing, and able to purchase at the price mentioned by the principal, provided the monthly rentals were equal to those represented to him by the broker, and he obtained his information respecting such rentals from his principal, who stated that they amounted to the given sum, whereas in point of fact they were less, and the purchaser thereupon refused to complete the sale, it was held that he could not recover his commissions, upon the ground that, since the purchaser was willing to buy only upon the condition as above stated, he had not fulfilled his contract by producing a buyer willing to purchase at the seller's terms. The court, however, declined to pass upon the question whether, in a proper action, the broker could recover damages because of misrepresentations which prevented the performance of his contract.

So, also, in Hausman v. Herdtfelder, 81 App. Div. 46, 80 N. Y. Supp. 1039, it was held that where the prospective purchaser procured by the broker was not ready and willing to enter into a legal contract of purchase upon the terms offered by the owner, the broker could not recover commissions, though the party procured by him withdrew because the lot was not as deep as the owner had told the broker it was.

In Crockett v. Grayson, 98 Va. 354, 36 S. E. 477,—an action of covenant for commissions,—the court recognized the rule that where the broker has found a purchaser ready and willing to complete the purchase upon the terms agreed upon, and the purchaser has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his misrepresentations, or by his whimsical or unreasonable refusal to comply with his contract, but held that where, in the contract signed by the prospective purchaser, the right was reserved to cancel the contract if liens on the property exceeded a certain amount, which amount the owner had represented would satisfy such liens, and the purchaser exercised such reserved right upon discovering that the liens exceeded such amount, there was no such performance on the part of the broker as would entitle him to commissions.

While the decision in the foregoing case seems justifiable upon the grounds stated in the cases immediately preceding, the reasoning of the court is rather unusual. It was said: "There are, perhaps, cases in which a broker may be entitled to compensation where a negotiation for the sale of real estate has been broken off by reason of a misrepresentation made by the seller. . . . It is a fundamental principle that the fraud of which one complains must be accompanied by damage, to constitute a cause of action. It is true that Grayson represented that $4,000 would satisfy the liens upon his lands, and this statement appears to have been untrue; but it is plain that, so far as it affects Crockett's right to recover in this action, it did not injure him in the least degree, for if the representation had not been made, Spiller would never have entered into the agreement. Had Grayson disclosed the precise state of the record with respect to the liens upon his property, it is safe to say that the negotiation between himself and Spiller would at once have ended."

Y. Supp. 306; Pratt v. Baptist Society, 93 Ill. 475, 34 Am. Rep. 187; Glover v. Shute, 26 La. Ann. 350; Bond v. Wabash, St. L. & P. R. Co. 67 Iowa, 712, 25 N. W. 892.

The instruction in question was erroneous for the further reason that it did not require the jury to find that the purchaser was willing to buy on terms satisfactory to Dotson, or to find that the vendor and the purchaser had agreed on terms.

McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; Crowe v. Trickey, 204 U. S. 228, 51 L. ed. 454, 27 Sup. Ct. Rep. 275; Hammond v. Crawford, 14 C. C. A. 109, 35 U. S. App. 1, 66 Fed. 427; Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981; Parker v. Walker, 86 Tenn. 566, 8 S. W. 391.

The court erred in giving the instruction in question for the additional reason that the condition upon which Easter proposed to buy 10,000 acres of the land was not that the purchaser should be satisfied that the representations made by Dotson as to the statements or promises made by Spencer to him were true, but upon the entirely different condition that Dotson should obtain from the Southern Railway Company a binding contract to build the branch railway.

Crockett v. Grayson, 98 Va. 354, 36 S. E. 477; Curtiss v. Mott, 90 Hun, 439, 35 N. Y. Supp. 983; French v. Brush-Swan Electric Light Co. 39 N. Y. S. R. 515, 15 N. Y. Supp. 161.

The instruction under consideration was improperly granted for the additional reason that it left to the jury the question whether the prospective purchaser was able to purchase 10,000 acres of land at $20 an acre.

Butler v. Baker, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019; Snyder v. Fidler, 125 Iowa, 382, 101 N. W. 130; Iselin v. Griffith, 62 Iowa, 670, 18 N. W. 302; Zeidler v. Walker, 41 Mo. App. 118; Coleman v. Meade, 13 Bush, 358; Grosse v. Cooley, 43 Minn. 188, 45 N. W. 15; Stewart v. Smith, 50 Neb. 631, 70 N. W. 235; Dent v. Powell, 93 Iowa, 714, 61 N. W. 1043; Sullivan v. Milliken, 51 C. C. A. 79, 113 Fed. 93; Alt v. Doscher, 102 App. Div. 344, 92 N. Y. Supp. 439, Affirmed in 186 N. Y. 566, 79 N. E. 1100; McGinn v. Garber, 125 Iowa, 533, 101 N. W. 279.

Mr. **J. J. Darlington** argued the cause and filed a brief for defendant in error:

Where an instruction, generally correct, is objected to on some special ground, that ground must be pointed out and a qualifying instruction asked, or the objection cannot afterwards be maintained.

McNitt v. Turner, 16 Wall. 352, 362, 21 L. ed. 341, 346; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 299, 23 L. ed. 900; Grand Trunk R. Co. v. Ives, 144 U. S. 414, 415, 36 L. ed. 488, 12 Sup. Ct. Rep. 679; McDermott v. Severe, 202 U. S. 600, 610, 611, 50 L. ed. 1162, 1168, 1169, 26 Sup. Ct. Rep. 709; Baltimore & P. R. Co. v. Mackey, 157 U. S. 86, 39 L. ed. 629, 15 Sup. Ct. Rep. 491; Wigmore, Ev. p. 57; Bell v. Denson, 56 Ala. 449; Warren v. Wagner, 75 Ala. 205, 51 Am. Rep. 446.

The sale having failed because of the fault, default, and misrepresentations of the plaintiff in error, he cannot defeat the broker of his compensation because of some element in the contract which it may be conjectured might, within the range of possibility, have interfered with its consummation, but which in fact did not do so. Where one of the parties is prevented from performance by the other, it should be taken as prima facie true that he would have performed but for such prevention.

McCreery v. Green, 38 Mich. 182.

Armstrong v. Mudd, 10 B. Mon. 144, 50 Am. Dec. 545, is of itself conclusive, since it establishes the law of the state where the land covered by the contract in the case at bar is located, in accordance with which law it must accordingly be construed.

See also Burrow v. Terre Haute & L. R. Co. 107 Ind. 435, 8 N. E. 167.

In order to recover compensation for his services, the broker need only produce a purchaser ready, able, and willing to purchase on the terms required; and a written, binding agreement is not a necessary prerequisite.

Crowe v. Trickey, 204 U. S. 228, 51 L. ed. 454, 27 Sup. Ct. Rep. 275; Holden v. Starks, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069; Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. 1,000; Cook v. Welsh, 9 Allen. 350; Desmond v. Stebbins, 140 Mass. 342, 5 N. E. 150; Middleton v. Thompson, 163 Pa. 112, 29 Atl. 796; Keys v. Johnson, 68 Pa. 43; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. 790; Washburn v. Bradley, 169 Mass. 86, 47 N. E. 512; Kock v. Emmerling, 22 How. 69, 16 L. ed. 292; Vaughan v. McCarthy, 59 Minn. 203, 60 N. W. 1075; O'Connor v. Semple, 57 Wis. 248, 15 N. W. 136; Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385; Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; Barnes v. German Sav. & L. Soc. 21 Wash. 448, 58 Pac. 570; Middleton v. Thompson, 163 Pa. 120, 29 Atl. 796; Fischer v. Bell, 91 Ind. 243; Lockwood v. Rose, 125 Ind. 591, 25 N. E. 710; Cheatham v. Yarbrough, 90 Tenn. 79, 15 S. W. 1076; Mechem, Agency, 966, 967; 2 Am. & Eng. Enc. Law, pp. 528, 581; 2 Addison, Contr. § 931; McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; Fraser v. Wyckoff, 63 N.

Y. 448; Cook v. Fiske, 12 Gray, 493; Vinton v. Baldwin, 88 Ind. 104, 45 Am. Rep. 447; Gonzales v. Broad, 57 Cal. 224; Schwartze v. Yearly, 31 Md. 270; Blodgett v. Sioux City & St. P. R. Co. 63 Iowa, 609, 19 N. W. 799; Ford v. Easley, 88 Iowa, 603, 55 N. W. 336; Gilder v. Davis, 137 N. Y. 506, 20 L.R.A. 398, 33 N. E. 599; Roche v. Smith, 176 Mass. 595, 51 L.R.A. 510, 79 Am. St. Rep. 345, 58 N. E. 152.

The broker is entitled to his commission although the transaction fails because of a defect in the title; and this, although the principal has made no representations in regard to the title, there being an implied stipulation, as between himself and the broker, that he has the ability to give a good title. Peet v. Sherwood, 43 Minn. 447, 45 N. W. 859. How much stronger is the case where he expressly stipulates that he has already perfected a necessary condition, without which the broker would not have entered upon the attempt to render the desired service.

Failure of the vendee to consummate the purchase because the principal's representation as to the property are found untrue cannot deprive the broker of his commissions.

Cohen v. Farley, 28 Misc. 168, 58 N. Y. Supp. 1102; Washburn v. Bradley, 169 Mass. 86, 47 N. E. 512; Hamlin v. Schulte, 34 Minn. 534, 27 N. W. 301; Strong v. Prentice Brownstone Co. 6 Misc. 57, 26 N. Y. Supp. 85.

Although, according to some authorities, the broker must show that his purchaser is willing, ready, and able to consummate his purchase, yet where it appears that the proposed purchaser was accepted by the principal, the burden is upon the latter to show that the former was not able to comply.

Davis v. Morgan, 96 Ga. 520, 23 S. E. 417; Fairly v. Wappoo Wills, 44 S. C. 248, 29 L.R.A. 215, 22 S. E. 108; Coleman v. Meade, 13 Bush, 358; Lockwood v. Halsey, 41 Kan. 170, 21 Pac. 98; Kalley v. Baker, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091.

The broker's duty is fully performed and his commissions earned, when a meeting of the minds of the principals takes place, his right to payment being irrespective of the fact whether the agreement between the principals be valid and enforceable or not, verbal or written, plain or obscure, and no matter how indefinite the terms of the contract may be.

Folinsbee v. Sawyer, 8 Misc. 370, 28 N. Y. Supp. 698.

The solvency of the purchaser is presumed, in the absence of some contrary showing in the evidence.

Henken v. Schwicker, 174 N. Y. 302, 66 N. E. 971; Hart v. Hoffman, 44 How. Pr. 168; Cook v. Kroemeke, 4 Daly, 268; Levy v. Ruff, 30 Abb. N. C. 291, 22 N. Y. Supp. 744; Goss v. Broom, 31 Minn. 484, 18 N. W. 290; McFarland v. Lillard, 2 Ind. App. 166, 50 Am. St. Rep. 234, 28 N. E. 229; Stauffer v. Linenthal, 29 Ind. App. 305, 64 N. E. 643.

At all events, the burden of proof shifts and the solvency of the person is to be presumed in the absence of proof, where the vendor accepts the purchaser by contracting with him.

Parker v. Estabrook, 68 N. H. 349, 44 Atl. 484; Russell v. Hurd, 113 Ill. App. 63; Higgins v. Miller, 109 Ky. 212, 58 S. W. 580; Steinbach v. Montpelier Carriage Co. 37 Fed. 760.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for a commission of $2.50 an acre on 10,000 acres of coal land belonging to the defendant, the plaintiff in error, for which, although not sold, the defendant in error, the plaintiff, says that he furnished a purchaser, satisfying the terms of the understanding on which he was employed. The errors alleged and now insisted upon are the giving of an instruction requested by the plaintiff and refusing one asked by the defendant. To explain them it will be necessary to give a summary of the evidence, or part of it.

Relations between the parties were opened by a letter from the defendant, written on April 24, 1902, at the request of a *friend of the plaintiff's, inclosing circulars [238] concerning 124,000 acres of coal land in Kentucky. The letter said: "We have arranged with R. R. companies to build a branch into it and develop the lands," and the circulars also stated that the owners had an understanding with the railroads near the land, by which they were to build a branch into the land as soon as the owners were ready to open up mines, etc., with more of the same sort. On April 30 the parties met and the plaintiff, Milliken, told the defendant, Dotson, that he knew the land, and, as was the truth, that the important thing was about the railroad,—whether there was any way to get the property to market. Dotson replied that he had an arrangement with Spencer, president of the Southern Railway, to build a road in there at once; that at that time they had their surveyors in there and were locating a line of road, etc. Thereupon it was arranged that Dotson would give $2.50 an acre for every acre Milliken could sell at $20, and that Milliken was to go to work for a purchaser, which Milliken accordingly did.

After a letter on May 2, giving an account of a first interview and an answer dwelling on the great increase of value that would come from the building of railroads at once through the property, Milliken wrote on May 7, saying that he was writing to the two roads to know if they would "build the road in there as soon as we are ready to begin the development of the property," and that the prospective purchasers "want to know positively about the railroad being built in there, if they go into it." The plaintiff seems to have written as his letter stated, but he testified that an assurance from Dotson would have been satisfactory and was satisfactory when it came. On May 8, to meet the purchasers' doubts, he telegraphed to Dotson: "See Spencer and write me to-night how much development he will require before building road into property," etc. On the same day Dotson replied: "I have already discussed fully with Mr. Spencer the point . . . and am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the [239] property holders *to put in certain sized plants, or any number of coke ovens," with further details. This seemed at the time to satisfy the purchasers. On May 12 Milliken wrote to Dotson that if his coal would make as good coke as the Stonega coal, and the Southern would build a branch line into the property, the parties would put their capital in; that it was for Dotson to "substantiate these two points, which I believe you will do;" that he had a letter from Mr. H. Smith, the president of the Louisville & Nashville, declining to build a branch line, but that if Dotson had Spencer safely committed to him they did not care for Smith's road. On the same day Dotson wrote Spencer, asking for a letter to show, which Spencer answered the next day, declining, until he had more definite knowledge and obligation as to improvement, and professing to repeat what he had said; *viz.*, that if the property of the amount previously named should be put into such shape as to warrant the construction of a railroad, they would take up and consider favorably a plan. This is thought by the plaintiff to contradict the statements that Dotson had made to him. Spencer testified that there never was any agreement, or more than what just has been stated from his letter, and Dotson's answer, written May 16, confirms the testimony by the absence of any tone of surprise.

Dotson testified that he showed Spencer's letter to Milliken. Milliken testified the contrary, and his case was that, having no notice of the correspondence, he was going ahead under Dotson's letter of May 8. On May 29 Dotson wrote as to samples of coal, adding that he understood the Southern Railway Company had secured their right of way with one or two exceptions, but that he hoped Spencer would call his men out and keep them out "until we get our tracts rounded up." On June 9 Milliken wrote to Dotson, communicating a very favorable report on his coal, and saying: "I may wire you by the time this letter reaches you to come up here to close the deal [for 5,000 acres]. They asked me in particular this afternoon how soon the railroad could be built into this land from Middlesboro." *He [240] added that Easter, one of the purchasers, asked if he could go and have a talk with Spencer on the subject, with Dotson, and that Milliken answered yes. On June 12 Dotson answered that, as Mr. Spencer's plans were fixed, Spencer would not hesitate to say to Mr. Easter that they would build the road into that section at once; and urged prompt action. In another letter, of July 8, he said: "After we completed arrangements with the R. R. company for the development of the property, we advanced price to $20 per acre." On July 24 an option on "10,000 acres of land in Harlan county, Kentucky," at $20 per acre for sixty days, was given to Easter in consideration of his forthwith sending an engineer to examine and report on the same, and on August 25 Milliken wrote to Dotson that Easter's party had decided to take the 10,000 acres on condition that Mr. Spencer would assure them as to the building of the railroad to Harlan Court House; that they had written to Spencer, and, if his answer confirmed Dotson's representations, they would close the purchase. If it did not, they did not want the land at any price. There was an interview, it seems, on September 5, at which Easter asked Dotson to get a letter from Spencer, but Dotson said that Easter was the proper party, and that they would have to offer some inducements to get such an assurance, but he thought that, if Easter would let Spencer know what he was willing to do, Spencer would not object. Thereupon there was some correspondence, it turned out that the railroad company would not build, and the transaction fell through.

The foregoing letters show that the plaintiff was employed and went to work. He spent a good deal of time and money in his efforts, as the defendant knew. There is no reasonable doubt as to the rate at which he was to be paid, and the substantial question is what he had to do to entitle himself to his compensation. The bargain made may have been improvident, and may have been different from that which the defendant would have made if he had taken all the chances into account. But the general question is what the jury was warranted [241] in *finding to have been made in fact. It was recognized that what the railroads would do was decisive, and it was to be expected that parties thinking of a purchase would require an assurance from them, or something more definite than what the defendant had said. The plaintiff was to go to work at once, and the jury well might find that he was not understood to take the risk of what the railroads might do. The question is between the broker and seller, not between the purchaser and seller. The seller was willing and meant that the broker should accept his confidence as well founded, although he must have known that the purchaser would or might ask more. The correspondence indicates very strongly that Milliken really relied upon Dotson's statement that an agreement had been made. So, again, it might be found that Dotson was willing to take his chances as to the specification of the 10,000 acres in the larger tract at the defendant's command. The option that satisfied him and his purchasers was enough, if accepted, to entitle the plaintiff to his pay. The jury was warranted in finding that the plaintiff was employed at the rate named to make a bargain for land to be identified later, and subject to requirement of the purchaser that the railroads or one of them would agree to build a road into the land.

The ruling requested for the plaintiff was as follows:

"If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan county coal lands at the price of $20 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20 per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build [242] the said railroad into *the said property without placing any requirements on the purchasers or holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready, and willing to purchase 10,000 acres of the said lands at the said price provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said railway company had so consented or agreed to construct a branch railroad into the said coal lands,—then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the said 10,000 acres, or $25,000 in all."

This was given, and the defendant took a general exception.

It is objected to this ruling that the jury was not required to find and could not have found that any particular land was agreed upon. But it at least would have been warranted in finding that the plaintiff had done in this respect all that his bargain required him to do. The agreement failed for a wholly different reason, and no difficulty in completing the sale arose on that ground. We are of opinion that the objection is entitled to no consideration, especially upon a mere general exception, and upon a point not taken in the trial court. McDermott v. Severe, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709. A second objection taken is that the condition of the consent to purchase was misstated; that the condition was not that the defendant's representation was correct, but that the railroad should agree to build. But this is evidently a point that should have been called to the attention of the court. We cannot doubt that the plaintiff's counsel and the judge meant to state what the letters showed to have happened, and would have stated it more exactly if the inaccuracy had been pointed out. Probably in speaking of the defendant's representations proving correct, statements of past facts were less referred to than those sounding in warranted prophecy. But the instruction was justified as it stood. If the defendant had had such an agreement as at one time he *gave the plaintiff to understand, no doubt [243] the purchaser would have been content and the sale would have been made.

One or two subordinate objections need only a word. It is said that the instructions did not require the jury to find that the owner and purchaser had agreed on terms. But this is best answered by reading the instruction. What is meant is that, on the evidence, there were possible points of disagreement open. This may or may not be true. But a finding that the parties had agreed was warranted and was presupposed in the request. So as to the ability of the purchaser. No question ever was raised about it; the defendant was satisfied with it, and it is questioned here only as a technical means of getting a large and doubtful verdict set aside. It is urged, faintheartedly, that a binding agreement was necessary before a commission was earned. This is not the prevailing view, and could not be the law in a case like this, where the jury must have found the defendant liable on a contract with the broker that might be performed before an absolute agreement with the purchaser should be reached.

The ruling requested for the defendant was as follows:

"If the jury believe from the evidence that any bona fide purchaser was actually found by the plaintiff for 10,000 acres of said land, as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands, and the purchaser did not rely on the said statements and representations of said plaintiff, but, with the knowledge or co-operation of said plaintiff, and at his suggestion, sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining, and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by in- [244] terviews, *conferences, or written communications, either personally or by attorney, or by others, with the president and first vice president of the Southern Railway Company, for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of the said branch railroad, and ascertained from the said officers of the said railway company, from time to time during said negotiations, and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch railroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed, and of the nonexistence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the nonappearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant."

As to this request, we must repeat that it does not matter how much or how little the purchaser relied upon the defendant's representations if the plaintiff relied upon them, and obtained a purchaser ready and able to purchase upon the basis that the defendant's representations to the plaintiff were true. That the plaintiff did rely upon them until the time when, on August 25, he announced Easter's readiness to purchase, hardly is open to dispute. But the judge told the jury that if the plaintiff at the beginning had made inquiries of the railroad and *found that it would not build, he could [245] not complain. The judge called attention to the failure to specify any time at which the plaintiff began to inquire, and said what we understand to mean that the prayers were based on the theory that if, after the purchaser was ready to complete the sale, and the question as to the railroad alone prevented it, the purchaser made an attempt to induce the railroad to build, and so discovered the truth, and thereupon refused to go on, the plaintiff could not recover. At all events, he said enough to warn the defendant to make some necessary amendments. He gave as his reason for refusing the instructions asked that they did not undertake to refer to any time prior to the consummation of the sale. The request assumed that no agreement had been reached until September 15, on evidence which it has not been necessary to state. But the plaintiff's argument was that he had earned his commission on August 25, and there was evidence on which his conclusion might be sustained. On the instructions given we have no doubt that the jury understood the true conditions of the plaintiff's case. They were told in terms that if the plaintiff was to recover they must find that the plaintiff did his work and found a purchaser, relying on the defendant's representations, if he made them, and that the purchase failed because they were inaccurate and the railroad had not agreed to build.

Judgment affirmed.

[246]*STILSON HUTCHINS, William J. Dante, and Ben. B. Bradford, Appts.,
v.
CARRIE L. MUNN.

(See S. C. Reporter's ed. 246–251.)

Injunction bond — who protected by.

1. An undertaking accompanying a temporary restraining order directed against "the defendants and each of them" inures to the benefit of all the defendants who were included in that order, although the undertaking is expressed to be one "to make good to the defendant all damages by him suffered," where it was exacted by the court, was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and shows in its title that there was more than one defendant.

Injunction bond — who protected by.

2. The owner of the property is entitled to the benefit of an undertaking exacted by the court as a condition of granting an order temporarily restraining the continuance of the erection of an addition to a dwelling, where, although such owner was never served with subpœna or notice, either of the order to show cause or of the restraining order, such order was observed until dissolved, and inflicted injury upon her rights.

Appeal — review of facts.

3. Findings of facts made by an auditor to whom a cause is referred to ascertain the damages resulting from the wrongful suing out of a temporary restraining order will not be set aside on appeal unless it is shown that there has been an error in law or a conclusion of fact unwarranted by the evidence.

Damages — for wrongfully suing out restraining order.

4. The value of the use of the dwelling for the period and season during which the owner was deprived of it as the direct result of the wrongful use of an order temporarily restraining the continuance of the erection of an addition is the proper measure of damages recoverable upon the undertaking to make good the resulting injury, exacted by the court as a condition of granting the order.

[No. 163.]

Argued March 10, 1908. Decided March 23, 1908.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, overruling exceptions to the report of an auditor to whom the cause had been referred to ascertain the damages resulting from the wrongful suing out of a temporary restraining order. Affirmed.

See same case below, 28 App. D. C. 271.

The facts are stated in the opinion.

Mr. **Edwin C. Brandenburg** argued the cause, and, with Messrs. Clarence A. Brandenburg and F. Walter Brandenburg, filed a brief for appellants.

Mr. **Samuel Maddox** argued the cause, and, with Mr. H. Prescott Gatley, filed a brief for appellee.

Mr. Justice **Moody** delivered the opinion of the court:

This is an appeal from a judgment of the court of appeals of the District of Columbia. The appellee, Carrie L. Munn, was *the owner of a lot of land, with a dwelling[247] house thereon, situated on Massachusetts avenue, in the city of Washington. The premises adjoining this lot were owned by Stilson Hutchins, one of the appellants. Mrs. Munn's dwelling house did not occupy the whole of her lot, and she decided to build an addition to it. She contracted with an architect and builder to design and construct this addition. The work under these contracts was begun about July 1, 1902, and it was expected that it would be completed about November 1, 1902, so that the enlarged structure would be ready for occupation during the season of 1902 and 1903. After making the contracts Mrs. Munn went to Europe with her family, intending to return and occupy the house on its completion in November. On August 14, 1902, Mr. Hutchins filed a bill in equity in the supreme court of the District of Columbia, praying an injunction against the continuance of the erection of the addition. Mrs. Munn, her husband, the architect, and the builder were made parties defendant. The grounds upon which the injunction was sought are not material here. On the day of the filing of the bill a justice of the supreme court of the District entered an order that the defendants show cause, on September 4 next, why the prayer for an injunction should not be granted, and further ordered that, until the hearing, the defendants be "restrained and enjoined from continuing the erection of the building." On the same day Mr. Hutchins, with the other appellants as sureties, filed an undertaking, approved by the court, which is as follows: 'Stilson Hutchins, the complainant, and William J. Dante, Ben. B. Bradford, sureties, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as

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NOTE.—As to damages for wrongfully suing out injunction—see note to Hubble v. Cole, 13 L.R.A. 312.

the justice shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction." Thereupon the work on the addition was suspended, and not re-[248]sumed until *November 25, 1902, when, upon hearing, the court dissolved the injunction and discharged the order to show cause. The work was then continued until its completion in April, 1903. Subsequently the decree of November 25, 1902, was affirmed by the court of appeals, and the cause was referred to an auditor to ascertain the damages caused to the defendants, or any of them, by the wrongful suing out of the injunction. The auditor reported that Mrs. Munn had sustained damages to the amount of $6,000, and that the other defendants had sustained no damage. Exceptions to the auditor's report were overruled by the supreme court, and the appellants were decreed to pay to Mrs. Munn, in accordance with the terms of the undertaking, the sum found by the auditor as damages. This decree was affirmed by the court of appeals in the judgment now under review.

It is contended that the undertaking does not, by its terms, include Mrs. Munn in its protection, because it is expressed to be an undertaking "to make good to the *defendant* all damages by *him* suffered." Little pains need be expended on the argument which arises out of the letter of the bond. The undertaking was exacted by the court, it was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and it was entitled "No. 23,468 Equity Docket, Stilson Hutchins, Complainant, Charles A. Munn et al., Defendants." It accompanied a restraining order directed against "the defendants and each of them," and we think it should be held to run to all the defendants who were included in that order.

It is further contended that, as Mrs. Munn was never served with a subpœna, or notice either of the order to show cause or of the restraining order, she is not entitled to the benefits of the undertaking. The order of the court was served immediately upon the architect and the builder, and the work was instantly stopped. No injury from the wrongful use of the injunction was inflicted upon either of the defendants served with the court's order, but only [249]upon the owner of the house. It is now *said that, although the court had, as a condition of issuing the restraining order, exacted an undertaking to indemnify her, she cannot recover upon it, because she was beyond the reach of the process of the court. But this view is based upon a misconception of a restraining order and the undertaking to make good the injury resulting from its wrongful use. The nature of the order and undertaking received the consideration of this court in Houghton v. Meyer (Houghton v. Cortelyou) 208 U. S. 149, ante, 432, 28 Sup. Ct. Rep. 234. The authority for the issue of such an order was shown to be § 718 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 580). The section contemplates, in cases where irreparable injury may be anticipated if the *status quo* be not preserved, the issue without notice of a temporary restraining order, to be enforced only until an order to show cause on the motion for an injunction can be heard and decided. The order may be granted with or without security to the defendants, in the discretion of the court. In the case at bar the order accomplished its purpose and instantly arrested the progress of the work by restraining those who were engaged in it. The injury against which the undertaking was designed to indemnify was incurred by Mrs. Munn, and we find nothing in the facts of this case which takes away the remedy on the undertaking exacted by the court for her protection. It is true that she did not learn of the issue of the restraining order for two weeks. But counsel, though without express authority, undertook to guard her interests, and moved to discharge the order on August 17. With all reasonable speed authority to file an answer was obtained and acted upon, the cause was heard, and the restraining order dissolved. In the meantime the restraining order was obeyed by all, had its full effect, and inflicted its full injury upon Mrs. Munn's rights. Under these circumstances it is beyond doubt that she is entitled to recover against those who undertook to make good her injuries, the damages which she sustained. It is enough that the order was obtained without notice to her, that it was wrongfully sued out, that it was observed until dissolved, and that it inflicted injury upon her rights. These facts, irrespective of the exact time when she *had knowledge of the pendency of [250] the suit or appeared in it, bring her within the terms of the undertaking. That is precisely the measure of protection which the law ought to give, and, by the statute, does give, to one against whom, without notice and hearing, an order of this kind is made.

The appellants alleged various exceptions to the auditor's report, which are directed to the findings of facts upon which the liability was based and of the amount of damages, and here, apparently, argue those exceptions on the theory that this court is at liberty to consider the evidence *de novo*, weigh and balance it, and draw such inferences and conclusions as seem proper. But this theory overlooks the proper function of an auditor, which was correctly appreciated by the court below. The findings should not be set aside unless it is shown that there has been an error in law or a conclusion of fact unwarranted by the evidence. It is enough to say that there was evidence which supported the findings of fact of the auditor and his assessment of damages. Nor does it appear that the auditor committed any error of law. His report shows the following facts, briefly stated: It was the habit of Mrs. Munn to occupy her house during the late autumn, the winter, and the early spring, and to live elsewhere during the remainder of the year. This was the common season of occupancy in Washington of houses of this character. She intended to occupy her house during the season of 1902 and 1903, but was prevented from doing so by the wrongful use of the restraining order. The addition which, if the work had not been stopped, would have been completed by November 1, was not completed until April, and could not have been completed, if reasonable speed had been used, before March. In the meantime the house, some of whose exterior walls had been removed, was practically uninhabitable. Shelter could doubtless have been found in some of the rooms, which could have been closed and warmed. But the owner was entitled to a house which could be occupied as a whole, and was available for use as a home for herself and her family. This was denied to her by the defendants' wrongful act. We [251]*think that the auditor correctly adopted as the measure of damages the value of the use of the property for the period and season during which she was thus deprived of it as the direct result of the restraining order which, in another proceeding, has been found to have been wrongfully and inequitably sued out. The decree of the court below is affirmed.

B. F. ASBELL, Plff. in Err.,
v.
STATE OF KANSAS.

(See S. C. Reporter's ed. 251-258.)

Commerce — state regulation — live-stock quarantine.

1. Interstate commerce is not unlawfully regulated, in the absence of controlling Federal legislation, by Kansas Laws 1905, chap. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.

Commerce — live-stock quarantine — conflicting state and Federal legislation.

2. Nothing in the provision of the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1907, p. 923), that, when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected animals and found them free from disease, such animals may be introduced into any state without further inspection, or exaction of fees of any kind except such as may be ordered or exacted by the Secretary of Agriculture, precluded the enactment of Kansas Laws 1905, chap. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.

Commerce — live-stock quarantine — state regulation — effect of regulations by Secretary of Agriculture.

3. A regulation promulgated by the Secretary of Agriculture under the authority of the act of February 2, 1903, which is directed to the transportation of cattle from quarantined states, and which in terms recognizes restrictions imposed by the state of destination, does not invalidate—at least, where no quarantined areas are involved—the provision of Kansas Laws 1905, chap. 495, § 27, making it a misdemeanor for any person to transport into the state cattle from any point south, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials, or by the Bureau of Animal Industry of the Interior Department of the United States.

[No. 166.]

Submitted March 6, 1908. Decided March 23, 1908.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction in the District Court of Labette County, in that state, for violating a live-stock quarantine statute. Affirmed.

NOTE.—As to constitutionality of state legislation regulating the importation of infected animals—see note to Reid v. Colorado, 47 L. ed. U. S. 108.

As to inspection laws as regulations of commerce—see note to New Mexico ex rel. McLean v. Denver & R. G. R. Co. 51 L. ed. U. S. 78.

As to inspection, quarantine, and sanitary regulations interfering with interstate commerce—see note to Smith v. Lowe, 59 C. C. A. 191.

See same case below, 74 Kan. 397, 86 Pac. 457.

The facts are stated in the opinion.

Mr. Nelson Case submitted the cause for plaintiff in error. Mr. Archie D. Neale was on the brief:

Such commodities as may lawfully become the subject of purchase, sale, or exchange are articles of interstate commerce within the protection of the commercial clause of the Constitution.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Re Ware, 53 Fed. 783; Donald v. Scott, 74 Fed. 859; Sawrie v. Tennessee, 82 Fed. 615; Re Scheitlin, 99 Fed. 272; Bennett v. American Exp. Co. 83 Me. 236, 13 L.R.A. 33, 23 Am. St. Rep. 774, 22 Atl. 159; Ballock v. State, 73 Md. 1, 8 L.R.A. 671, 25 Am. St. Rep. 559, 20 Atl. 184.

A state has not the power to prevent the importation of lawful subjects of commerce.

Leisy v. Hardin, supra; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Bowman v. Chicago & N. W. R. Co. 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Schollenberger v. Pennsylvania, supra.

If an article is not a lawful subject of commerce, then unquestionably a state would have the right, under its police power, to exclude such article; and it is only when an article is not a lawful subject of commerce that it has such right.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; Hannibal & St. J. R. Co. v. Husen, supra.

From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation.

Bennett v. American Exp. Co. 83 Me. 236, 13 L. R. A. 33, 23 Am. St. Rep. 774, 22 Atl. 159; People ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 558, 29 N. E. 1002; Gilman v. Philadelphia, 3 Wall. 724, 18 L. ed. 99; The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394. 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; United States v. E. C. Knight Co. 156 U. S. 13, 39 L. ed. 329, 15 Sup. Ct. Rep. 249; Ex parte Koehler, 1 Inters. Com. Rep. 28, 30 Fed. 867; Hardy v. Atchison, T. & S. F. R. Co. 32 Kan. 698, 5 Pac. 6; Myers v. Baltimore County, 83 Md. 385, 34 L.R.A. 309, 55 Am. St. Rep. 349, 35 Atl. 144.

Defendant brought the cattle in question from the Indian territory (now Oklahoma) into this state, and proceeded with them to the railroad, and shipped them to Missouri. He was engaged in interstate commerce, and was in possession of a lawful subject of interstate commerce.

State v. Duckworth, 5 Idaho, 642, 39 L.R.A. 365, 95 Am. St. Rep. 199, 51 Pac. 456; Bowman v. Chicago & N. W. R. Co. 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1065.

It will not do to say that the state may protect itself by the passage of statutes interfering with interstate commerce, on the theory that possible injury may occur.

State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476.

The question whether an article is or is not a subject of lawful interstate commerce must depend upon the intrinsic state or condition of the article, and not upon a mere declaration of a state legislature.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

A mere evasion of the right of Congress to regulate commerce will not be tolerated.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

A state may not, under cover of exercising its police powers, substantially prohibit or burden any foreign or interstate commerce.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543.

A police regulation going beyond the necessities of the case, and interfering with interstate commerce, is void.

Missouri, K. & T. R. Co. v. Haber, supra; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 473, 24 L. ed. 531; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Lake Shore & M. S. R. Co. v. Ohio, supra.

Congress having power to regulate commerce among the states to the same extent as with foreign nations, when that body acts all conflicting laws must give way. In this case it being shown that the rules and regulations of the Secretary of Agriculture are in direct conflict with the statute of this state under consideration, the statute must give way.

Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 99-105, 39 L. ed. 910-913, 15 Sup. Ct. Rep. 802.

This statute, being a regulation of commerce under the guise of an inspection law, cannot be upheld, but must be condemned.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

Mr. **E. L. Burton** submitted the cause for defendant in error. Messrs. C. E. Pile and W. B. Glasse were on the brief:

The state may pass inspection laws.

Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; Missouri P. R. Co. v. Finley, 38 Kan. 556, 16 Pac. 951.

Mr. Justice **Moody** delivered the opinion of the court:

A statute of the state of Kansas makes it a misdemeanor, punishable by fine or imprisonment or both, for any person to transport into the state cattle from any point south of the south line of the state, except for immediate slaughter, without [254] having *first caused them to be inspected and passed as healthy by the proper state officials or by the Bureau of Animal Industry of the Interior Department of the United States. Session Laws of 1905, chap. 495, § 27. The plaintiff in error was duly charged by information in the state court with a violation of this statute, and found guilty by the verdict of a jury. The conviction was affirmed by the supreme court of the state, and the case is now here on a writ of error, allowed by the chief justice of that court. The only Federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a state to impose.

The obvious purpose of the law was to guard against the introduction into the state of cattle infected with a communicable disease. It undoubtedly restricts the absolute freedom of interstate commerce in cattle, but only to the extent that all cattle coming to cross the guarded boundary are subjected to inspection to ascertain whether or not they are diseased. If healthy they are admitted; if diseased they are excluded. The validity of such a restriction for such purposes has been frequently considered by this court, and the principles applicable to the settlement of the question have been clearly defined. The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the states. It is not now necessary to cite the many cases supporting this proposition, or to consider some expressions in the books somewhat qualifying its generality, because in carefully chosen words it has recently been affirmed by us. At this term, Mr. Justice Peckham, speaking for the court, said: "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious." Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, ante, 230, 234, 28 Sup. Ct. Rep. 121, 123.

But, though it may not legislate for the direct control of interstate commerce, the state may exercise any part of the legislative *power which was not withdrawn [255] from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the state will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in Gibbons v. Ogden, 9 Wheat. 194, 204, 6 L. ed. 68, 72:

"So, if a state, in passing laws on subjects acknowleged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

[256] *Foreseeing cases where national and state legislation based upon different powers might, in their application, be brought into conflict, he, in the same case (p. 211), declared that then "the law of the state, though enacted in the exercise of powers not controverted, must yield,"—a rule which has constantly been applied by this court. These general principles control the decision of the case at bar. Cattle, while in the course of transportation from one state to another, and in that respect under the exclusive control of the law of the national government, may, at the same time, be the conveyance by which disease is brought within the state to which they are destined, and in that respect subject to the power of the state, exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the state may enact laws for the inspection of animals coming from other states with the purpose of excluding those which are diseased and admitting those which are healthy. Reid v. Colorado. 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

The state may not, however, for this purpose, exclude all animals, whether diseased or not, coming from other states (Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527), nor, under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other states; and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law, it is really and substantially a regulation of foreign or interstate commerce which the Constitution has conferred exclusively upon the Congress. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862. Tested by these principles, the statute before us is an inspection law and nothing else; it excludes only cattle found to be diseased; and, in the absence of controlling legislation by Congress, it is clearly within the authority of the state, even though it may have an incidental and indirect effect upon commerce between the states. *The cause, [257] however, cannot be disposed of without inquiring whether there was, at the time of the offense, any legislation of Congress conflicting with the state law. If such legislation were in existence, the state law, so far as it affected interstate commerce, would be compelled to yield to its superior authority. This question was considered and the national legislation carefully examined in Reid v. Colorado, supra, and the conclusion reached that Congress had not then taken any action which had the effect of destroying the right of the state to act on the subject. It was there said, p. 148: "It did not undertake to invest any officer or agent of the Department with authority to go into a state, and, without its assent, 'take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority, by its officers or agents, to inspect cattle within the limits of a state and give a certificate that should be of superior authority in that or other states, or which should entitle the owner to carry his cattle into or through another state without reference to the reasonable and valid regulations which the latter state may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested." There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretaries of Agriculture by the act of February 2, 1903 (32 Stat. at L. 791, chap. 349, U. S. Comp. Stat. Supp. 1907, p. 923), and the act of March

3, 1905 (33 Stat. at L. 1264, chap. 1496, U. S. Comp. Stat. Supp. 1907, p. 925). The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and [258] found *them free from infectious, contagious, or communicable disease, "such animals so inspected and certified may be shipped, driven, or transported . . . into . . . any state or territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture." There can be no doubt that this is the supreme law, and, if the state law conflicts with it, the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the state of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none.

Judgment affirmed.

CHARLES THOMAS, Pltf. in Err.,
v.
STATE OF IOWA.

(See S. C. Reporter's ed. 258-263.)

Error to state court — Federal question — how raised.

A contention that certain instructions to the jury in a criminal case in effect deprived the accused of his liberty without due process of law does not, of itself, raise a Federal question under U. S. Const., 14th Amend., with sufficient distinctness to sustain a writ of error from the Federal Supreme Court to a state court.

[No. 533.]

Argued February 26, 1908. Decided March 23, 1908.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a conviction of murder in the District Court of Polk County, in that state. Dismissed for want of jurisdiction.

See same case below (Iowa) 109 N. W. 900.

The facts are stated in the opinion.

Messrs. **Chester C. Cole** and **John T. Mulvaney** argued the cause, and, with Messrs. Mulvaney & Mulvaney, filed a brief for plaintiff in error.

Mr. **Charles W. Lyon** argued the cause, and, with Messrs. H. W. Byers and E. B. Evans, filed a brief for defendant in error.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error by which it is sought to re-examine a judgment of the supreme court of the state of Iowa. The judgment affirms the conviction of the plaintiff in error of the crime of murder in the first degree. The Code of Iowa contains the following provisions:

"4727. Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

"4728. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree, and shall be punished with death or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court, if the defendant pleads guilty.

"4729. Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years.

"4730. Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine, the degree; but if the defendant is convicted upon a plea of guilty, the court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly." Code of Iowa, 1897, title 24, chap. 2, §§ 4727-4730.

The count of the indictment upon which the verdict was returned alleged that the accused deliberately, premeditatedly, and with malice aforethought, murdered one Mabel Schofield by administering poison to her. The judge presiding at the *trial in- [262]

NOTE.—As to how and when questions must be raised and decided in state court in order to make a case for writ of error from Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

structed the jury in substance that if they were satisfied that the accused administered poison to Mabel Schofield, unlawfully and with bad intent, and that she died from the poison thus administered, then they should find him guilty of murder in the first degree, although there was no specific intent to kill. This instruction was approved by the supreme court as a correct expression of the law of the state. With that aspect of the question we have nothing to do. But it is assigned as error and argued here that this instruction in effect withdrew from the jury the question of the degree of the murder, and to that extent denied the plaintiff in error a trial by jury, and therefore denied him due process of law, in violation of the 14th Amendment to the Constitution of the United States. Without intimating that upon this statement any Federal question is presented, we must first consider whether the question was raised in the court below in such a manner as to give us jurisdiction to consider it. There is nothing in the record to show that it was so raised. The plaintiff in error duly and seasonably excepted to the instructions complained of, but in no way was it then indicated (except as hereafter appears) that he claimed that any right under the Federal Constitution was impaired by them.

The judgment of the state supreme court does not contain the slightest allusion to any Federal question. The chief justice of the state supreme court, after the final judgment in that court, signed a bill of exceptions, which contains the following statement:

"Under the rules of practice in the supreme court of Iowa no assignment of errors is required or allowed; but the questions made and discussed by counsel on the hearing in the supreme court were such as arise upon the record, the exceptions, and the motion in arrest, and for a new trial, as shown hereinbefore, and, among them, that the court below erred in giving to the jury each of the instructions set out in this bill of exceptions, and numbered, respectively, two, three, four, five, six, and fourteen, and that by said instructions the said dis-[263]trict court *of Iowa in and for Polk county denied to this plaintiff in error the right of trial by jury, in that the court, by said instructions, determined the degree of the crime of murder of which the jury should find the defendant guilty, if at all, whereas, by the common law and by the express statute of Iowa, the degree of the offense is a matter for the jury to determine, thereby in effect deprived the plaintiff in error of *his liberty without due process of law.*

"That, upon the trial and hearing of the case in the supreme court of Iowa, the parties, respectively, to wit, the state of Iowa and also the defendant and appellant, Charles Thomas, by their respective counsel, submitted arguments, both in print and orally, wherein they discussed the questions aforesaid, and all others arising upon the record."

The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for a writ of error from this court or in the assignments of error here. Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281. All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they "in effect deprived the plaintiff in error of his liberty without due process of law;" and that the question thus raised was discussed before the supreme court of the state. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments which exist under the Constitution and is regulated by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). A mere claim in the court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution. See Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; Miller v. Cornwall R. Co. 168 U. S. 131, 134, 42 L. ed. 409, 410, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 88, 49 L. ed. 394, 397, 25 Sup. Ct. Rep. 176.

Writ of error dismissed.

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*ADOLPH F. LIPPHARD, William A. Lipphard, Adolph F. Lipphard, Jr., et al., Plffs. in Err. and Appts., [264]

v.

IDA P. HUMPHREY, John F. Pyle, George B. Anderson, et al.

(See S. C. Reporter's ed. 264–274.)

Evidence — presumption — knowledge of contents of will by illiterate testatrix.

1. A testatrix will not be presumed ignorant of the contents of a will, which was not read to her at the time of execution, because she cannot read, where there is a total lack of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will.

Evidence — declarations of testatrix.

2. Declarations of an illiterate testatrix

prior and subsequent to the date of her will, as to how she intended to dispose, or had disposed, of her property, are properly held inadmissible to show that she was ignorant of its contents, where there was no evidence of testamentary incapacity at the date of the will, and nothing in the evidence excluded from which it could be inferred, and there was no evidence of fraud or undue influence.

[No. 188.]

Argued March 20, 1908. Decided April 6, 1908.

IN ERROR to and APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, admitting a will to probate. Affirmed.

See same case below, 28 App. D. C. 355.

Statement by Mr. Chief Justice **Fuller**:

Loraine Lipphard, of the District of Columbia, died December 9, 1903, leaving a paper writing purporting to be her last will and testament, bearing date April 27, 1898, duly attested by three witnesses, and naming Rev. Mr. Meador as executor.

Decedent left surviving her as her next of kin and sole heirs at law her husband, Adolph F. Lipphard, Sr.; three sons, named John, William A., and Adolph F. Lipphard, Jr.: two daughters, named Sophia L. Hellen, born Lipphard, and Capitola L. Anderson, born Lipphard; sixteen grandchildren, four of whom were infants under the age of twenty-one years. All the other of her heirs and next of kin were of lawful age.

Decedent's property consisted of a small quantity of personal property, valued at $350, and some real estate, valued at $10,000.

The husband, Adolph F. Lipphard, Sr., and two of the sons, William A. and Adolph F. Lipphard, Jr., filed a caveat to the probate of the will. All of the other next of kin and heirs at law became parties in one way or another. Before the issues were framed on the caveat the Rev. Mr. Meador departed this life. Thereupon decedent's
[265]daughters, Capitola L. Anderson *and Sophia L. Hellen, beneficiaries under the writing, petitioned the court for leave to propound said paper writing as and for the last will of decedent, and an order was passed by the court below authorizing this to be done. Thereafter a decree was passed framing issues upon the caveat, to be tried by a jury. The issues were five in number and were as follows:

"1. Was the paper writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?

"2. Was the said writing executed and attested in due form, as required by law?

"3. At the time of the execution of said paper writing, was the said Loraine Lipphard of sound and disposing mind and capable of making a valid deed or contract?

"4. Was said writing procured by fraud or undue influence, practised upon her by any person or persons?

"5. Was the signature of the said Loraine Lipphard procured by force exercised upon her by any person or persons?"

Barnard, J., presiding at the trial of the issues, directed the jury to find the third, fourth, and fifth issues in favor of the caveatees, on the ground that the evidence was insufficient to warrant the jury in finding a verdict thereon in favor of the caveators. The first and second issues were submitted to the jury with instructions by the court to the effect that unless the jury believed that the contents of the paper were known to testatrix at the time of execution, they should find for the caveators. If, however, they should find from the evidence that testatrix did know the contents of the paper, and did sign the same by her mark in the presence of witnesses, who signed the same as witnesses in her presence, the verdict should be in favor of the caveatees. The jury found the issues in favor of the caveatees, and the will was accordingly admitted to probate and record May 3, 1906.

From this decree the caveators appealed to the court of appeals of the District of Columbia (28 App. D. C. 355), which affirmed the decree of the supreme court of the District, and thereupon the case was brought to this court.

*The paper writing in controversy was wit-[266]
nessed by three credible witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appeared that on the 27th day of April, 1898, Mrs. Loraine Lipphard brought the writing to the office of Miss Parker, one of the attesting witnesses, with whom she had long been acquainted, and told her that it was her last will and testament, and that she wanted it attested by three witnesses. Two other witnesses with whom she was also acquainted, one of them for forty years, were procured, and, all three being present, testatrix declared the paper writing to be her will and signed it by her mark thereto in the presence of all the witnesses, and they signed their names thereto as attesting witnesses in her presence. The testatrix was at the time of sound mind and capable of making a valid deed or will. The will was not read in the presence of the witnesses, and after the testatrix had subscribed her "mark" and the will had been witnessed, it was handed to her and she took it away with her. After Mrs. Lipphard's

death the will was produced by Rev. Mr. Meador and given by him to an attorney, who lodged it in the office of the register of wills.

Evidence was adduced on the trial on behalf of the caveators that Mrs. Lipphard could not read or write; and she was a licensed midwife and had a great number of cases; that the title to the real estate devised by the will was originally in her husband; that in March, 1857, he put a trust on the property, and it was subsequently sold thereunder; that he afterward took title to the property and again it was sold, and then the title was taken in the wife's name. The husband's testimony tended to show that he was improvident. Testatrix was an energetic woman and a good wife. Part of the property when purchased was vacant land. In 1894 this land was improved by two houses. Testatrix made the contract for the erection of these houses and attended to the building of the same. The husband and wife had lived happily together for sixty-five years.

[267] *The will devised and bequeathed the entire estate of the testatrix to the Rev. Chastain C. Meador in trust: (1) To pay all funeral expenses and debts; (2) for the use of her husband, Adolph F. Lipphard, during his life; (3) to pay the expenses of said husband's last illness and funeral; (4) upon the death of the husband, to divide the same among children named, according to the directions therein contained; the trustee also being appointed executor. The real estate consisted of three lots, two of which were specifically devised to the two daughters.

Mr. **Chapin Brown** argued the cause, and, with Messrs. Charles H. Bauman and J. P. Earnest, filed a brief for plaintiffs in error and appellants:

Declarations of illiterate testators are admissible in evidence.

Harleston v. Corbett, 12 Rich. L. 604; Watterson v. Watterson, 1 Head, 1; Cox v. Cox, 4 Sneed, 81; Rollwagen v. Rollwagen, 63 N. Y. 504; Selden v. Myers, 20 How. 506, 15 L. ed. 976; Adams v. Norris, 23 How. 353, 16 L. ed. 539.

Where a person, not intelligent, but illiterate, executes his will with due formalities, the presumption of knowledge of the contents of the will does not prevail, but it devolves upon the proponents of the will to prove that the testator was familiar with such contents.

1 Underhill, Wills, 201; Day v. Day, 3 N. J. Eq. 552; Schouler, Wills, 3d ed. § 317; 1 Wms. Exrs. 7th Am. ed. p. 414; 1 Jarman, Wills, Bigelow's 6th Am. ed. p. 47; Harleston v. Corbett, supra; Lake v. Ranney, 33 Barb. 49; Re Murphy, 15 Misc. 208, 37 N. Y. Supp. 223; Harding v. Harding, 18 Pa. 340; Watterson v. Watterson, supra; Taylor v. Creswell, 45 Md. 422; Wisener v. Maupin, Baxt. 342; Key v. Holloway, 7 Baxt. 575; Tucker v. Calvert, 6 Call (Va.) 90; Guthrie v. Price, 23 Ark. 407; Rollwagen v. Rollwagen, 63 N. Y. 517; Weir v. Fitzgerald, 2 Bradf. 42; Burritt v. Silliman, 16 Barb. 198; Van Pelt v. Van Pelt, 30 Barb. 134; Price v. Price, 12 Eng. L. & Eq. 144.

Where the issue of mental or testamentary capacity is involved, and upon the question of undue influence, the declarations of the supposed testator are admissible.

Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Barbour v. Moore, 4 App. D. C. 548; Denison's Appeal, 29 Conn. 399; Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444; Robinson v. Hutchison, 26 Vt. 38, 60 Am. Dec. 298; Howell v. Barden, 14 N. C. (3 Dev. L.) 442; Tunison v. Tunison, 4 Bradf. 138.

The declarations of the testatrix should certainly have been admitted to show that she did not know the contents of the will.

Adams v. Norris, supra; Thompson v. Updegraff, 3 W. Va. 629; Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346; Anderson v. Cranmer, 11 W. Va. 582; Jarrett v. Jarrett, 11 W. Va. 584; Mathews v. Warner, 4 Ves. Jr. 186; Pemberton v. Pemberton, 13 Ves. Jr. 290; Norris v. Sheppard, 20 Pa. 475; Neel v. Potter, 40 Pa. 483; Starrett v. Douglass, 2 Yeates, 46; Den ex dem. Trumbull v. Gibbons, 22 N. J. L. 140, 51 Am. Dec. 253; Crispell v. Dubois, 4 Barb. 399; Stewart v. Lispenard, 26 Wend. 261.

Mental or testamentary capacity is not perfect in case of blindness, illiteracy, or weakmindedness.

1 Underhill, Wills, 201; 1 Jarman, Wills, 6th ed. ** 35, 47; Harleston v. Corbett, Watterson v. Watterson, Burritt v. Silliman, Weir v. Fitzgerald, and Adams v. Norris,—supra.

Messrs. **B. F. Leighton** and **C. Clinton James** argued the cause and filed a brief for defendants in error and appellees:

In the absence of fraud or undue influence, the illiterate maker of a will knows its contents. Affirmative proof of such knowledge, where the will is properly signed and executed, is not required.

Vernon v. Kirk, 30 Pa. 224; King v. Kinsey, 74 N. C. 261; Hoshauer v. Hoshauer, 26 Pa. 404; Guthrie v. Price, 23 Ark. 407; Boyd v. Cook, 3 Leigh, 32; Shanks v. Christopher, 3 A. K. Marsh. 144; Pettes v. Bingham, 10 N. H. 514; Clifton v. Murray, 7 Ga. 565, 50 Am. Dec. 411; Harrison v.

Rowan, 3 Wash. C. C. 584, Fed. Cas. No. 6,141; Doran v. Mullen, 78 Ill. 342; Walton v. Kendrick, 122 Mo. 504, 25 L.R.A. 707, 27 S. W. 872; Nickerson v. Buck, 12 Cush. 341; Upchurch v. Upchurch, 16 B. Mon. 110; Smith v. Dolby, 4 Harr. (Del.) 351; Rosser v. Franklin, 6 Gratt. 25, 52 Am. Dec. 97; 1 Underhill, Wills, §§ 118, 141; Jarman, Wills, 5th ed. § 78; Windham v. Chetwynd, 1 Burr. 414.

The declarations of the testatrix were properly excluded.

Throckmorton v. Holt, 180 U. S. 573, 45 L. ed. 673, 21 Sup. Ct. Rep. 474; Gibson v. Gibson, 24 Mo. 227; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Shailer v. Bumstead, 99 Mass. 123; Boylan v. Meeker, 28 N. J. L. 274.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The contention of the appellants is that, as testatrix could not read, and as the will was not read to her at the time of its execution, it was therefore to be presumed that she did not know the contents of the will when she executed it, or that the jury ought not to have been allowed to presume from the evidence produced before them that the testatrix had knowledge of the contents of the will.

Mrs. Lipphard brought the will with her to the office of one of the attesting witnesses for the purpose of execution, and, after its execution, took it away with her, and at her death it appeared in the possession of the Rev. Mr. Meador, the executor named therein, and by whom it was propounded for probate and record. She declared to the witnesses that it was her will, and requested them to attest it as such; and its provisions were reasonable and natural. She was shown to be a woman of intelligence and business capacity; she was in bodily and mental health and vigor when the instrument was executed; and there was no suggestion of fraud or undue influence in the case.

In these circumstances the jury properly concluded that the testatrix knew the contents of the will at the time of its execution, and the court might well have directed such finding, unless the bare fact of the inability of testatrix to read raised a legal presumption that she did not possess that knowledge, and the absence of the reading of the will to her at that time was fatal. But we know [269] of no such presumption as matter *of law, and, on the contrary, the presumption where a will is properly signed and executed is that the testator knows the contents. Where there is evidence of the practice of fraud or of undue influence, affirmative proof of knowledge of the contents may be necessary, but not so in any other case, simply because of a presumption arising from inability to read. Taylor v. Creswell, 45 Md. 422, 431; Vernon v. Kirk, 30 Pa. 224; King v. Kinsey, 74 N. C. 261; Hoshauer v. Hoshauer, 26 Pa. 404; Clifton v. Murray, 7 Ga. 565, 50 Am. Dec. 411; Doran v. Mullen, 78 Ill. 342; Walton v. Kendrick, 122 Mo. 504, 25 L.R.A. 701, 27 S. W. 872; Nickerson v. Buck, 12 Cush. 341; Guthrie v. Price, 23 Ark. 407.

In the latter case testatrix's name was subscribed to the will, and between her Christian and surname was her mark in the form of a cross. The attesting witnesses signed the will at her request, in her presence, and in the presence of each other. She produced the paper writing for them to attest, and declared that it was her will, and that she desired them to witness it as such. She did not write her name, but made her mark to the paper. It was not shown who did write her name to the will. It was not written by either of the witnesses, nor in their presence. Testatrix could not read, and the will was not read to her in the presence of, or to the knowledge of, the witnesses. The trial court instructed the jury, in effect, that notwithstanding the will was executed in accordance with the formalities prescribed by the statute, yet, it being shown that the testatrix could not read, the will was invalid, unless it was proved that it was read to her and that she was informed as to its contents. After a review of the authorities, the supreme court of Arkansas held such instruction to be erroneous, and Chief Justice English, in the concluding part of his opinion, said:

"It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, but it may have been before. She produced the will herself, declared it to be her will, asked the witnesses to attest it as *such, signed it [270] by making her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease, or approaching dissolution. The provisions of her will appear to be reasonable. It is not shown that any imposition was practised upon her, or that her sons had any agency in the preparation of the will. It was erroneous for the court to tell the jury as a matter of law that, it being shown that she could not read, it was necessary to prove that the will was read to her. They had the right to infer, from all the circumstances, that she knew the contents of the will, though, as shown by the authorities above quoted, in determining whether there was fraud or imposition in the execution of the will, the fact that she could not read, and that the will was not read to her at the time she signed it, were circumstances to be considered by the jury."

True, the presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption, but it must prevail in the absence of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will. In the present case there was no attempt to show that the testatrix was not capable of making a valid deed or contract at the date of making the will; on the contrary, the evidence showed that she was a woman of energy, capacity, and intelligence. Nor was any proof offered of fraud or undue influence in the production of the will. Mrs. Lipphard brought the will, as we have said, to Miss Parker's office for the purpose of having it executed; she declared to the attesting witnesses the paper to which she made her mark to be her last will and testament. She was a person of sound mind at the date of the will, and it was executed and attested in the manner required by statute.

It is obvious that the verdict of the jury ought not to be disturbed and a new trial allowed unless some reversible error was committed in the course of the trial, and [271]appellants insist *that such error existed in the exclusion of evidence of declarations alleged to have been made by the testatrix prior and subsequent to the date of her will as to how she intended to dispose, or had disposed, of her property.

Decedent's husband testified that his wife talked to him often, prior to the date of the will, as to what she intended to do with her property after her death, and that they talked the matter over after the date of the will. He was asked what she said, but objection to the question was sustained. Appellants did not state what they expected to prove by the husband.

Albert R. Humphrey, another witness, testified that he had a conversation with Mrs. Lipphard about two years before she died. He was asked the following questions:

"Did she tell you how she had left her property, or how she was going to leave it? A. Yes, sir.

"What did she say to you in reference to that matter?"

To which caveatees objected, and the court sustained the objection. Counsel for appellants stated that he desired to show by this witness that testatrix denied leaving the property as mentioned in the will, this being more than three years after the will was executed.

William A. Lipphard, one of the caveators, was asked a similar question, and, upon objection, the court made a like ruling, excluding the evidence. He said that he had a conversation with her in reference to her will just before her death; that she told him how she had left her property.

Mrs. Sarah Lipphard, the wife of one of the caveators, testified that eight or ten weeks before decedent died she asked her if she had made a will, and then she was asked the following question:

"What did she say in reference to what was in her will and what she had done with her property, if anything?"

On objection by the caveatees the evidence was excluded. Counsel of caveators stated to the court that he desired to show by this witness that testatrix had denied to the witness *that she had left her property as[272] and in the manner stated in the will.

Appellants' brief asserts that the offer was made in support of the issue of want of mental capacity in the testatrix at the time she made her will.

In Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262, 265, Fed. Cas. No. 13,412, Mr. Justice Washington said that declarations of a deceased, prior or subsequent to the execution of a will, were nothing more than hearsay, and that there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity.

In Throckmorton v. Holt, 180 U. S. 573, 45 L. ed. 673, 21 Sup. Ct. Rep. 474, Mr. Justice Peckham, speaking for the court, expressed the opinion, after much consideration, that the principles upon which our law of evidence is founded necessitated the exclusion of such evidence, both before and after the execution; saying:

"The declarations are purely hearsay, being merely unsworn declarations, and, when no part of the *res gestæ*, are not within any of the recognized exceptions admitting evidence of that kind.

"Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But, if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

. . . .

"When such an issue [one of mental capacity] is made, it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations [273]are admitted, not as any evidence *of their truth, but only because he made them; and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity.

. . . .

"It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of a state of mind, whether mentally strong and capable, or weak and incapable, and that, from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy."

And see Re Kennedy, 167 N. Y. 163, 176, 60 N. E. 442. In Shailer v. Bumstead, 99 Mass. 123, it was ruled:

"Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question."

In the present case no foundation was laid for the admission of this evidence. Not a syllable of testimony was adduced by appellants to show want of testamentary capacity at the date of the will. For aught the record shows, she retained her mental powers up to the time of her death, which took place five years and eight months after making her will.

As we have said, appellants did not state what they expected to prove by decedent's husband, nor what they expected to prove by the evidence of William A. Lipphard. This witness testified on cross-examination that he did not know his mother had made a will until after her death. In his direct examination he stated that she told him, in a conversation had with her a week before she died, how she had disposed of her property by her will.

And so the offer to prove by Albert R. Humphrey, that the testatrix, two years [274]prior to her death, and more than *three years after the execution of the will, denied giving her property as provided by her will, or the similar offer made with respect to the witness Mrs. Sarah Lipphard, wife of Adolph Lipphard, as to alleged conversations with decedent eight or ten weeks before her death, were at a period too remote to throw any light upon the mental condition of the testatrix at the time the will was made.

There was no evidence whatever of mental incapacity, and this particular evidence was too remote to justify any reasonable inference to that effect; and, if there was no lack of mental capacity, then this evidence would have no tendency to show that she did not have knowledge of the contents of the will when she executed it and declared it to be her last will and testament. Because she may have resisted importunity for information in respect to what she had done, three years after she had made her will, it does not follow that she did not know the contents of the will when she made it. There must be some other proof, some suspicious circumstances, some evidence of fraud or undue influence, before evidence of conversations years after the execution of the will should be admitted to show that she did not know what she was doing when she made it.

Decree affirmed.

*McCABE & STEEN CONSTRUCTION[275] COMPANY, a Corporation, Plff. in Err.,

v.

WILLIAM N. WILSON.

(See S. C. Reporter's ed. 275–282.)

Appeal — waiver of error.

1. Any supposed error committed by the trial court in overruling a demurrer to the evidence is waived where the defendant thereafter proceeds to introduce testimony in its own behalf.

Appeal — harmless error.

2. The refusal, based upon the state of the pleadings, to permit a corporate defendant to prove facts tending to show that the partnership out of which it grew was the real party in interest, does not affect "substantial rights" within the meaning of Wilson's Okla. Ann. Stat. chap. 66, art. 8, § 146, governing the reversal of judgments, where no testimony on that point was offered after the pleadings were amended, and the incorporation was evidently merely for business convenience, the partners taking nearly all the stock in their own names, and was followed by no change in the manner of doing business.

NOTE.—As to who are fellow servants generally—see note to Northern P. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.

As to question whether servants handling ordinary trains, and servants employed in repair or construction of a permanent way, are fellow servants—see note to Sofield v. Guggenheim Smelting Co. 50 L.R.A. 432.

As to when railroad conductors and engineers are fellow servants of other employees—see note to Northern P. R. Co. v. Hambly, 38 L. ed. U. S. 1009.

Appeal — sufficiency of general exception.

3. An exception taken as an entirety to the ruling of the court upon several requested instructions is not sufficient to raise the correctness of the ruling.

Master and servant — who are fellow servants.

4. A fireman employed on a locomotive, and engaged in the movement of a train, is not a fellow servant with the superintendent of construction and the foreman of a bridge gang, who are present and engaged in supervising and directing the work on the bridge.

Appeal — review of verdict — negligence.

5. A verdict finding that a construction company was guilty of negligence toward a locomotive fireman in its employ who was injured by the giving way of a pile bridge during high water will not be disturbed by the Federal Supreme Court, where it has been approved by both the trial and territorial supreme courts, and there was evidence that the bridge had once before given way in time of high water, and was rebuilt without change of plan.

Master and servant — contributory negligence.

6. A locomotive fireman is not guilty of contributory negligence precluding a recovery for an injury caused by the giving way of a bridge because he did not avail himself of the engineer's permission, given before the engine moved onto the bridge, to leave the engine and go back on the train, where both the engineer and himself were advised by the construction force that the bridge was safe.

[No. 155.]

Argued March 5, 6, 1908. Decided April 6, 1908.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of the Third Judicial District, in that territory, in favor of plaintiff in an action by an employee of a construction company to recover damages for injuries caused by the giving way of a bridge. Affirmed.

See same case below, 17 Okla. 355, 87 Pac. 320.

Statement by Mr. Justice **Brewer**:

On June 9, 1902, Wilson, the defendant in error, was injured by the giving way of a railroad bridge across the Canadian river in the territory of Oklahoma. The bridge was on a new line of railroad, which was being [276] constructed from Oklahoma *City to Quanah, Texas. The petition, filed October 18, 1902, in the district court of the third judicial district, sitting in and for the county of Oklahoma, charged that the defendant, now plaintiff in error, was a subcontractor and constructing a portion of the railroad, including therein the crossing of the Canadian river; that Wilson was a locomotive fireman employed by the defendant. The circumstances of the injury were stated in the petition, and negligence on the part of the defendant was averred. A trial resulted in a verdict and judgment in favor of the plaintiff for $5,500. This judgment was affirmed by the supreme court of the territory (17 Okla. 355, 87 Pac. 320), and thence brought here by writ of error.

Mr. **Arthur G. Moseley** argued the cause, and, with Mr. Louis B. Eppstein, filed a brief for plaintiff in error:

The testimony offered did not show any negligence on the part of the defendant.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Daniel v. Metropolitan R. Co. L. R. 3 C. P. 216; Re Michigan S. S. Co. 133 Fed. 577; Baldwin v. St. Louis, K. & N. R. Co. 68 Iowa, 37, 25 N. W. 918; Chesapeake, etc., R. Co. v. Thierman, 15 Ky. L. Rep. 655; Foss v. Baker, 62 N. H. 247; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462.

If negligence existed, it existed equally on the part of the plaintiff and on the part of the master.

Factors & T. Ins. Co. v. Werlein, 42 La. Ann. 1046, 11 L.R.A. 361, 8 So. 435; Cowhill v. Roberts, 71 Hun, 127, 24 N. Y. Supp. 533; Hayden v. Smithville Mfg. Co. 29 Conn. 548; Hunt v. Kane, 40 C. C. A. 372, 100 Fed. 256; Larkin v. Washington Mills Co. 45 App. Div. 6, 61 N. Y. Supp. 93; Louisville & N. R. Co. v. Hall, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277; Louisville & N. R. Co. v. Banks, 104 Ala. 508, 16 So. 547; Devitt v. Pacific R. Co. 50 Mo. 302; Rains v. St. Louis, I. M. & S. R. Co. 71 Mo. 164, 36 Am. Rep. 459; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 684.

The plaintiff assumed whatever risk was attendant upon crossing the bridge.

Enright v. Oliver & Burr, 69 N. J. L. 357, 101 Am. St. Rep. 710, 55 Atl. 277; Anderson v. Winston, 31 Fed. 528; Roul v. East Tennessee, V. & G. R. Co. 85 Ga. 197, 11 S. E. 558; Writt v. Girard Lumber Co. 91 Wis. 496, 65 N. W. 173; Wright v. Southern R. Co. 80 Fed. 260; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257; Allen v. Gilman, 127 Fed. 609; Tesch v. Milwaukee Electric R. & Light Co. 108 Wis. 593, 53 L.R.A. 618, 84 N. W. 823; Baltimore & O. R. Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Dewitt v. Pacific R. Co. supra; Hooper

v. Columbia & G. R. Co. 21 S. C. 541, 53 Am. Rep. 691; Carbine v. Bennington & R. R. Co. 61 Vt. 348, 17 Atl. 491.

The plaintiff having laid the negligence attributable to defendant to the unskilful and negligent manner in which the bridge was constructed and repaired by defendant, and the court having told the jury in the charge quoted that the uncontradicted evidence showed that the defendant company did not originally build and did not make the repairs upon the bridge, the verdict should have been for the defendant.

Buffington v. Atlantic & P. R. Co. 64 Mo. 246; Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 516; Columbus, C. & I. C. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Beck v. Ferrara, 19 Mo. 30; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818.

The allegation of negligence having been the negligent and unskilful manner in which the bridge was constructed and repaired by defendant, and that being the only allegation of negligence, the charge given by the court, to the effect that, although defendant did not construct or repair the bridge, if the construction was faulty, and defendant knew of it, it would be chargeable the same as though it had built the bridge, is not supported by the petition, in which no allegation of knowledge is made.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Columbus, C. & I. C. R. Co. v. Troesch, supra; 22 Enc. Pl. & Pr. p. 557; Price v. St. Louis, K. C. & N. R. Co. 72 Mo. 414.

Apart from a consideration of the work that they were actually engaged in at the time, Pratt, Fallahay, Waters, and the plaintiff were fellow servants.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 380, 37 L. ed. 778, 13 Sup. Ct. Rep. 914; Northern P. R. Co. v. Peterson, 162 U. S. 347, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983.

Neither the construction nor the repairing of the bridge was any more the master's work than the construction or repair of any other portion of the road, but was a part of the common undertaking of all persons there engaged; and the rule requiring the master to furnish his servants with a reasonably safe place in which to work does not apply where the place of work is one that the servants themselves undertake to erect and provide as one of the duties and undertakings of their common employment.

Thayer v. Smoky Hollow Coal Co. 121 Iowa, 121, 96 N. W. 718; Kansas City Southern R. Co. v. Billingslea, 54 C. C. A. 109, 116 Fed. 335; Kansas & T. Coal Co. v. Chandler, 71 Ark. 518, 77 S. W. 912; Kellogg v. Denver City Tramway Co. 18 Colo. App. 475, 72 Pac. 609; Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Hoelter v. McDonald, 82 App. Div. 423, 81 N. Y. Supp. 616; Culver v. South Haven & E. R. Co. 138 Mich. 443, 101 N. W. 663; Baltimore & O. S. W. R. Co. v. Hunsucker, 33 Ind. App. 27, 70 N. E. 556; Fournier v. Pike, 128 Fed. 991.

Mr. **James R. Keaton** argued the cause, and, with Messrs. John W. Shartel, Frank Wells, and John H. Wright, filed a brief for defendant in error:

Conceding, for the sake of the argument, that at the time the demurrer was interposed plaintiff's evidence was in fact insufficient to show any negligence on the part of the defendant, still, when defendant proceeded to introduce evidence in its behalf, and in so doing supplied this deficiency by introducing some which reasonably tended to show negligence on its part, then such defect was cured.

Atchison & N. R. Co. v. Reecher, 24 Kan. 228; Pine v. Western Nat. Bank, 63 Kan. 462, 65 Pac. 690; German Ins. Co. v. Frederick, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 144; Simpson v. Kimberlin, 12 Kan. 579.

If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has the right to rely on his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely on his master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has the right to assume that he is not sent into any unusual peril, and that he is not bound to investigate the risk before obeying his orders.

1 Shearm. & Redf. Neg. 5th ed. § 186.

Negligence on the part of defendant is abundantly shown by the evidence in the case at bar.

Terre Haute & I. R. Co. v. Fowler, 154 Ind. 682, 48 L.R.A. 531, 56 N. E. 228; Van Amburg v. Vicksburg, S. & P. R. Co. 37 La. Ann. 650, 55 Am. Rep. 517; Copeland v. Wabash R. Co. 175 Mo. 650, 75 S. W. 106; Hardesty v. Largey Lumber Co. 34 Mont. 151, 86 Pac. 29; Westland v. Gold Coin Mines Co. 41 C. C. A. 193, 101 Fed. 59; Bradford Glycerine Co. v. Kizer, 51 C. C. A. 524, 113 Fed. 894; 1 Thomp. Neg. § 15.

The fact that an assurance of safety had been given is one to be weighed in this case.

Haas v. Balch, 6 C. C. A. 201, 211, 12 U. S. App. 534, 56 Fed. 987; 4 Thomp. Neg. § 4669; Kerrigan v. Chicago, M. & St. P. R. Co. 86 Minn. 407, 90 N. W. 976.

The defendant owed a duty to plaintiff in the matter of furnishing a reasonably safe roadbed, including bridges, upon which his engine could be operated.

Toledo, P. & W. R. Co. v. Conroy, 68 Ill. 560; Elmer v. Locke, 135 Mass. 575; 4 Thomp. Neg. § 4856; Van Amburg v. Vicksburg, S. & P. R. Co. 37 La. Ann. 653, 55 Am. Rep. 517; Lynn v. Antrim Lumber Co. 105 La. 451, 29 So. 874.

Plaintiff was not guilty of contributory negligence, and did not assume whatever risk was attendant upon crossing the bridge.

Pursley v. Edge Moor Bridge Works, 56 App. Div. 71, 67 N. Y. Supp. 719; Giles v. Diamond State Iron Co. 7 Houst. (Del.) 453, 8 Atl. 368; Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 18 U. S. App. 683, 61 Fed. 927; Tennessee Coal, I. & R. Co. v. Henderson, 100 Ala. 451, 14 So. 287; Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 So. 176; Valley R. Co. v. Keegan, 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357; Jemnienski v. Lobdell Car Wheel Co. 5 Penn. (Del.) 385, 63 Atl. 935; Ross-Paris Co. v. Brown, 28 Ky. L. Rep. 813, 90 S. W. 568; Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109; Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 4 L.R.A.(N.S.) 1161, 77 N. E. 190; Columbian Enameling & Stamping Co. v. O'Burke, 37 Ind. App. 518, 117 Am. St. Rep. 337, 77 N. E. 409; Kerrigan v. Chicago, M. & St. P. R. Co. supra.

The duty of the master to furnish a safe place for its employees to work in is an independent one.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; Northern P. R. Co. v. Peterson, 162 U. S. 347, 353, 40 L. ed. 994, 997, 16 Sup. Ct. Rep. 843.

The cases cited by counsel for plaintiff in error do not support the proposition that the act of the engineer and fireman in running a train across a bridge is so related to the principal work of repairing the bridge as to make it a "common undertaking," so as to abrogate the rule requiring the master to furnish a safe place on which to run such engine.

Mr. Justice **Brewer** delivered the opinion of the court:

When the plaintiff rested the court overruled a demurrer to the evidence. This ruling, however, cannot avail the defendant, whatever the defects then in the case, for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error. Accident Ins. Co. v. Crandal, 120 U. S. 529, 530, 30 L. ed. 741, 742, 7 Sup. Ct. Rep. 685; Robertson v. Perkins, 129 U. S. 233, 236, 32 L. ed. 686, 687, 9 Sup. Ct. Rep. 279; Bogk v. Gassert, 149 U. S. 17, 23, 37 L. ed. 631, 634, 13 Sup. Ct. Rep. 738; Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217.

The petition averred that one Pratt was defendant's superintendent of construction and one Fallahey foreman of the gang engaged in work on the bridge, and that the plaintiff was employed by the defendant through its general superintendent. The answer, in addition to certain special defenses, was *an unverified general denial, and the [**277**] court held that under the pleadings the defendant was estopped from showing that the foreman of the bridge gang and the superintendent of construction were not in its employ. This ruling was based upon § 3986 of the Oklahoma General Statutes, which provides that "in all actions allegations . . . of any appointment or authority . . . shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Defendant also sought to prove that plaintiff was not in its employ; that it in fact did not exist at the time of the accident; that the contract for the construction work was taken by a partnership, McCabe & Steen. The answer of defendant alleged that the injury to plaintiff "was due to one of the risks assumed by the plaintiff in his contract of employment with this defendant."

The general denial in the answer as originally filed was, in terms, of "the allegations contained in the petition in manner and form as therein set forth." During the progress of the trial the defendant asked leave to amend by striking out the words "in manner and form as therein set forth," to which application the plaintiff objected, saying:

"As far as the general denial being sufficient to permit the defendant admitting that it is the proper defendant, and to raise further issues as far as it not being guilty of any negligence, admitting that it was the defendant and was doing the contracting work there, why we don't care anything about it; but we do object to their being permitted to amend their answer in any way so as to raise the issue that this defendant is not the defendant with whom the plaintiff contracted and who was doing this work."

The court thereupon announced its decision to neither permit nor deny the defendant leave to amend at that time, saying:

The Court: We will go ahead now and

treat this answer as a general denial at this time, and will reserve my ruling on your motion until I see further; I will fix the terms later.

[278] *Thereafter the question came up again, and the record shows these facts:

The Court: The defendant will be permitted to amend the general denial by striking out those words (the words heretofore referred to) by the payment of half of the costs of court to this date, except the witnesses of the plaintiff,—the fees; that is, provided, however, that if a continuance by reason of this amendment is taken by the plaintiff, the defendant shall be taxed with all the costs, unless the court should continue it on account of some showing made by the plaintiff; then, of course, the costs occasioned by the amendment would follow.

Mr. Keaton: Counsel for plaintiff here states that if it is permitted to show by testimony that the McCabe & Steen Construction Company were not building this road and not building the bridge, then the plaintiff will have to make a showing and ask for a continuance of the case in order to reform the pleadings.

Mr. Moseley: Well, we have not offered that testimony yet.

The Court: You gentlemen have heard my statement that if a continuance should be made necessary, then all the costs will follow.

Whereupon the defendant amends its answer by striking out certain words, the same being "in manner and form as therein set forth," which appeared between the word "petition" and the word "and" in the third line of first paragraph of said answer.

It will be observed that counsel for the defendant stated that he had not yet offered testimony to show that the McCabe & Steen Construction Company was not building the road and the bridge, and the record shows that thereafter there was no testimony in any form offered to establish that fact. Now whatever might have been competent testimony under the answer as amended, it appears by the statement of counsel that no testimony respecting the matter had been offered, and the record shows that none was thereafter offered. It [279] must *be stated, however, that prior to the ruling just quoted it had been shown that within six weeks after the injury, and while the work of construction was still in progress, the partnership conveyed all its interest to the corporation, the two members of the partnership of McCabe & Steen taking 96 per cent of the corporate stock. This transfer was of so little significance that it was unknown to its counsel at the time he filed the answer, and from his statement he evidently did not care to press any defense on that ground. The Oklahoma statute provides: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Wilson's Rev. & Anno. Stat. chap. 66, art. 8, § 146.

With reference to these several matters thus grouped together, we are of opinion that the Oklahoma statutes we have just quoted sufficiently answer any claim of error. The litigation proceeded upon the theory that the corporation was the real party in interest, and while the partnership and the corporation were not identical, yet the partners were substantially the corporation, and the change in organization did not materially effect the rights of the plaintiff. Evidently, for business convenience, the partners concluded to organize as a corporation; and yet they took the bulk of the stock in their own names. They were practically the owners, and it does not appear that there was any change in the manner of doing business or in the relations of the employer to the employees. To hold, especially after this admission of counsel and his failure to offer any further testimony on the subject, that the substantial rights of the defendant were affected by any of these matters, would be sacrificing substance to form. The objections were properly disregarded by the Oklahoma courts, both trial and supreme.

While the defendant asked several instructions, the exception taken was not to the ruling on each instruction separately, but to them as an entirety. This plainly was insufficient. *Fullenwider v. Ewing, 25 Kan. [280] 69; Bailey v. Dodge, 28 Kan. 72; Fleming v. Latham, 48 Kan. 773, 30 Pac. 166.

There remain for consideration these matters: One, the contention that the plaintiff was a fellow servant with the foreman of the gang at work on the bridge and the superintendent of construction; another, the question of negligence on the part of the defendant; and a third, contributory negligence. With reference to the first, it must be borne in mind that the plaintiff was a fireman employed on a locomotive, and his work was in a separate department from that of the employees engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow servant. It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These latter employees represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employees were to do their work,—Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, and cases cited in the opinion,—and, in discharging that positive duty, they, and not he, were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant.

With reference to the second question, that of negligence on the part of the defendant, it must be premised that this is largely a question of fact, and a question of fact is submitted to the decision of a jury. Notwithstanding the able argument of counsel for defendant in endeavoring to show that the defendant did everything that prudence required for the purpose of making the bridge safe, we are not satisfied that the testimony is so convincing in this respect as to justify us in setting aside the verdict of the jury, approved as it was by the trial [281]*and supreme courts of Oklahoma. There is of course, resting upon the employer the duty of providing a suitable and safe place and structures in and upon which its employees are called to do their work, and this plaintiff was charged with no duty in respect thereto.

A full statement of the testimony would unnecessarily prolong this opinion, and a brief outline must suffice. The bridge was a pile bridge, the piles having been, as claimed, driven down to solid rock. This rock substratum sloped from the north to the south side of the river, the first bent striking the rock at 8 or 10 feet. At the place where the bridge sank the depth to the rock was 18 feet. Above the rock was quicksand, and the piles were driven through it. The bridge was originally constructed some weeks before, but during high water a portion of it had washed out. It was rebuilt upon the same plan and with apparently no further protection than when originally constructed. At the time of the injury there was again high water, and that high water made a roaring torrent of the flowing stream. When the train upon which the plaintiff was fireman came to the river it was found that upon the bridge there had been placed a loaded flat car. Disengaging itself from the balance of the train, the locomotive moved onto the bridge and pulled that car off. As it did so there was a slight subsidence at the place where the bridge finally gave way. So the engine returned to the north bank of the river, while the gang of employees, under the direction of the foreman and the superintendent of construction, proceeded to place a false span underneath the bridge at the point of subsidence, and after awhile notified the train employees that the bridge was safe. Thereupon the engine moved slowly onto the bridge, and when it got to the place where there had been a prior subsidence the bridge sank so as to drop the engine into the river, and in that way the plaintiff was injured. Now it appears that by actual experience the bridge as originally constructed gave way in time of high water, and yet was rebuilt, without change of plan and without adding *further[282] protection. When the high water returned, as it did at the time of the injury, there was again a giving way of the bridge. From this general outline of the case (filled, of course, more in detail by the testimony as to the circumstances of the work and the injury) it is apparent that there was a question whether the defendant had made suitable provision for securing a safe structure upon which the trains should pass; and, upon a review of all the testimony, we do not feel that we are justified in disturbing the verdict, approved as it was by the Oklahoma courts.

Thirdly, it is insisted that the plaintiff was guilty of contributory negligence, in that, when the engine moved onto the bridge, at the time of the injury, the engineer said to him that he need not stay on the engine, but might go back on the train. But his place of work was in the engine, the same as that of the engineer; and because he did not avail himself of the suggestion, and leave that place, it can hardly be said that he was guilty of contributory negligence. He stayed at his regular place of work and where his ordinary duty called him to be, and it would be a harsh rule to hold that a man so doing was guilty of contributory negligence because he did not avail himself of a permission to occupy a different and perhaps a safer place; especially as both the engineer and himself were advised by the construction force that the bridge was safe.

These are all the matters that call for notice. We find no error in the rulings of the Supreme Court of Oklahoma, and its judgment is affirmed.

[283]*JUAN R. GARZOT and Faustino R. Fuertes, Copartners under the firm name of Garzot & Fuertes, Appts.,
v.
MARIA RIOS DE RUBIO. (No. 141.)

VICTOR BURSET, Petronila Rios de Noya, and her husband, Francisco Noya, Appts.,
v.
MARIA RIOS DE RUBIO. (No. 142.)

VICTOR BURSET, Petronila Patricia Rios, joined by her husband, Francisco Noya; Juan R. Garzot and Faustino R. Fuertes, Copartners under the firm name of Garzot & Fuertes; Catalina Romaguera, et al., Appts.
v.
MARIA RIOS DE RUBIO. (No. 604.)

(See S. C. Reporter's ed. 283-306.)

Appeal — from Porto Rico district court — review of facts.

1. Only matters of law can be considered by the Federal Supreme Court on the appeal authorized by the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, to be taken from the district court of the United States for the district of Porto Rico in the same manner and under the same regulations as from the supreme courts of the territories.

Parties — necessary defendants.

2. The mother's estate and her children by a second marriage are necessary parties defendant to a bill which seeks to set aside for fraud a family settlement made between the mother and the children of the first marriage, to annul the title which apparently flowed therefrom. to avoid collaterally decrees of the Porto Rican courts concerning the same, and to set aside, as simulated and fraudulent, the sales made in virtue of the title apparently vested by the settlement, where such bill, though alleging that the property transferred to the mother by such settlement was acquired by the husband by inheritance, contains no averment concerning the property allotted to the daughters which tends to rebut the legal presumption of community as to the property acquired during marriage, which the bill seeks to administer and distribute.

Evidence — judicial notice.

3. Judicial notice is taken by the Federal Supreme Court that the distinctions between law and equity, in a technical sense, do not obtain in the local law of Porto Rico.

Courts — conflict of jurisdiction — probate matters — district court of Porto Rico.

4. The district court of the United States for the district of Porto Rico has no jurisdiction of a bill which seeks to administer decedents' estates which are open in a local court and subject to the power and authority of such court, because such bill also seeks to liquidate a community existing between husband and wife, to annul for fraud a family settlement of the estates, and to set aside, as simulated and fraudulent, sales made in virtue of the title apparently vested by such settlement, where the relief sought in this regard is merely ancillary to the prayer for the liquidation and settlement of the estates.

Courts — probate jurisdiction — Porto Rican courts.

5. The Porto Rican courts, as an incident of their general and probate authority, and their power over all personal and real actions concerning decedents' estates, have jurisdiction to determine whether a decedent's estate has been closed by a family settlement which is attacked as fraudulent, to determine whether the property transferred to the widow by such settlement still remains a part of the estate, and to liquidate and settle the community existing between the husband and wife.

[Nos. 141, 142, 604.]

Argued February 27, 28, 1908. Decided April 6, 1908.

APPEALS from the District Court of the United States for the District of Porto Rico to review a decree setting aside, for fraud, a family settlement and the title which apparently flowed therefrom, avoiding collaterally decrees of the Porto Rican courts concerning the same, and setting aside sales made in virtue of the title apparently vested by the settlement. Reversed and remanded with directions to dismiss the bill for want of jurisdiction.

See same case below, on motion to vacate decree, 2 Porto Rico Fed. Rep. 189.

The facts are stated in the opinion.

Messrs. **N. B. K. Pettingill** and **George H. Lamar** argued the cause and filed a brief for appellants.

Messrs. **Frederic D. McKenney** and **Francis H. Dexter** argued the cause and filed a brief for appellee.

Mr. Justice **White** delivered the opinion of the court:

These several appeals were taken by the various appellants from the same decree. We dispose of them together. The transcript is voluminous and confused. Following the order of the court below and the direction of the counsel for all the appellants, not objected to by the counsel for the appellee, the transcript contains all the proceedings, all the testimony offered at the hearing, together with the opinion as well as the elaborate findings of fact and conclusions of law

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NOTE.—As to appellate jurisdiction of Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

by which the court below disposed of the case. The many assignments of errors proceed upon the assumption that every question arising from the transcript is open for our consideration.

Our power to review is derived from § 35 of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), which provides "that writs of error and appeals from the final decisions of . . . the district court of the United States [for Porto Rico] shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations . . . as from the supreme courts of the territories of the United States." Our jurisdiction over causes coming from the territories generally was thus stated in Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 513, 33 L. ed. 433, 436, 10 Sup. Ct. Rep. 177, 178:

"Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the territorial courts, 'in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27, 28."

[285] *And, as pointed out in the same case, (p. 513), followed since in a long line of cases:

"The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to consider the testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' Hecht v. Boughton, 105 U. S. 235, 236, 26 L. ed. 1018."

While the suggestion that because there is no intermediate reviewing court between this and the district court of the United States for Porto Rico, differing from what is generally the case in the territories of the United States, a wider scope of authority should exist in reviewing by appeal the decrees of the district court of Porto Rico, may have cogency, it affords no ground for disregarding the plain command of the statute of 1874, which is here applicable, as expounded by many previous decisions of this court. It follows that the greater part of the transcript is superfluous, and we therefore disregard it and confine our attention to such legal questions as necessarily arise on the face of the record; *viz.*, to rulings concerning the rejection or admission of testimony, duly excepted to, and to the sufficiency of the findings to sustain the legal conclusion or decree based on them.

The sole complainant, María Rios de Rubio, a widow, was averred to be "a resident of San Juan, Porto Rico, and a loyal subject of the King of Spain." There was no specific traverse of this averment. The court expressly found "that the citizenship and residence of the parties was as alleged in the bill of complaint." After the findings of fact had been made and the decree entered, and after an appeal by one of the parties, other of the defendants who had initiated appeals, but had not perfected them, moved for an extension of time to perfect *their appeals and for an opening of [286] the decree, on the ground that when the bill was filed complainant was not a citizen of Spain, but of Porto Rico, and therefore the court never had jurisdiction of the case. This motion was entertained by the judge then presiding, who succeeded in office the judge by whom the cause was tried. After hearing the evidence offered by both parties and analyzing the same, it was found that the complainant was a citizen of Spain, as alleged. The motion to reopen was therefore denied. Without stopping to review the elaborate discussion of the subject on behalf of the appellants, we content ourselves with saying that we think the facts upon which the court based its action sustain that conclusion, and therefore the contention as to want of jurisdiction, because of the alleged absence of Spanish citizenship of the complainant, is without merit.

In approaching the merits we put out of view for the moment the many assignments of error which are addressed to rulings of the court admitting or rejecting evidence, and reserve for ulterior determination whether, in view of the state of the record, such objections are open, and, if they are, whether any of them are well taken.

In order to a clear understanding of the origin of the controversy, we state the facts out of which it arose, confining ourselves to those shown by the pleadings or documents made a part thereof or established by the findings below.

José María Rios and Manuela Gutman were married in Porto Rico in 1866. There being no marital contract to the contrary, a legal community of property, as defined in the Spanish law, supervened between the spouses.

The wife, at the time of the marriage, had 8,000 pesos of separate money and the husband about half that amount. During the nine years which intervened between the marriage and September 8, 1875, the husband had become the owner of various pieces of real estate, seven or eight of which were situated in the district of Naguabo, and one, or maybe two or more, in the district of [287] Humacao. On September *8, 1875, the husband, Rios, died, leaving surviving him his widow, Manuela, and three minor children, the issue of the marriage; *viz.*, two daughters, the one Petronila and the other María, and a son, José. On the night of his death the husband executed a power of attorney, authorizing his wife to make a last will on his behalf, and on September 12 following, in virtue of this power, the wife executed the will. As the document was in no respect dispositive, but purely declaratory of the rule of legal succession, its effect on this controversy may be put out of view. By the law of Spain the three children were the heirs of the estate of their father, less the mother's share of the community estate, if any, subject to the usufruct of the mother on her husband's estate, and subject to a marital fourth in favor of the wife, if the circumstances justified such an allowance. The widow instituted the necessary preliminary probate proceedings in the proper court to open the estate, and became executrix and the tutrix of her minor children and usufructuary of their estate, and, in one or both capacities, went into possession and control of the entire property, including in such property her community estate, if any there was. Two years after the widow married Miguel Bustelo.

In November, 1887, José, the son by the first marriage, being yet a minor, died intestate, and his mother, Manuela, instituted in the proper court proceedings concerning the estate of her deceased son. It may be conceded that the mother, as the immediate ascendant, was the sole heir of the son, to the exclusion of the sisters, the estate taken by her, however, being only usufructuary in character, since at her death, as the estate of the son had come to him as part of his paternal inheritance (the succession of his father), it reverted to the sisters, children of the father, because of the principle of the Spanish law which took into account the source whence the estate of the son had been derived, for the purpose of regulating its transmission by death.

In 1890 the daughter María married one Rubio, and in 1898 Petronila, the other [288] daughter, married one Noya. In the *meanwhile five children were born of the marriage between Manuela Gutman and Bustelo, and the latter died, leaving surviving him his widow and these five children. From the death of the first husband, in 1875, to January, 1901, Manuela Gutman possessed and controlled all the property which she entered into possession of at the date of the death of her first husband, without rendering accounts of her administration to the court in which the estate had been opened, although that court had full power to control and direct her administration.

The daughters, before their marriage, generally lived with their mother and were educated and supported by her, and after their marriage received some allowance for their support, the extent of which need not be considered. It is undoubted that after their marriage dissatisfaction on the part of the daughters and their husbands ensued because of the failure of the mother to account and finally settle the estate of the father. This dissatisfaction culminated a short while before January 1, 1901, by the bringing of a suit in the district court of Porto Rico, in which the succession of the father was pending, seeking to compel the mother to account and distribute the estate. In this suit the daughters were both represented by their attorney, Mr. Cuadra. Shortly after the commencement of this proceeding an asserted understanding was had between the mother and her daughters for the entire settlement of all matters relative to the property which had come into her possession and under her control, as the result of the death of her husband and her minor son, the issue of the first marriage. The settlement was embodied in a writing dated the 16th day of January, 1901, and signed by the parties and witnesses, among these witnesses being Mr. Cuadra, the lawyer of the two daughters, and Mr. Landron, a lawyer who represented the mother in the negotiations which preceded the agreement. The agreement, which is in the margin,†

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†First. Doña Manuela Gutman, widow of Bustelo, in her own proper right shall deliver immediately to her daughters by her first marriage, named Doña María Guadalupe Rios, widow of Rubio, and Doña Petrolina Patricia Rios de Noya, all the lands and tenements comprised in the plantation known as "San José de las Mulas," situated in this jurisdiction, with the exception of a lot of land 40 cuerdas in extent, belonging now to the succession of her second husband, Mr. Bustelo, and acquired by said succession at a public auction.

Second. In the same manner Señora Gutman shall immediately deliver to the above-named daughters of her first marriage the lands which form the estate called "Culo Prieto," in the jurisdiction of Naguabo.

Third. Doña Manuela Gutman shall retain for herself, and as sole and exclusive

[289] purported *by way of transaction to adjust all controversies as to the property between the mother and daughters, and, to accomplish this purpose, transferred to the mother [290] in full ownership *certain described properties, left by the first husband, situated in the district of Naguabo, and to the two daughters in joint equal undivided ownership a certain estate situated in Naguabo, and also a much larger estate situated in Humacao, both of which also at the death of the first husband stood in his name and had passed into the possession of his widow, in virtue of her administration or usufruct.

In April, 1901, Mr. Cuadra, as the attorney of the daughters María and Petronila, and Mr. Landron, as the attorney of the mother, Manuela, instituted in the district court of Humacao a proceeding under the Spanish mortgage law to have the legal title to the property referred to in the agreement put of record. The prayer was that the property referred to in the agreement and thereby transferred to the mother be placed of record in her name as the full owner thereof, and that the property referred to in such agreement, transferred to the two daughters, be placed in their names as the full owners. Conformably to *the [291] Spanish law, citation was issued to other vicinal owners, and publication in the official gazette of a notice of the application was made under the order of the court. Before the application was acted upon by the court, Cuadra withdrew as the counsel of record for the daughter María, and Mr. Juan F. Vias appeared on the record as her attorney, and filed in her behalf what is styled "in opposition to the proceedings." The motion by which this was done prayed that the "said proceeding . . . be approved in its main part, with the expressed declaration that the properties acquired by

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owner with all property rights, all the lands that may be found remaining in the jurisdiction of Naguabo, left at the death of her first husband, Don José Rios y Berrios, or, approximately 900 cuerdas.

Fourth. In view of the fact that by this instrument the co-ownership, existing until now, in the hereditary estate left at the death of the intestate, Don José Rios y Berrios, becomes finally dissolved, it is by this settlement understood and agreed that each contracting party hereto becomes the exclusive owner of her share without reservation or limitation of any kind.

Fifth. As soon as this settlement shall be signed before witnesses by the contracting parties, without prejudice to its being converted into a public document within the space of forty-eight hours following the day of its date, or as soon as the notary of this town may return to his office, the lawyers of Mrs. Gutman and her daughters shall put a stop to all their mutual judicial proceedings, not only as to the voluntary suit touching the estate of Don José Rios y Berrios, but also as to all collateral and appellate matters.

Sixth. The lawyers, José María Cuadra and Rafael Lopez Landron, the first representing Doña María Guadalupe and Doña Petronila Patricia, and the second representing Doña Manuela Gutman, become hereby obliged to conclude this settlement in a manner which shall carry the same to conclusion without loss of time, so as to leave each interested party in full possession of what belongs to her by this agreement, and furnished with their respective titles of property as inscribed in the books of the registry, free from every charge and lien.

Seventh. The expenses of this settlement, that is, the deeds, the expenses of registration, the means of ratifying this settlement before the courts, aside from the fees of the lawyers, shall be to the exclusive account of Doña Manuela Gutman.

Eighth. Moreover, on the occasion of this arrangement, which the interested parties esteem as highly convenient, Doña María and Doña Petronila find themselves satisfied with the correctness observed by their mother in the very troublesome duty of preserving so large an estate for the term of so many years, in spite of the very serious difficulties overtaking the estate; the said Mrs. Gutman reserves to herself the right to present to her daughters solemn proof of the honesty with which she has acted up to this day, and a detailed and approved statement of the very grave misfortunes against which the estate has struggled during the long time in which she has administered it.

Ninth. Because of her being better acquainted than any other of the interested parties with the claims of all kinds which may now be pending or are to be established in favor of the estate left at the death of Don José María Rios y Berrios, Mrs. Manuela de Gutman is commissioned to continue or begin such reclamaciones within the shortest time possible, it being well understood that the amounts obtained from these claims shall be considered into three equal parts for the advantage and use of Mrs. Gutman and her said two daughters by her first husband.

Thus the three contracting parties sign before the witnesses who are present and the lawyers, who likewise subscribe the same as parties thereto, in Humacao this 16th day of January, 1901.

(Signed)
Manuela G., Widow of Bustelo.
María Rios, Widow of Rubio.
Petronila Patricia Rios de Noya.
Lawyer José María Cuadra.
Lawyer Rafael Lopez Landron.
Francisco Noya.
M. Argueso.
Jesus Almiroty.

Doña Manuela Gutman are so acquired as heir ab-intestate of her son José Rios Gutman, and those belonging to his client and to her sister . . . from the inheritance of their deceased father . . . and that, in case that this decision should not be deemed proper, then that the approval of the proceedings brought be absolutely denied, for the reason that, in the petition, the true title of the acquisition of the properties adjudicated to the petitioner Señora Gutman, widow of Bustelo, is not set forth therein." In addition, in the record of the proceeding it is recited that, for the purpose of the decision of the opposition which he made to the application for the registry of the titles in accordance with the agreement, the lawyer of María, Mr. Vias, "accepted as his own the evidence proposed by lawyers Lopez Landron y Cuadra, with the addition of such documentary evidence as was filed by him and is attached to the record, which said evidence was admitted." The court, on November 16, 1901, allowed the petition for the registry of title according to the agreement, and overruled the opposition. The considerations which led the court to its conclusion were thus stated by it:

"Whereas, in accordance with the provisions of §§ 1809 and 1816 of the Civil Code, a compromise agreed upon and adjusted between capable persons upon a licit matter is not only a valid and efficient contract, but it further has for the contracting parties the authority of *res judicata;* and

"Whereas, the opposition to proceedings [292] of dominio authorized *by § 395 of the mortgage law is that of third persons cited for the proceeding and introduction of evidence, and in no manner can such opposition be made by any of the parties soliciting the said dominio; and

"Whereas, Doña Manuel Rios, I mean Doña María Rios, widow of Rubio, is one of the solicitors of the said proceeding, she has signed the compromise which is the basis for instituting the said proceeding, she has agreed upon the adjudication to each of the interested parties according to the terms of the compromise (clauses 3 and 4), she has accepted as her own the corroborative evidence of the very facts of the compromise, and she cannot exercise legally against her own acts such actions as could be exercised by strange persons to the institution of dominio proceedings; and

"Whereas, it is left to the court to consider the weight of the evidence introduced and the allegations made approving or disapproving the claims made and making the declarations that the dominio has been justified; and

"Whereas, the court, after a consideration of the true value and extent of the evidence introduced, it is of the opinion that a writ of approval of this proceeding should issue."

The daughter María prosecuted an appeal to the supreme court of Porto Rico, sitting as a court of cassation.

We do not refer to many matters discussed at bar concerning the relations between the mother and her daughter María which took place pending the appeal, because those subjects are not referred to in the findings. In April, 1902, while the appeal was pending, the mother, Manuela, sold the properties which had been transferred to her by virtue of the agreement, and had been recorded in her name as full owner, to Victor Burset, who had married one of her daughters by the second marriage. Buset in turn sold the properties to Palmer, and mortgages were put upon them. Palmer sold some of the property to Garzot and Fuertes, and a portion of the land was sold by him to Petronila, the sister of María. In June, 1902, Mrs. Manuela Gutman died, and in the same month of the [293] *same year the appeal taken from the decree of the district court, ordering the titles recorded in accordance with the agreement, was affirmed by the supreme court. The court, in its opinion, after reciting the appearance and opposition of María to the application to register the titles, concluded by observing:

"Considering that even supposing that the construction given by the trial court to article 395 of the mortgage law was erroneous, in holding in one of its conclusions of law that Doña María Rios could not oppose the proceeding of dominion because she instituted it in conjunction with her mother, Doña Manuela, and her sister, Doña Petronila, the reversal of the order appealed from would not be proper, as it would be always sustained by the essential and necessary foundation of the same, which is the declaration made by the district court of Humacao of having been proven the dominion of the properties in question, without any limitation or reservation whatsoever, which declaration cannot be discussed in cassation, because the appeal of cassation was not founded upon paragraph 7 of article 1690 of the Law of Civil Procedure. Considering that the order appealed from conforms to all the claims made by the parties, and does not grant more than was prayed for, as it is thereby granted the prayer made by Doña Manuela Gutman, and her daughters, Doña María and Doña Petronila, in the petition instituting the *ex parte* proceeding of dominion, and the claim made by Doña María through her attorney, Don Juan F. Vias, is denied."

Again, we do not stop to consider many matters referred to by counsel which it is deemed conclusively show that the daughter María accepted the decision of the supreme court as final, and acted upon the assumption that she was the owner of property allotted to her by the agreement, because the matters thus relied upon are also but a part of the evidence, and not embraced in the findings below made. About one year after the death of the mother and the decision of the supreme court of Porto Rico, the bill [294]by which this cause was *commenced was filed on behalf of the daughter Maria, alleging herself to be a citizen of Spain. The only defendants made to the bill were her sister Petronila, Burset and his wife, Palmer and his wife, Garzot and Fuertes, and several others, who, it was alleged, had acquired an interest in the property sold by the mother to Burset, and by him transferred as above stated. Demurrers were filed by some of the defendants. The court allowed the bill to be amended, and ordered that, as amended, it be rewritten. In substance the bill, as rewritten, alleged the death of the father, the leaving of the three minor children, herself included, the death of the brother, and the taking by the mother of the preliminary probate steps to administer the property, and the death of the mother. It alleged that, at the time of his death, the father had left certain property, which was specifically described, the property thus described being only that which had been transferred to the mother by virtue of the agreement. It was alleged that the complainant was the owner of an undivided half of the property thus described as heir of the father and brother, and "that the said property was separate property of said José María Rios, theretofore derived by inheritance from his father and mother and by purchase from his sisters with his separate funds." The bill then, with great amplitude, alleged a conspiracy and combination between the mother and sister Petronila to defraud the complainant by obtaining a title to the property described in order to benefit the children of the second marriage, and charged that the lawyers Landron and Cuadra, as parties to this conspiracy, had united with the mother and sister, by deceit and fraud, to secure the agreement, concealed or had misrepresented its contents, and, in furtherance of the same conspiracy, prosecuted the proceedings in the courts of Porto Rico. It then alleged that, in execution of the said conspiracy, the mother had sold the property transferred to her after the decree putting the title in her name had been rendered by the district court; that Burset, the purchaser from her, and all those holding under him, were cog-[295]nizant of the fraud and held *fraudulent and simulated titles. No reference was made in the bill, except inferentially, to the property which had been transferred to the complainant by the agreement, and which had been put in her name in virtue of the decree of registry. The bill contained an allegation that a copy of the agreement could not be produced because it had been concealed from the complainant, and also contained a charge that the mother had refused to deliver to the complainant the property which had been transferred to her by such agreement. The prayer of the bill was for a decree recognizing complainant as the absolute owner of one half the property described in the bill,—that is, that which had been transferred to the mother; the annulment of the decree of the district court of Porto Rico, executing the agreement; the erasure of the inscriptions of title resulting therefrom, and for the annulment of the sale to Burset, and all the transfers of title by sale, mortgage, or otherwise consequent thereon. Shortly afterwards the bill was amended by detailed averments, charging that the proceedings in the district court of Porto Rico for the registry of the title were wholly void, that they were instituted by Cuadra in the name of the complainant without authority, and with full knowledge on his part that she did not accept the agreement, and consequently not only that decree, but the affirmance thereof by the supreme court of Porto Rico, was without effect upon the rights of the complainant. In accordance with these averments a prayer was inserted, asking that the decrees of both the Porto Rican courts and the registry of title consequent thereon be held to be void. In addition it was prayed "that an account be taken of all the foregoing properties and assets [referring to the properties which had been allotted to the mother by the private agreement], and all other properties in which complainant may have an interest; that a master be appointed to take such accounting and ascertain all the property—real, personal, and mixed—belonging to the estate of Don José María Rios and Doña Manuela Gutman and Don José Rios y Gutman, and the participation or interest therein which corresponds *to [296] your oratrix, and, upon the filing of this report, this court shall decree a partition and division thereof in the proportion of one half to your oratrix, and shall declare by its decree the right of your oratrix as aforesaid in and to the same." Finally, after all the testimony was closed, just prior to the submission of the cause, the court allowed an amendment concerning the value of the pieces of property described in the bill, and which had been allotted to the complainant by the private agreement, and permitted the striking out of the averment that some of those properties had been purchased by the father from his sisters with his separate funds.

The various defendants pleaded *res judicata,* based upon the decrees of the district and the supreme court, putting the agreement of record. Petronila, moreover, pleaded a judgment asserted to have been rendered in a proceeding which, it was alleged, had been brought by the complainant, María, in an insular district court, to set aside the agreement. Although the judgment thus pleaded purported to be annexed to the plea, it was not so annexed, and no reference to such judgment, if any, or to the suit in which it was rendered, is contained in the findings of fact below. The pleas having been overruled, answers were filed traversing all the charges of fraud as to the agreement, as to the proceedings to enforce the same, and as to the sales or contracts concerning the property which that agreement had transferred to the mother.

The court decreed the agreement to be void for fraud. It decided that the judgment of the district court, affirmed by the supreme court, was void for the same reason. It therefore directed the erasure from the public records of the registry of title which had arisen from the inscription of the judgment. The complainant was held to be the perfect owner, not only of an undivided half of the property which had been allotted to the mother by the agreement, and which was described in the bill, but also a like owner of an undivided half of the property which the agreement had allotted to her, and it was directed that the judgment be [297] inscribed in order to constitute *a muniment of title to the property. Among the findings of fact upon which the decree was based was one finding that although a liquidation and settlement of the estates of the father, mother, and son had been prayed, such settlement was not essential, as full relief could be afforded without an accounting.

Before coming to consider such of the assignments of error as are within our cognizance, we are admonished that we must first determine whether the necessary parties are before us to justify us in deciding the case on the merits. And this inquiry also involves determining whether the necessary parties were before the court below to authorize it to make the decree which it entered.

Our duty in the matter was thus stated in Minnesota v. Northern Securities Co. 184 U. S. 199, 235, 46 L. ed. 499, 515, 22 Sup. Ct. Rep. 308, 322:

"The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte,* though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Hipp v. Babin, 19 How. 271, 278, 15 L. ed. 633, 635; Parker v. Winnipiseogee Lake Cotton & Woolen Co. 2 Black, 545, 17 L. ed. 333."

Again:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the *court the whole case [298] may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72."

Whether the necessary parties are here or were before the court below involves a consideration of the case in a fourfold aspect: First, as to the agreement; second, as to the decrees of the district and supreme court; third, as to the contracts made by the mother or those holding under her in consequence of the agreement and the registry of the title which it created; fourth, as to the nature and character of the rights with which the agreement was concerned, and the effect of the relief sought in consequence of the prayer for the annulment of that agreement.

The agreement was made between the complainant, her sister, Petronila, and the mother. Now, although the bill was brought after the mother's death, and alleged the existence of children of the second marriage, who were, of course, entitled to participate in their mother's estate, neither the estate of the mother nor such children of the second marriage were made parties to the cause. But either or both the estate and these children were necessary parties to the determination of the rights of the mother under the agreement. It is no answer to say they were not because the property with which the agreement was concerned came from the estate of the first husband, in which the mother and her children of the second marriage had no interest, since such an assumption but disregards the nature and character of the title created by the agreement, and therefore presupposes that its validity could be judicially determined in the absence of the parties whose rights were necessarily involved. And this is also true as to the judgments of the district and the supreme court of Porto Rico. The mother was not only a party to those judgments, but a beneficiary thereof; and the presence of her estate or heirs was essentially necessary to a determination of whether those judgments were the result of fraud, and the [299]nature and *extent of their operation upon the recorded title. Manifest also is it that the same reasoning is controlling as to the relief which the bill sought concerning the sale made by the mother to Burset of the property transferred to her by the agreement and held by others under or as a consequence of that sale. We say this because it is apparent that to determine the validity of the sale or sales in the absence of the estate of the mother or her heirs would be, in effect, to pass upon the rights of the estate or heirs without a hearing. Demonstrative as are the foregoing considerations as to the want of power, in the absence of the estate of the mother or her heirs, to annul the agreement and the title which apparently flowed therefrom, and to collaterally avoid the decrees of the Porto Rican courts concerning the same, and to set aside, as simulated and fraudulent, the sales made in virtue of the title at least apparently vested by the agreement, they all become more controlling when the nature and character of the rights with which the agreement dealt are taken into view. Between the husband and wife, by virtue of the marriage, in the absence of a contract to the contrary, a legal community supervened. Porto Rico Civ. Code, art. 1315. And although the Code was not in force in 1866, when the marriage took place, the same rule, as we have already said, was then controlling under the more ancient Spanish law. Partidas, 5 Ll. 57, 59. See also the statement of the ancient Spanish law on the subject in Bruneau v. Bruneau, 9 Mart. (La.) 217. The community thus arising by operation of law embraced all "the earnings or profits indiscriminately obtained by either of the consorts during the marriage." Porto Rico, Civ. Code, article 1392. The community also embraced all "property acquired during the marriage by onerous title at the expense of the community property, whether the acquisition is made for the community or for only one of the consorts." Article 1401. Besides, it embraced in the joint ownership many other things which it is unnecessary to enumerate, and which are fully set out in the articles of the Code following those just cited. And the *Code, for the purpose[300] of protecting the community and securing a just liquidation of the respective interests in the same, expressly provides, article 1407, that "all the property of a marriage shall be considered as community property until it is proven that it belongs exclusively to the husband or to the wife." Although the presumption thus created was not expressed in the text of the Partidas, it was from ancient times a part of the Spanish law, having been declared in Ley 203, Del Estilo (A. D. 1566), and such presumption, common to both the Code Napoleon and the Louisiana Code (Code Napoleon, art. 1403; Louisiana Code, art. 2405), was, in express terms, embodied in Law 5, title 4, book 10, of the Novisima Recopilación. In speaking of the ancient Spanish law on the subject, in Savenat v. Le Breton, 1 La. 520, 522, the court said:

"This question must be decided according to the provisions of the Spanish laws relating to rights which subsist in the marriage state between the parties to the matrimonial contract. By these laws everything purchased during the marriage fell into the common stock of gains, and, at the death of either of the parties, was to be divided equally between the survivor and the heirs of the deceased. And this effect was produced whether purchases were made with the money or capital of the community, or with that of either of the married parties, whether in the name of both, or that of one of them separately. See Febrero add. part 2, lib. 1, chap. 4, § 1, no. 6."

And the text of the Novisima concerning the presumption was expounded and applied by the Supreme Court of Spain on May 7, 1868, in a case which came before it from Havana. 17 Jurisprudencia Civil, No. 124, pp. 435-439. It is undoubted that all the real estate to which the agreement related was acquired by the husband after the marriage, and therefore was controlled, generally speaking, by the presumption of community. True it is that the bill, as originally drawn, alleged that some of the property which was transferred to the mother by the agreement was acquired by inheritance *by the husband, and others by pur-[301]chase, and that just before the hearing the court permitted an amendment striking out the words "by purchase," so as in effect to cause the bill to allege that the property transferred to the mother by the private agreement had been acquired by the husband by inheritance. But no averment tending in any way to deflect the legal presumption of community as to property acquired during marriage was made concerning the property allotted to the daughters by the agreement, and which the bill, as amended, sought to administer and distribute. This being the case, it follows that the necessary effect of the bill, as amended, was to assert that, notwithstanding the legal presumption of community, the interest of the deceased wife in the property could be determined without the presence of her estate or of her heirs who were directly interested.

It does not meet this difficulty to suggest that the effect of the agreement was to close the question of community, since the ground upon which the relief was sought was that the agreement was void. Nor is there merit in the suggestion that the presence of the estate of the mother or her heirs was not necessary because the court below found as a fact either that there was no community property, or, if there was, that no accounting or liquidation was essential. But these findings could not be made in the absence of the estate of the mother or her heirs without in effect denying a hearing to those vitally interested.

While the considerations previously stated establish the impossibility of affirming, and the necessity for reversing and remanding, they also engender the inquiry whether, in view of the nature and character of the relief sought by the bill, it is our duty to remand for a new trial, or with directions to dismiss the bill because of an inherent want of jurisdiction to give the relief which the bill sought.

Putting out of view for a moment the averments and prayer of the bill relating to the nullity of the private agreement, and the sales made of the property which was [302] transferred by that *agreement to the mother, we think it is patent on the face of the bill that it but invoked the authority of the court to exercise purely probate jurisdiction by administering and settling the estate of Rios, the estate of his son, and that of the mother, and, as an incident thereof, to liquidate the community which had existed between Rios and his wife. Indeed, such was exactly the substantive relief which the bill as finally amended prayed. As by the bill it is alleged that, on the death of the father and brother, probate proceedings concerning both estates had been commenced in the proper Porto Rican court, it results that not only did the bill seek to administer the estates through the court below, but it sought also to do so, although the estates were open in the local court and subject to the power and authority of such court. In establishing a civil government for Porto Rico, Congress, scrupulously regarding the local institutions and laws, by § 33 of the act of April 12, 1900 [31 Stat. at L. 84, chap. 191], preserved the local courts, both original and appellate, and recognized their power and authority to deal generally with all matters of local concern. In creating, by the 34th section of the same act, the district court of the United States for Porto Rico, the jurisdiction and power of that court, we think by the very terms of the act, were clearly fashioned upon and intended to be made, as far as applicable, like unto the jurisdiction exercised by the circuit and district courts of the United States within the several states of the Union. It is true that the jurisdiction of the district court, resulting from citizenship, has been made broader than that conferred upon the circuit and district courts of the United States within the states. But this does not tend in any way to establish that it was the purpose of Congress, in creating the district court of the United States for Porto Rico, to endow that court with an authority not possessed by the courts of the United States (Farrell v. O'Brien [O'Callaghan v. O'Brien] 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727), to exercise purely probate jurisdiction to administer and settle estates, in disregard of the authority of the local court, as created and defined by law.

*By the Porto Rican Code of Civil Procedure (article 62, paragraph 5), power to [303] administer estates, both testamentary and intestate, is vested in the judge of the last place of residence of the deceased. That the power thus conferred is exclusive is shown by the text of the same article and by the comprehensive grant of authority embraced in the provisions of the Code which follow, relating to the settlement of both testamentary and intestate successions. That it embraces authority to entertain and dispose of all actions, whether real or personal, necessarily incidental to the accomplishment of the powers granted over estates, is shown by the provisions of article 1001 of the same Code. The similarity between the provisions of the Louisiana Code as to the community, and the analogy which obtains between the provisions of the Louisiana Code of Practice and the Code of Civil Procedure of Porto Rico, concerning the power of the judge or court charged with the administration of estates, whether testamentary or intestate, especially where questions concerning the liquidation of a community which has existed between husband and wife is concerned, make pertinent the observations of the supreme court of Louisiana in Lawson v. Ripley, 17 La. 238, 248, where it was said:

"The succession of the husband is therefore so far connected with the community as to form together, at the time of his death, an entire mass, called his estate, which is not only liable for the payment of the common debts, but also for the portion of the wife or her heirs to the residue, if they have not renounced. The widow or her representatives have consequently such an interest in the mass of the estate or succession of the husband, with regard to whom no distinction is made between his separate property and that of the community until the net proceeds or amount of the acquests and gains are ascertained, that their assistance at the inventory and their concurrence at all the proceedings relative thereto, which are to be carried on contradictorily with them, are generally required. All such proceedings take place before the court of pro-[304]bates, who, *according to law, has exclusive jurisdiction of all the matters concerning the estate, particularly in those cases where it is in a course of administration; and it does not occur to us that separate proceedings can properly be had in relation to the community until, after the settlement of the husband's estate and the payment of the common debts, a division of the residue of the acquests and gains is to be made between the heirs of the deceased and the surviving spouse; and even then the affairs of the husband's estate, administered under the control and supervision of the court of probates, are to be inquired into and sometimes fully investigated."

True it is that by article 1046 of the Porto Rican Code of Civil Procedure the parties interested in an estate which is unsettled and under the dominion of the proper court are given power to terminate the estate by a voluntary agreement between them, and that such may have been the effect of the agreement between the parties here in question if the same was valid. But, as the bill charged. and the relief which it asked was based upon the conception, that the agreement was void, it follows that the relief which the bill sought could only have proceeded upon the hypothesis that the estate had not been closed, and was yet subject to be administered in the proper court. And that this was the theory of the bill is shown by the prayer that the court appoint a master to liquidate and settle the estates.

Coming to consider the subject from the point of view of the averments as to the nullity of the agreement and the fraudulent simulation of the sales, it is clear that the relief sought in this regard was merely ancillary to the prayer for the liquidation and settlement of the estates. As we take judicial notice of the fact that the distinctions between law and equity in a technical sense do not obtain in the local law of Porto Rico, and, as under that law a court charged with the administration of an estate is one of general as well as probate jurisdiction, and has full power over all personal and real actions *concerning the estate, it follows that [305] the local court had, in the nature of things, power to determine, as an incident to its general and probate authority, whether the estate had been closed by the agreement, and hence to decide whether that agreement was void, and had also jurisdiction and power to determine whether the property which had been transferred to the mother by the agreement yet remained a part of the estate, and, as an incident to so doing, to decide the questions of fraud and simulation which were alleged in the bill. Of course, the general scope of the authority which the court then possessed endowed it with the power to liquidate and settle the community which existed between the husband and wife, as that liquidation was of necessity involved in the settlement of the estate. Speaking on this latter subject in Lawson v. Ripley, supra, the supreme court of Louisiana said:

"But it is contended that this would be giving to the court of probates the right of trying questions of title. Probate courts have certainly no power to try titles to real estate, and to decide directly on the validity of such titles; but, as this court has said in the case of Gill v. Phillips, 6 Mart. N. S. 298, 'those courts possess all powers necessary to carry their jurisdiction into effect; and when, in the exercise of that jurisdiction, questions arise collaterally, they must, of necessity, decide them; for if they could not no other court could.' And, 'any other construction would present a singular species of judicial power,—the right to decree a partition, without the authority to inquire into the grounds on which it should be ordered, or the portions that each of the parties should take. The end would thus be conceded without the means.' Baillio v. Wilson, 5 Mart. N. S. 217. We are satisfied that whenever a question of title to real property and slaves arises collaterally in the court of probates, and an examination of it becomes necessary in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title, at least for the purpose of *ascertaining [306] which property belongs to either of the spouses respectively or to the community."

The decree is reversed and the case is remanded to the court below, with directions to dismiss the bill for want of jurisdiction over the subject-matter.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plff. in Err.,
v.
UNITED STATES FOR THE USE AND BENEFIT OF STRUTHERS WELLS COMPANY.

(See S. C. Reporter's ed. 306–317.)

Statutes — retroactive effect — matters of procedure.

Those provisions, if any, governing procedure, contained in the amendment made by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1907, p. 709), to the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), for the protection of persons furnishing materials and labor for the construction of public works, will not be given a retroactive effect so as to apply to existing causes of action, where such amendatory statute, which consists of but one section, contains various provisions dealing with substantive rights, which must be regarded as prospective in their operation.

[No. 154.]

Argued March 5, 1908. Decided April 6, 1908.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of New York, in favor of plaintiff, in an action on a bond given by a contractor for public work. Affirmed.

Statement by Mr. Justice **Peckham**:

This is a writ of error to the circuit court of appeals for the second circuit, which brings up for review the judgment of that court affirming that of the circuit court of the eastern district of New York in favor [**307**] of the defendant in error (plaintiff *below) against the plaintiff in error for the sum of $2,054.23. The action was brought in the circuit court above mentioned, in the name of the United States, for the use and benefit of Struthers Wells Company against the plaintiff in error, and against the individual defendant Flaherty, as well as one Lande, upon a bond dated December 10, 1903, executed by Flaherty as principal, and the above-mentioned plaintiff in error as surety, by which they were held bound in the sum of $40,000, to be paid the United States as liquidated damages, the condition of the obligation being that if Flaherty, his successors, heirs, etc., should well and truly execute the contract annexed to the bond, which he had entered into with Colonel W. A. Jones, U. S. A., engineer, of the fifth lighthouse district, for and in behalf of the United States, by which Flaherty covenanted and agreed to completely construct and deliver the metal work for the Baltimore lighthouse, Maryland, according to all the conditions of the said contract, and should promptly make payments to all persons supplying said Flaherty labor and materials in the prosecution of the work provided for in such contract, then the obligation was to be void; otherwise to remain in full force and virtue.

It was averred in the complaint that the action was brought in the name of the United States by Struthers Wells Company, for its use and benefit, against the plaintiff in error and Flaherty (and also one Lande, who had been joined with Flaherty in the contract), pursuant to the act of Congress of August 13, 1894. See 28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523. The section is set forth in the margin.†

*The Struthers Wells Company, under an [**308**] agreement with the defendants Flaherty and Lande, and in or about the month of March, 1904, supplied to them certain materials, described in the complaint, for use by them in the prosecution of the work which they had contracted with the United States to do in constructing the metal work for the Baltimore lighthouse, as mentioned in the bond.

NOTE.—As to retroactive laws—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331; Re Medley, 33 L. ed. U. S. 835; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

†28 Stat. at L. chapter 280, p. 278:

"Be it enacted, etc., That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution: Provided, That such action and its prosecution shall involve the United States in no expense."

The material furnished by the company was of the value of $1,890.25. The company duly performed all the conditions of its contract with the defendants, which it had agreed to perform, and made delivery as provided for in its agreement, and by reason of the premises there became due and payable to the company from the defendants, including the plaintiff in error, the sum of $1,890.25, with interest from June 7, 1904, no part of which has been paid. Judgment was demanded for that sum, with interest, as stated.

The action was commenced on the 12th of April, 1905. The plaintiff in error demurred to the complaint on the ground, first, that the court had no jurisdiction of the person of the defendant the United States Fidelity & Guaranty Company; second, that the court had not jurisdiction of the subject of the action; and, third, that the complaint does not state facts sufficient to constitute a cause of action against the defendant the United States Fidelity & Guaranty Company. This demurrer was overruled, with leave to the defendant to answer, which the defendant refused to do, and thereupon judgment was entered for the plaintiff against it, which was affirmed by the circuit court of appeals.

Mr. **Leonidas Dennis** argued the cause and filed a brief for plaintiff in error:

Though the cause of action of the plaintiff arose before the passage of the act of February 24, 1905, this action was not begun until after the enactment of this law; and the provisions therein contained, regulating the enforcement of such causes of action, apply to this action, as they do not affect the cause of action itself, but only the method of enforcing the same.

Larkin v. Saffarans, 15 Fed. 147; 26 Am. & Eng. Enc. Law, p. 695; Endlich, Interpretation of Statutes, § 287.

The rule of construction, that the provisions of the amendment which affect the remedy, but not the right itself, apply to causes of action existing when the amendment was passed, is strengthened in this case by the application of the most important rule of construction, that the old law, the mischief, and the remedy, are to be considered carefully in determining the intent of the legislature.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 293, ante, 208, 28 Sup. Ct. Rep. 72.

As the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the circuit court was invoked in this action.

United States Fidelity & G. Co. v. United States, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 381.

The only court which has jurisdiction over a cause of action upon a bond like that involved in this cause is the circuit court in the district in which the contract was to be performed and executed. The prohibition against other courts exercising jurisdiction is equivalent to a repeal.

Merchants' Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540.

When a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law.

Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; Assessors v. Osborne (Gates v. Osborne) 9 Wall. 567, 19 L. ed. 748; Sherman v. Grinnell, 123 U. S. 679, 31 L. ed. 278, 8 Sup. Ct. Rep. 260; Gurnee v. Patrick County, 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; McNulty v. Batty, 10 How. 72, 13 L. ed. 333; Merchants' Ins. Co. v. Ritchie, supra; Ex parte McCardle, 7 Wall. 506, 514, 19 L. ed. 264, 265; National Exch. Bank v. Peters, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; Fairchild v. United States, 91 Fed. 297.

Statutes prescribing a new or different limitation take effect immediately.

Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Wilson v. Iseminger, 185 U. S. 63, 46 L. ed. 807, 22 Sup. Ct. Rep. 573.

The statute of February 24, 1905, can be so interpreted as not to affect the substantive rights of materialmen or impair the obligation of their contracts.

Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234.

Mr. **Herbert A. Heyn** argued the cause, and, with Messrs. Heyn & Covington, filed a brief for defendant in error:

Every presumption is to be taken against retroactive operation.

Dash v. Van Kleeck, 7 Johns. 499, 5 Am. Dec. 291; Sutherland, Stat. Constr. pp. 1158–1161; Wade, Retroactive Law, § 34; Southwestern Coal & Improv. Co. v. McBride, 185 U. S. 503, 46 L. ed. 1012, 22 Sup. Ct. Rep. 763; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717; United States v. Heth, 3 Cranch, 413, 2 L. ed. 483.

Even in respect to statutes relating to procedure and practice, the intention of the legislature is just as important and binding upon the courts as in reference to any others.

Wade, Retroactive Law, §§ 38, 39; Pierce v. Cabot, 159 Mass. 202, 34 N. E. 362; Shallow v. Salem, 136 Mass. 136; Eddy v. Morgan, 216 Ill. 437, 75 N. E. 174; Auditor General v. Chandler, 108 Mich. 569, 66 N. W. 482; Bedier v. Fuller, 116 Mich. 126, 74 N. W. 560.

Statutes regulating procedure and the remedy are never given retrospective effect, if thereby the right itself is affected, as well as the remedy.

Larkin v. Saffarans, 15 Fed. 147; 26 Am. & Eng. Enc. Law, p. 695.

To give the new statute retrospective effect would affect the right of defendant in error.

Von Hoffman v. Quincy (United States ex rel. Von Hoffman v. Quincy) 4 Wall. 548, 18 L. ed. 408; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Louisiana v. New Orleans, 102 U. S. 206, 26 L. ed. 133; 2 Sutherland, Stat. Constr. p. 1201.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The demurrer put in by the plaintiff in error is founded upon an amendment of the above-mentioned act, which, it is contended, applies to the case before us. The amendment is set forth in the margin.†

[312] *The record shows that the contract between Flaherty and the United States was entered into December 10, 1903, and the material was furnished to Flaherty by the Struthers Wells Company in March, 1904. It thus appears that the bond was executed under the provisions of the original act of Congress, and the materials were furnished Flaherty while that act was in force and before its amendment. The legal rights of the Struthers Wells Company had become vested before the enactment of the amendment. It is contended on the part of the plaintiff in error that the passage of the amendment (February 24, 1905) made it necessary for the defendant in error to follow its provisions when it commenced this action on the 12th of April, 1905. It is argued that the amendment prescribes the procedure to be followed by materialmen in enforcing claims against a surety on a bond of the nature of the one in suit; that, as amended, the law prohibited a materialman from commencing any action in any district other than that in which the contract was to be performed (in this case *the Maryland **[313]** district of the fourth circuit), and also not until after the complete performance of the contract for the performance of which the bond was given, and until the expiration of six months after such completion, during which time the United States alone has the right to commence an action. The plaintiff in error insists that, although the cause of action herein arose before the passage of the amendment, the action itself not having been commenced until after that time, all the provisions of the amendment regulating the enforcement of such cause of action apply to the action before us, as they do not affect the cause of action itself, but only the method of enforcing the same. In other words, it is contended that the amendment is to have retroactive effect in all matters relative to procedure, and that, as so construed, this action was improperly brought in the circuit court of the United States for the eastern district of New York, and that it was prematurely brought because

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†Chapter 778, 33 Stat. at L. p. 811, U. S. Comp. Stat. Supp. 1907, p. 709:

"Be it enacted, etc., That the act entitled 'An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works,' approved August thirteenth, eighteen hundred and ninety-four, is hereby amended so as to read as follows:

"'That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action, and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with it does not appear that at the time of the commencement of this action the contract [314] had *been completed, or that six months had expired since its completion, or that the United States had not itself sued on the bond.

The act which is amended consists of but one material section, the 2d section providing only for the comparatively unimportant matter of security for costs. The act amending the section also consists of but one section. The question is whether the amended act applies to this case.

There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Dash v. Van Kleeck, 7 Johns. 499, 5 Am. Dec. 291; Jackson ex dem. Hicks v. Van Zandt, 12 Johns. 169; United States v. Heth, 3 Cranch, 399, 414, 2 L. ed. 479, 484; Southwestern Coal & Improv. Co. v. McBride, 185 U. S. 499, 503, 46 L. ed. 1010, 1012, 22 Sup. Ct. Rep. 763; United States v. American Sugar Ref. Co. 202 U. S. 563, 577, 50 L. ed. 1149, 1152, 26 Sup. Ct. Rep. 717.

The language of the amended act is prospective, as it provides "that hereafter any person or persons entering into a formal contract with the United States," etc. That language, standing alone, would leave little doubt as to the intention of Congress in the matter of the taking effect of the amendment.

It is urged, however, that as the amendment in this respect but reiterates the language of the original act, the use of the word "hereafter" in the commencement of the amendment ought not to have the significance which would otherwise attach to it, because it is simply in this particular re-enacting the law as it already stood.

There is considerable force in the suggestion that the word "hereafter" is not to receive the weight which, in other circumstances, it ought to have. The question is, however, one *as to the intention of Con- [315] gress, and when we come to look at the provisions of the statute, as amended, we are convinced that Congress did not intend that the amendment should apply to cases where the bond had already been executed, the work done, the respective rights of the parties settled, and the cause of action already in existence. If Congress had intended otherwise, we think it would have still further amended the original act by providing in plain language that the amendment should apply to all cases, and not be confined to the future.

The plaintiff in error contends that where an amendment to an act relates only to procedure, it takes effect upon causes of action existing when the amendment was passed; and hence that part of the amendment in question applies and prevents the taking of jurisdiction by the circuit court for the eastern district of New York. It is admitted by the plaintiff in error, that the act is not confined to procedure, but deals with

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a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof; and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and, upon so doing, the surety will be relieved from further liability: Provided further, That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene, as the court may order, shall be given to all known creditors, and, in addition thereto, notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.'"

substantive rights in some instances, one of which is the provision granting a preference to the United States over all other creditors. In such case counsel admits that the provision must be construed and held to apply to bonds executed subsequent to the enactment of the statute, and to such bonds alone. Under the statute of 1894 no such preference could be obtained. American Surety Co. v. Lawrenceville Cement Co. 96 Fed. 25; United States v. Heaton, 63 C. C. A. 156, 128 Fed. 414.

It would follow necessarily that, if the full amount of the liability of the surety on the bond were insufficient to pay all the claims and demands, the provision that, after paying the full amount due the United States, the remainder only should be distributed *pro rata* among the interveners, would also be a substantive amendment, and not one of procedure. Hence counsel admits that the full amount which may be due the United States depends upon whether the bond was executed prior or subsequent to the amendment of the statute; that, if the bond were executed prior thereto, the gov- [**316**] ernment is only entitled *to its *pro rata* share, while, if executed subsequently, the full amount of its claim, regardless of the claims of the other creditors, would be the amount due. In other words, these provisions, contained in the single section of the act, are to be considered as prospective only, and as applicable to bonds executed subsequently to the passage of the amendment.

There is another most important amendment, by which the materialman's right to sue is suspended until after the completion of the work and final settlement and for six months thereafter, during which the United States can alone sue upon the bond. Instead of a right to sue at once upon the nonpayment of his claim, he is precluded from doing so, perhaps for years.

Although the time in which to commence action may be shortened and made applicable to causes of action already accrued, provided a reasonable time is left in which such actions may be commenced (Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Wilson v. Iseminger, 185 U. S. 55, 46 L. ed. 804, 22 Sup. Ct. Rep. 573), yet that is a different principle from taking away absolutely a present right to sue until a period of time, measured possibly by years, shall have elapsed.

These various provisions are all contained in the same section of the statute, and there is not much of it left to be made retrospective, as matter of procedure, after these other provisions have been held to be prospective only. If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively. As it is only a question of intention we are not prepared to hold that the section is prospective in its operation in regard to all its other provisions, but retrospective in the one instance, as to the district in which the suit is to be commenced. Even matters of procedure are not necessarily retrospective in their operation in a statute, and we see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion *of it made ap- [**317**] plicable to cases already existing and other portions applicable only to the future. We are convinced Congress did not intend such separation. Viewing the whole section, we think Congress meant that only in future cases should the provisions of the amendment apply, although some trifling portion of those provisions might be regarded, technically, as in the nature of procedure. It is therefore wiser to hold the entire section governed by the usual rule and as applying only to the future.

The judgment of the Circuit Court of Appeals was right, and is affirmed.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA, Appt.,
v.
NATIONAL LIFE INSURANCE COMPANY, D. G. Drake, Fred A. Busse, Postmaster, Frank I. Miller, and A. J. Fleidlich.

(See S. C. Reporter's ed. 317–326.)

Courts — interference with Postoffice Department.

The ruling of the Postoffice Department, that mail addressed to the "National Life Insurance Company" at Chicago, Illinois, without street or office address, be delivered to the corporation of that name, and not to a company subsequently incorporated, with a similar name, will not be interfered with because, judging from past experience, the very great majority of the mail so addressed is, in fact, intended for the latter company.

[No. 162.]

Argued March 9, 10, 1908. Decided April 6, 1908.

NOTE.—Interference by courts with rulings of Postoffice Department.

The general rule deducible from the decisions appears to be that while the courts will interfere with the action of the postal authorities where such action is without au-

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Illinois, Eastern Division, dismissing, for want of equity, a bill to enjoin the delivery of mail to the addressee, on the ground that such mail was, in fact, intended for the complainant, though not addressed to it. Affirmed.

Statement by Mr. Justice **Peckham**:

The appellant commenced this suit in equity against the defendants on the 18th day of July, 1905, in the circuit court of the United States for the northern district [318] of Illinois. *eastern division, for the purpose of obtaining an injunction against the corporation defendant, restraining it and its manager, the defendant D. G. Drake, at Chicago, Illinois, from receiving, and the Chicago postmaster and the letter carriers named as defendants from delivering, mail matter directed to "National Life Insurance Company, Chicago, Illinois," to the company so designated, on the ground that, in fact, such mail matter was intended for the complainant, even though not addressed to it. An answer of the corporation defendant and that of its manager was duly filed and served, to which the complainant filed a replication. After a hearing it was adjudged by the circuit court "that the defendant National Life Insurance Company is entitled to have delivered to it such mail as may come to the postoffice at Chicago ad-

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thority of law or in excess of the power granted by law, they will not ordinarily review the exercise of discretion within the scope of the authority with which the postal officials are invested by law, unless such discretionary action is clearly wrong.

Thus, the discretion of the Postmaster General in determining whether a publication complies with the requirements of the statute, so as to be entitled to second-class mail privileges, will not be interfered with by the courts, unless they are satisfied that his decision is clearly wrong; and therefore his decision that a periodical publication consisting of text and colored plates, claimed by the publisher to be descriptive of changes in fashion, but by the postal authorities to consist of text descriptive of patterns for sale by the publishers, and fashion plates designed and intended for separate use, is not entitled to such privileges, will not be reviewed. United States ex rel. Reinach v. Cortelyou, 28 App. D. C. 570, 12 L.R.A.(N.S.) 166.

And in Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595, Affirming 22 App. D. C. 250, it is held that the refusal of the Postmaster General to admit to the mails, as a periodical publication entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with the greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts.

But in Lewis Pub. Co. v. Wyman, 152 Fed. 787, a temporary injunction was granted, restraining a postmaster from enforcing an order of the Postmaster General withdrawing the second-class mailing privilege granted to the complainant, because, no hearing having been given the complainant as required by statute, the Postmaster General had exceeded his authority.

So, also, in Payne v. United States, 20 App. D. C. 581, a writ of mandamus was issued to compel the Postmaster General to receive and transmit in the mails, as second-class mail matter, a publication containing railroad and steamboat time-tables and other information concerning railroad and steamboat lines, upon the ground that the characteristics of the publication were such as were prescribed by the statute, though it failed to comply with a superadded requirement of the Postoffice Department that it must consist of current news.

Similar questions have arisen in relation to the so-called "fraud orders."

Thus, in American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33, it was held that the determination of the Postmaster General that letters addressed to a certain corporation should be refused delivery was not so conclusive on the Federal courts as to preclude them from granting injunctive relief to such corporation, where his action was not authorized by the statutes under which he assumed to act; and that, since the statutes authorizing the retention of letters directed to any person obtaining money through the mail by false pretenses or promises are only intended to cover cases of actual fraud, an order prohibiting the delivery of letters addressed to a corporation which assumed to heal disease through the influence of the mind, was made without authority, the effectiveness of such treatment being a mere matter of opinion.

And in Public Clearing House v. Coyne, 194 U. S. 496, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789, it was held that a person injured by a fraud order of the Postmaster General might apply to the courts for redress in case that officer had exceeded his authority or his action was palpably wrong; though it was also held that his action would not be reviewed in "doubtful cases."

In Missouri Drug Co. v. Wyman, 129 Fed. 623, it was held that the courts would not review the action of the Postmaster General, where the complaining party had had a reasonable opportunity to be heard, unless the case was one where, upon the state of facts laid before that officer, it was "legally impossible to hold that the complaining party was engaged in obtaining money through the mails by false or fraudulent representations."

dressed 'National Life Insurance Company, Chicago, Illinois,' unless such mail shall also bear the street number of the office of the National Life Insurance Company of the United States of America, or shall be in some other way designated, upon the exterior of the envelope or wrapper containing such mail matter, or otherwise, as designed for the National Life Insurance Company of the United States of America, and not for the National Life Insurance Company. Wherefore, it is further ordered, adjudged, and decreed that the bill of complaint herein, as amended, be and the same is dismissed for want of equity." This judgment was affirmed by the circuit court of appeals.

Upon the trial, among others, the following facts were agreed upon:

An insurance company known as the National Life Insurance Company of the United States of America was duly incorporated by special act of Congress in the year 1868. Its chief office and place of business was, by its charter, located in the city of Washington, District of Columbia. The corporation thereupon entered upon the life insurance business and continued to transact that business and to seek new business of that kind until 1881.

*The company was duly admitted to do [319] business in the state of Illinois on or about August 16, 1868, and in the year 1874 it established in the city of Chicago, Illinois, what is denominated its principal branch office, and thereafter continuously transacted in the city of Chicago nearly all of the busi-

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In People's United States Bank v. Gilson, 140 Fed. 1, it was held that where a statute conferred upon the Postmaster General the power, "upon evidence satisfactory to him," to order the retention of registered letters and nonpayment of money orders to any person or company engaged in or conducting a fraudulent scheme through the mails, the finding of the Postmaster General that a concern was using the mails for such a scheme could not be reviewed by the courts in so far as it involved questions of fact, or unless a plain error of law was shown.

In Donnell Mfg. Co. v. Wyman, 156 Fed. 415, it was held that the court would direct the delivery of mail to the complainant, although the Postmaster General had, on the fixing of a date six months in advance for a hearing on the question of the issuance of a fraud order against complainant, directed all mail addressed to complainant to be withheld in the meantime, there being no statute susceptible of a construction giving authority to the Postmaster General to withhold mail under such circumstances.

In the following cases decided before the rendition of the opinion of the Supreme Court in American School v. McAnnulty, supra, the question as to the power of courts to interfere with the fraud orders of the Postmaster General was raised with different results.

In New Orleans Nat. Bank v. Merchant, 18 Fed. 841, an injunction was granted to restrain a postmaster from carrying out a fraud order of the Postmaster General, because that officer had failed to find that the person against whom the order was directed was engaged in an enterprise prohibited by law.

But in Enterprise Sav. Asso. v. Zumstein, 15 C. C. A. 153, 37 U. S. App. 71, 67 Fed. 1000, the court refused to enjoin a postmaster from carrying out a fraud order forbidding him to deliver registered letters to, or to pay money orders presented by, the complainant, a corporation, upon the ground that the order was made "in the exercise of the discretion reposed in the Postmaster General by express direction of Congress," which discretion could "not be supervised or controlled by the courts."

In Hoover v. McChesney, 81 Fed. 472, the court, while refusing to restrain a postmaster from withholding any mail addressed to the complainant as secretary of the corporation declared to be engaged in an illegal business, granted an injunction to restrain him from withholding and refusing to deliver to the complainant letters directed to him upon which there were no words, language, or indications that they were addressed to him as such secretary, basing such distinction upon the ground that while the decision of the Postmaster General whether a business which is being carried on is within the statutory prohibition may be final as to corporations, the Postmaster General cannot prohibit absolutely, without legal trial, the use of the mails by a citizen or citizens, without violating their constitutional rights.

In Fairfield Floral Co. v. Bradbury, 89 Fed. 393, while the court refused to assent to the refinement made in the above case, that the decision in Enterprise Sav. Asso. v. Zumstein, supra, involved any distinction between an individual and a corporation; yet it confined the latter decision to the other facts appearing in that case, and to that extent professed to be bound thereby; but regarded the complainant as entitled to a permanent injunction as to so much mail as was not registered and did not contain money orders, if the evidence had not shown that its business was one for which the postal system could not lawfully be used.

Orders prohibiting the delivery of mail on other grounds may also be interfered with by the courts, where it appears that the Postmaster General has acted without authority or in excess of the power granted him by law.

Thus, in Davis v. Brown, 103 Fed. 909, while it was held that a Federal statute providing that all matter otherwise mailable by law, having upon its envelope or outside wrapper anything calculated and obviously intended to reflect injuriously upon another, should not be conveyed in ness usually transacted at the home office of an insurance company.

In 1881 the company ceased to solicit or to write any new business, and such omission continued until 1900, and during that period the business transacted by it at its principal branch office in Chicago was such as was incident to the care and preservation of the business written prior to 1881. Between those years the company was suffering a natural liquidation, its outstanding policies decreasing from 5,966 in number to 1,317, while its policies in Illinois had decreased from 394 to 100. In the year 1900 the company again began to solicit new business, and up to March, 1904, transacted at its principal branch office in Chicago all of the business usually transacted at the chief or national office of an insurance company.

In March, 1904, the complainant was incorporated under the laws of the state of Illinois, with its principal office and place of business in the National Life building, at 159 La Salle street, in the city of Chicago, and the complainant forthwith took over all the property and business of the Washington, District of Columbia, corporation, and continued thereafter to transact the business theretofore transacted by the latter corporation. Prior to this time (March, 1904) the Washington company had taken over the business of two other life insurance companies and one trust company, all of which had become merged in the Washington company when the complainant took over

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the mails or delivered from any postoffice, but should be withdrawn from the mails under such regulations as the Postmaster General should prescribe, vested the Postmaster General with power to exclude nonmailable matter from the mails, and, by reasonable implication, with authority to determine what matter was nonmailable, it was also held that the courts could review his action if he acted maliciously or fraudulently, or exceeded his authority.

And in Teal v. Felton, 12 How. 284, 13 L. ed. 990, it was held that an order of the Postmaster General directing that no paper mail should be delivered to anyone without payment of letter postage, if there were any marks upon the wrapper in which it was enclosed, would not justify a postmaster in holding a paper upon the wrapper of which was a mark, where the statute required such action only when the writing or memorandum was concealed in the paper.

In Commerford v. Thompson, 2 Flipp. 611, 1 Fed. 417, authority for an order of the Postmaster General directing the withholding of complainant's letters was claimed to exist under a statute providing that no letter or circular concerning lotteries or other schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses should be carried in the mails. It was held that the detention was not authorized by law, although an injunction was refused because it was admitted that the letters in question were concerning a lottery, and therefore the complainant was not entitled to the protection of a court of equity.

The question of the right of the courts to interfere with rulings of the Postmaster General has also frequently arisen in regard to rulings as to the compensation of mail contractors or postmasters.

In Allman v. United States, 131 U. S. 31, 33 L. ed. 51, 9 Sup. Ct. Rep. 632, it was held that where by statute, as well as by the terms of the contract itself, the Postmaster General was authorized to make deductions from the pay of contractors for failure to perform service according to contract, and to fine them for other delinquencies, forfeitures imposed by him for the failure of a contractor engaged in carrying the mail to perform that duty within the time prescribed by his contract were with the discretion of the Postmaster General, and not subject to review by the court.

So, in Neil v. Ohio, 3 How. 720, 11 L. ed. 800, it was held that the imposition of such forfeitures rested altogether in the discretion of the Postmaster General, where the power had been conferred upon him by Congress to determine at what hours the mails should leave particular places and arrive at others, and to determine the frequency of its leaving and arriving.

So, also in United States v. Wright, 11 Wall. 648, 20 L. ed. 188, it was held that a statute requiring the Postmaster General to make a special order allowing a proportionately reasonable compensation to a postmaster by reason of the presence of a military or naval force near his postoffice, causing unusual business to accrue, which statute prescribed no rules to govern the conduct of that officer, "constituted him the sole judge to determine not only whether the exigencies in the case had arisen, but, if they had, the manner and extent of the allowance;" that it was not competent for a court or jury to revise his decision: and that it was not re-examinable anywhere else.

But in Otis v. United States, 24 Ct. Cl. 61, it was held that contractors were not bound by the action of the Postmaster General in imposing fines upon them for failure to perform service according to contract, and for other delinquencies, where that officer acted "incompatibly with the reasonable and legitimate use of the power" conferred by the statute.

And in Parker v. United States, 26 Ct. Cl. 344, while it was held that the decision of the Postmaster General imposing such fines in cases "properly within his jurisdiction" were final, it was said: "Though it may well be that, where the failure to perform was due to some cause for which the law will not allow a contractor to be held responsible, its business. The Washington corporation still preserves its corporate entity, but since March, 1904, has transacted no business except such as was incident to carrying out the contracts by which the complainant took over its property and business.

The average number of pieces of mail received by the complainant at its chief office [320] in Chicago, intended for it, during *the year 1905 and up to May 1, 1906, was about 200 per day for each business day.

The defendant F. E. Coyne was the postmaster at Chicago up to the 8th of January, 1906, since the commencement of this suit, and on that date Fred A. Busse was appointed and has since acted as such postmaster. The other individual defendants are the mail carriers in that city for the territory in which the complainant's place of business is situated.

The corporation defendant was organized and incorporated by an act of the legislature of Vermont on the 13th day of November, 1848, under the name of "National Life Insurance Company of the United States." By another act of the legislature, approved October 7, 1858, the name of the company was changed to "National Life Insurance Company," and since that time its name has been continuously and is now "National Life Insurance Company."

The company was duly admitted to do business in the state of Illinois on the 5th of October, 1860, and has done business in that state continuously from that time to the present. It has maintained since some time prior to 1868 a branch office in the city of Chicago, and has done business continuously at that branch office since its establishment up to the present time. That office since March 1, 1895, has been in charge of the defendant D. G. Drake, as its manager. During the period from 1881 to 1900 the business of this corporation in the state of Illinois increased from 190 policies to 3,846 policies. It has in all more than 70,000 policy holders, and the average number of pieces of mail matter received by it and D. G. Drake, its manager, at the office of the company, in the Marquette building, in Chicago, and intended for them, or one of them, during the year 1905, and up to May 1, 1906, was about 23 pieces per day for each business day.

There had been received for some years prior to 1905, at the Chicago postoffice, numerous pieces of mail matter every day, addressed simply "National Life Insurance Company, Chicago, Illinois." During the year 1905 the average number *of such pieces [321] of mail matter was about five per day. Prior to the 19th of January, 1905, substantially all such mail matter thus addressed had been delivered to D. G. Drake,

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the decision will be subject to review in the courts."

In United States v. Dumas, 149 U. S. 278, 37 L. ed. 734, 13 Sup. Ct. Rep. 872, it was held that an order of the Postmaster General withholding commissions from a postmaster because of fraudulent returns of business made by the latter, and allowing a discretionary compensation, under a statute so providing, and his adjustment of the postmaster's accounts, were not conclusive upon the postmaster and his sureties, in a suit to recover moneys illegally retained by him, but were only prima facie evidence of the balance due. See also Jaedicke v. United States, 29 C. C. A. 199, 56 U. S. App. 409, 85 Fed. 372, where this rule was applied to a similar state of facts.

And in Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45, it was held, under statutes providing a rate and basis of compensation for mail transportation, that the action of the Postmaster General in directing payment of such compensation could not be regarded as a conclusive determination, when brought in question in a court of justice.

In Day v. United States, 21 Ct. Cl. 262, which was an action by a mail transportation contractor to recover an extra month's pay, which by his contract was to be paid him if the Postmaster General should order the service discontinued, the court allowed the claim, though the Postmaster General had ruled that he was not entitled to the same.

The question under discussion has also arisen in the following miscellaneous instances:

In Brown v. United States, 9 How. 487, 13 L. ed. 228, it was held that a ruling of the Postmaster General allowing the treasurer of the Postoffice Department credit in his account with the government for the amount of a sum of money deposited by the treasurer in his own name in the bank from which the Department had borrowed money, and which at the time of allowing such credit had become insolvent, could not be considered a final adjudication closing the transaction from judicial scrutiny.

And in United States ex rel. Romero v. Cortelyou, 26 App. D. C. 298, mandamus issued to compel the Postmaster General to re-establish a postoffice which he had discontinued without authority of law.

But in United States ex rel. Wallace v. Key, 3 MacArth. 337, it was held that a rule would not be granted on the Postmaster General to show cause why he should not be compelled to enter into a contract with the petitioner in the name of the United States for carrying the mails on a certain route, since this required of the Postmaster General investigation and the exercise of judgment, and it appeared from the petition itself that that officer had acted upon the matter and disposed of the question submitted to his judgment.

as manager for the defendant National Life Insurance Company, and from day to day Drake opened or caused to be opened the pieces of mail matter thus addressed, and those not found to be intended for the company defendant would be marked by him "Not for National Life Insurance Company," would then be redeposited in the United States mail and subsequently delivered to the National Life Insurance Company of the United States of America.

The complainant was dissatisfied with this condition of things, and contended that all the mail thus addressed should be delivered to the complainant. Various letters passed upon the subject between the complainant and the postmaster at Chicago, and the manager of the defendant corporation, and also the authorities of the Postoffice Department, at Washington. For the purpose of settling the question it was suggested from Washington that the postmaster at Chicago should direct a representative of the two companies to appear at his office daily for a period of ten days and open the mail in the presence of an employee of the office, designated by the postmaster, and that a record should be kept of the mail received, and the proportion thereof intended for each company. If it then appeared that a great majority of the mail was really intended for the complainant, delivery should be made to that company. On the other hand, if the contention that the greater part of the mail so addressed belonged to the complainant was not supported by the facts, the existing conditions should be continued; and should either party decline to assent to these conditions, delivery should then be made to the other. The defendant corporation did not agree to this examination of the mail, and asked (January 17) for delay for further communications; but the postmaster at Chicago, on account of this refusal, and also acting under advices from the Postmaster General's Department, at Washington, directed, [322] under date *of January 18, 1905, that thereafter the mail should, until otherwise directed, be delivered to the complainant. Under this order the mail was so delivered from January 19, 1905, until July 12, 1905. During that time the complainant received 794 letters addressed "National Life Insurance Company, Chicago, Illinois," and of that number 778 were found to be intended for the complainant and related to its business; 2 letters were intended for the defendant and related to its business; and the remaining 14 pieces consisted of circular letters relating to bonds, mortgages, and other securities and investments, advertising, catalogues, and statistics, in regard to which it was impossible to tell from the inspection of the envelope and contents whether they were intended for the complainant or the defendant.

On the 21st of June, 1905, the Postoffice Department altered its directions, and directed the Chicago postmaster to thereafter deliver mail addressed "National Life Insurance Company, Chicago, Illinois," to the National Life Insurance Company, a Vermont corporation, at its offices in the Marquette building, Chicago, Illinois.

This order has ever since been obeyed by the Chicago postmaster, and for the purpose of obtaining relief therefrom the present suit was commenced.

Mr. **L. A. Stebbins** argued the cause, and, with Mr. W. H. Sears, filed a brief for appellant:

The courts have jurisdiction to review the orders of the Postoffice Department, and make them conform to law, and therefore have jurisdiction of this mail controversy.

American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

Mail is property, conferring upon the owner thereof all of the rights incident to the ownership of other forms of property.

Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688.

The Postoffice Department is the prepaid agent of the owner of the mail, charged with the duty of delivering the same to the owner thereof.

The intent of the sender determines the ownership of mail, and should be respected by the Postoffice Department, when such intent is known by it.

The rules of the Postoffice Department have the binding force of law.

Aldridge v. Williams, 3 How. 29, 11 L. ed. 478; Gratiot v. United States, 4 How. 80, 116, 11 L. ed. 884, 901; United States v. Symonds, 120 U. S. 46, 48, 30 L. ed. 557, 558, 7 Sup. Ct. Rep. 411; Grady v. United States, 39 C. C. A. 42, 98 Fed. 239; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; Ex parte Reed, 100 U. S. 13, 21, 25 L. ed. 538, 539.

The Postmaster General is not at liberty to disregard his own rules providing that mail should be delivered to the party for whom it is intended. This is analogous to the case of a court attempting to disregard its own rules.

Rio Grand Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 603, 606, 43 L. ed. 1103, 1105, 19 Sup. Ct. Rep. 761.

Mr. **Henry Russell Platt** argued the cause and filed a brief for appellees:

When a corporation has established itself in business under a name to the use of which it is entitled, no other corporation will be permitted to acquire any right based upon the adoption of a name so similar as to cause confusion, even though there be no actual intent to defraud in connection with the adoption of the similar name.

Hendricks v. Motagu, L. R. 17 Ch. Div. 638; Hoby v. Grosvenor Library Co. 28 Week. Rep. 386; People ex rel. Felter v. Rose, 225 Ill. 496, 80 N. E. 293.

The appellant has either wilfully or negligently encouraged the confusion of names, and therefore comes into equity with unclean hands, and asks the court to deliver to it the fruits of unfair competition, and is here seeking to acquire rights by acts which could properly have been enjoined at the prayer of the appellees.

Saunders v. Sun Life Assur. Co. [1894] 1 Ch. 537; Hoby v. Grosvenor Library Co. supra.

A decree, if granted in response to the prayer of the bill filed in this cause, would amount to a judicial sanction of an appropriation of appellee's name by appellant, and would be inconsistent with the general rules laid down in a vast number of cases bearing upon the question of unfair trade and the assumption of a name calculated to deceive or cause confusion of identity.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 357; International Committee, Y. W. C. A. v. Y. W. C. A. 194 Ill. 194, 56 L.R.A. 888, 62 N. E. 551; Newby v. Oregon C. R. Co. Deady, 609, Fed. Cas. No. 10,144.

The controlling propositions in the case at bar have been fully covered by the decision of the Attorney General of the United States, delivered to the Postoffice Department; and the decision of the Postmaster General carries a strong presumption of its correctness, and will not, ordinarily, be reviewed by the courts.

Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The record shows that the defendant company was first incorporated in Vermont in 1848 by act of the legislature, under the name "National Life Insurance Company of [323] the United *States;" but in 1858 the legislature of that state altered the name to "National Life Insurance Company," and this was ten years prior to the incorporation of the Washington, District of Columbia, corporation. The defendant company has, ever since that time, maintained the name given it in 1858, and it was in use by it when, in 1860, it was admitted to do business in Illinois. It established a business office in Chicago prior to 1868, and has since that time continuously made use of the mails of the United States, under its corporate name.

After the Washington company was incorporated, in August, 1868, it was admitted to do business in the state of Illinois, but it was not until 1874 that it established in the city of Chicago what it denominated its principal branch office.

The defendant company, under the law of Illinois, places on its signs in the building where it does business a statement that it was incorporated in Vermont, but its corporate name has no such addition.

Both companies being engaged in the life insurance business in various states, and, after 1874, both having business offices in Chicago, are constantly receiving letters through the mails. Large numbers of them are properly addressed, those intended for the complainant being addressed to it by its own name, to which is usually added the street number of the building in which it has its office, 159 La Salle street, while those intended for the defendant company are addressed to it by name, with the addition of Marquette building, where its office is, or they are addressed to D. G. Drake, its manager. The difficulty has arisen over letters which were simply addressed "National Life Insurance Company, Chicago, Illinois," and these have, with the exception of a brief time between January and July, 1905, been delivered to the defendant company, in the Marquette building. After they have been there opened such of them as have been intended for the complainant have been returned to the postoffice at Chicago, from which they have been then delivered to the complainant. A very large proportion of the letters thus addressed have proved, upon *being opened, to have been intended for [324] the complainant. The letters that are addressed to the defendant by its corporate name cannot be known to have been intended for the complainant until they have been opened. In other words, there is nothing on the outside of the letters from which it could be determined that they were not intended for the company to which they were addressed by its corporate name, but for the complainant. Some of the letters thus addressed have been, in fact, intended for the defendant company, although a very small proportion of them.

As the defendant company used its name long prior to the adoption of a somewhat similar name by the complainant, it is apparent that the confusion which has arisen therefrom in regard to the mail delivered at Chicago is not at all the fault of the defendant company. The whole claim of the complainant rests upon the averment that a very large majority of the letters that are addressed to the defendant company by its own name alone are in reality intended for the complainant. This fact does not clothe the complainant with the legal right to insist that the Chicago postmaster shall be directed to deliver all mail of the character in question to a corporation other than that to which the mail is addressed. It is a matter of confusion arising from a similarity of names, wherein the greater proportion of the total amount of the mail thus addressed belongs to the complainant, although not addressed to it, and yet some portion of the mail thus addressed actually belongs to the company to which the mail is in fact addressed. There are no means of discovering to which company the letters belong short of opening them. The complainant, by adopting greater caution in the matter of directions to its correspondents as to the proper address, might probably be able to secure more correctness in the direction of letters intended for it.

In the endeavor to discharge its duty the Department has provided, in paragraph 4 of § 645 of its Postal Laws and Regulations of 1902, the following general regulation:

[325] *"Attempts to secure the mail of an established house, firm, or corporation through the adoption of a similar name should not be recognized. Where disputes arise between individuals, firms, or corporations as to the use of a name or designation, matter addressed to a street, number, or building should be delivered according to such address. When not so addressed *the mail will be delivered to the firm or corporation which first adopted the name of the address at that place.*"

The Postoffice Department made a special order herein, following substantially that rule. The appeal made by the complainant to the Department was really nothing but an appeal to its discretion; complainant could only have asked for the order because, upon the whole, it was thought but fair and equitable that the corporation for which, in a great majority of cases, the letters were probably intended, should have them, although letters so addressed were, in a number of cases, intended for the corporation named on them. The court is now asked, in effect, to review and reverse that order, not because the complainant has a legal right to the delivery of all these letters, but only because, judging from the past, the numbers intended for complainant are many more than those intended for defendant, even though all are addressed to the latter. The court is therefore asked to judge by the experience of the past, although in making the order asked for it inevitably directs the delivery of some letters to the wrong party, and in opposition to the address upon the letters. Assuming that the court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the court, and the complainant has no clear legal right to obtain the order sought. See Bates & G. Co. v. Payne, 194 U. S. 106-108, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595.

A court in such case ought not to interfere in the administration of a great Department like that of the Postoffice by an injunction which directs the Department how to conduct *the business thereof, where the [326] party asking for the injunction has no clear right to it.

This case has nothing in common with American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. There the Postoffice Department was assuming to act under a statute giving it the power to refuse to deliver mail matter to an individual guilty of fraud in his business, and this court held that the case made did not show that the plaintiff in error had been guilty of any conduct that could be held to be a fraud under the statute under which the Postoffice Department was acting. The Department was, therefore, without jurisdiction to make the order, which was reversed in this court.

The judgment of the Circuit Court of Appeals must be affirmed.

ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, PENNSYLVANIA, Plff. in Err.,
v.
FIREMEN'S INSURANCE COMPANY OF BALTIMORE, TO THE USE AND BENEFIT OF FRANCIS E. S. WOLFE, Receiver.

(See S. C. Reporter's ed. 326-337.)

Reinsurance — necessity of payment of loss by reinsured.

1. The reinsured, under a compact of reinsurance, is not bound to pay the loss before enforcing its claim against the reinsurer because such compact provides that

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NOTE.—As to reinsurance—see note to Sun Mut. Ins. Co. v. Ocean Ins. Co. 27 L. ed. U. S. 337.

Liability of reinsurer as affected by nonpayment of loss by reinsured.

An unbroken line of authority holds that the liability of a reinsurer is in no way dependent upon the payment, or ability to make payment, of the loss by the reinsured.

losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the reinsured under the contracts reinsured; and that, in no event, shall the reinsurer be liable for an amount in excess of a ratable proportion of the sum actually paid to the insured by the reinsured under the original contracts of insurance, after deducting therefrom any and all liability of other reinsurers.

Reinsurance — necessity of payment of loss by reinsured.

2. Payment of the loss to the original insured is not made a prerequisite to a recovery by the reinsured on a contract of reinsurance, because the compact provides that the reinsured shall forward to the reinsurer a statement of the date and probable amount of loss or damage, and. after having adjusted, accepted proofs of, or paid such loss or damage, shall forward the proofs and a copy of the original receipt taken upon the payment of such loss.

[No. 180.]

Argued March 17, 18, 1908. Decided April 6, 1908.

Payment of the loss is not made a prerequisite to the enforcement of such liability by a clause providing "losses, if any, payable *pro rata*, at such time and in such manner as the reassured may pay" as the words "may pay" will be construed to mean "liable to pay." Fame Ins. Co.'s Appeal, 83 Pa. 397, Affirming 9 Phila. 292.

In Norwood v. Resolute F. Ins. Co. 47 How. Pr. 43, 4 Jones & S. 552, it was held that because another clause of the policy of reinsurance provided, "reinsurance, in case of loss, to be settled in the proportion which the sum reinsured shall bear to the whole sum covered by the reinsured company," the clause, "loss, if any, to be payable *pro rata* with the reassured," did not mean that the reinsurer was not liable to pay under the policy of reinsurance until the original loss had been paid by the insurer.

In Hone v. Mutual Safety Ins. Co. 1 Sandf. 137, it was held that the extent of the liability of a reinsurer was not affected by the insolvency of the reassured, nor by its inability to fulfil its own contract with the original assured; and this judgment was affirmed by the court of appeals in 2 N. Y. 235.

So, also, in Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 59, it was held that the insolvency of the original insurer in nowise affects or limits the responsibility of the reinsurer, who is liable to pay the whole amount of the reinsurance to the trustee of the original insurer. although the original assured has been paid but a small dividend.

To the same effect is Strong v. Phœnix Ins. Co. 62 Mo. 289, 21 Am. Rep. 417.

In Gantt v. American Cent. Ins. Co. 68 Mo. 503, it was said that the reassured was not obliged, in order to maintain his action against a reinsurer, to show that he had paid the loss, and that therefore, when a loss occurs which is covered by the policy of reinsurance, the reassured is entitled to recover from the reinsurer not what he has paid, but all that he has become liable to pay by reason of such loss.

Nor will the extent of the reinsurer's liability, where the reinsured by reason of insolvency is partially unable to pay the loss, be limited by a clause in the policy of reinsurance providing "loss, if any, payable at the same time and *pro rata* with the insured," its fair construction being that the liability of the reinsuring company was to be no greater than that of the original company; that the reinsurer was not to be compelled to pay any faster than the original company; and that it was to have the benefit of any defense which the original company would have had (Re Republic Ins. Co. Fed. Cas. No. 11,705; Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364); nor by a clause providing, "in case of loss the company shall pay *pro rata* at and in the same time and manner as the reinsured" (Cashau v. Northwestern Nat. Ins. Co. 5 Biss. 476, Fed. Cas. No. 2,499); nor by a clause providing that "loss, if any, to be settled and paid *pro rata* with the insured, and at the same time and place, and upon the same terms and conditions" (Hunt v. New Hampshire Fire Underwriters' Asso. 68 N. H. 305. 38 L.R.A. 514, 73 Am. St. Rep. 602, 38 Atl. 145); nor by a clause providing "loss, if any, payable *pro rata* and at the same time with the insured" (Blackstone v. Alemannia F. Ins. Co. 56 N. Y. 104, Affirming 4 Daly. 299).

And in Re Eddystone Marine Ins. Co. 61 L. J. Ch. N. S. 362, it is held that the words, "to pay as may be paid thereon," in a policy of marine insurance, do not mean that the reinsurer is liable only for such ratable proportion of any dividend that the insolvent reinsured may be able to pay to the original insured, payment by the reinsured not being a prerequisite for enforcing the liability of the reinsurer.

Nor, ordinarily, will the liability of the reinsurer be suspended until payment of a dividend by the insolvent reinsured.

Thus in Re Eddystone Marine Ins. Co. [1892] 2 Ch. 423, it was held that under a reinsurance policy "subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon" the reinsurer is liable to the extent of the liability under the original policy, instead of only for the proper ratable proportion of any dividend which may be paid by an insolvent insurer, and has actually been declared and paid.

For a discussion of the general question of the liability of a reinsurer, see note to Traders' Ins. Co. v. Aachen & M. F. Ins. Co. 8 L.R.A.(N.S.) 844.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, in favor of plaintiff, in an action on a policy of reinsurance. Affirmed.

See same case below, 28 App. D. C. 330, 14 L.R.A.(N.S.) 1049.

Statement by Mr. Justice **Peckham**:

[327] *This action was brought by plaintiff, who is the defendant in error, in the supreme court of the District of Columbia, for the purpose of recovering an amount alleged to be due the plaintiff from the defendant (plaintiff in error) on a policy of reinsurance. The plaintiff obtained judgment in the trial court, which was affirmed in the court of appeals of the District.

The plaintiff had originally insured the property which was destroyed, and had, prior to the loss, reinsured a proportion of the original insurance with the defendant company. After such reinsurance the plaintiff suffered heavy losses by reason of the great fire in the city of Baltimore in the month of February, 1904, for which losses it became liable, and was rendered thereby insolvent, and is unable to pay the same, unless the plaintiff is able to collect the amount due it from the defendant by virtue of its reinsurance policies, and from other corporate fire insurance companies with which plaintiff had contracts of reinsurance. By reason of the insolvency of the corporation a receiver was appointed by a decree of the circuit court of Baltimore city, prior to the commencement of this action.

Upon the trial the plaintiff proved a cause of action against the defendant, unless the facts, which it also proved, that it had become insolvent by reason of the losses sustained by it incident to the Baltimore fire in 1904, and that a receiver had been appointed for it by the court in Maryland, and that the receiver had paid to its creditors, after this suit was brought, but 55 per cent of the amount of its liability, amounted to a defense.

The contract between the plaintiff and defendant was described therein as a "reinsurance compact," and in it the defendant agreed to "reinsure the Firemen's Insurance Company" in the amounts and manner therein stated.

There were contained in the compact, and forming part thereof, the following subdivisions:

"10. Upon receiving notice of any loss or [328] claim under any *contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or damage, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company, upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and, upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions, as paid by the said reinsured company under its contracts hereunder reinsured; and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

The defendant gave no evidence, but requested the court to instruct the jury as follows:

"No. 2. The jury are instructed that proof of mere liability on the part of the plaintiff under the original contracts or policies involved in this suit is not sufficient to entitle it to a verdict against the defendant; and the jury are therefore further instructed that they must return a verdict in favor of the defendant, unless they shall find from the evidence that the plaintiff has actually paid the whole or some *part of one [329] or more of the claims against it, enumerated in the schedule annexed to the contract of reinsurance here sued upon.

"No. 3. The jury are instructed that, if they find for the plaintiff, their verdict must not be for an amount in excess of a ratable proportion of the various sums actually paid by it to its policy holders under the original contracts or policies enumerated in the schedule attached to the declaration filed herein."

These instructions were refused and the refusal duly excepted to. Thereupon the jury, under instructions, returned a verdict in favor of the plaintiff for $12,613.24, being the amount which it was conceded was due under the reinsurance compact, provided the fact of insolvency and nonpayment by the reinsured did not constitute a defense.

Messrs. **H. Prescott Gatley** and **Andrew Y. Bradley** argued the cause, and, with Mr. Charles H. Bradley, filed a brief for plaintiff in error:

The language of paragraph 11 of this contract is neither technical nor ambiguous; nor have any of the terms used therein acquired a meaning distinct from the popular sense of the same terms. They must, therefore, be taken and understood in their plain, ordinary, and popular sense.

Imperial F. Ins. Co. v. Coös County, 151 U. S. 462, 463, 38 L. ed. 235, 236, 14 Sup. Ct. Rep. 379; 2 Parsons. Contr. 7th ed. pp. 626, 628, 632.

The meaning of the words "actually paid" is so clear it is difficult, if not impossible, to suggest a synonymous phrase which will not tend to obscure rather than to clarify that meaning. It is impossible to construe them to mean "may become liable to pay," without absolutely disregarding all definitions and rules of construction.

Kelly v. Supreme Council, C. M. B. A. 46 App. Div. 82, 61 N. Y. Supp. 394.

The liability of the reinsuring company being clearly and expressly fixed by the terms of the contract, the court will not enlarge it.

Kerr, Ins. pp. 729–735; Imperial F. Ins. Co. v. Coös County, supra.

The moment the reinsured accepted the contract in this case, it assumed and took upon itself the duty of performing a certain definite act by which, and by which alone, the extent and measure of the liability of the reinsuring company could be ascertained in the event of a loss. The reinsured, by its acceptance of this contract, agreed that actual payment by it of its losses should be a condition precedent to its right of recovery against the reinsuring company.

Langdell, Contr. § 33; Ostrander, Fire Ins. § 334; Kerr. Ins. p. 740; Braunstein v. Accidental Death Ins. Co. 1 Best & S. 782.

The fact that performance of this condition precedent is now impossible does not invalidate it, nor is the reinsured relieved or discharged from its obligation.

9 Cyc. Law & Proc. pp. 625, 627, 628.

Messrs. **William F. Mattingly** and **T. Wallis Blackistone** argued the cause and filed a brief for defendant in error:

The contract did not contemplate insolvency. It was a contract of indemnity, and the legal construction of section 11, in connection with the entire contract, following the strict intent of both parties to it, is that in no event should the defendant be required to pay under its contract more than its ratable proportion of the actual liability of the plaintiff.

May, Ins. §§ 11, 11a; 2 Clement, Fire Ins. 551–557; Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 74; Blackstone v. Alemannia F. Ins. Co. 56 N. Y. 104; Fame Ins. Co.'s Appeal, 83 Pa. 396; Cashau v. Northwestern Nat. Ins. Co. 5 Biss. 476, Fed. Cas. No. 2,499; Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364; Re Republic Ins. Co. Fed. Cas. No. 11,705.

The consideration of the situation of the parties when the contract was made, its subject-matter, and the purpose of its execution, are material to determine the intention of the parties and the meaning of the terms they used; and when these are ascertained they must prevail over the words of the stipulations.

Kauffman v. Raeder, 54 L.R.A. 250, 47 C. C. A. 278, 108 Fed. 171; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; O'Brien v. Miller, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140; Insurance Co. v. Duval, 8 Serg. & R. 147; Illinois Mut. F. Ins. Co. v. Andes Ins. Co. 67 Ill. 362, 16 Am. Rep. 620; Eagle Ins. Co. v. Lafayette Ins. Co. 9 Ind. 443; Gantt v. American Cent. Ins. Co. 68 Mo. 503; 24 Am. & Eng. Enc. Law, 2d ed. pp. 265 f, 267 (2), 270, VIII.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The only question before the court is as to the construction *of the language of the [332] reinsurance compact. The term "reinsurance" has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed "double insurance," *i. e.*, an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its inability to fulfil its own contract with the original insured. The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon the greater or less ability to pay by the reinsured. If the reinsured commenced his action against the reinsurer before he had himself paid the loss, the reinsured took upon himself the burden of making out his claim with the same precision that the first insured would be required to do in an action against him. But there is no authority for saying that he must pay the loss before enforcing his claim against the reinsurer. These propositions are adverted to and enforced in Home v. Mutual Safety Ins. Co. 1 Sandf. 137, where the authorities upon the subject are gathered and reviewed at some length. The case itself was subsequently affirmed in the court of appeals in 2 N. Y. 235. See also Blackstone v. Alemannia F. Ins. Co. 56 N. Y. 104. The same doctrine is held in Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 59.

Counsel for plaintiff in error frankly concedes that the legal propositions above stated are correct, and, unless there is something in the special provisions of this reinsurance contract which changes the ordinary rule on that subject, the judgment herein must be affirmed. Reference is made to the eleventh subdivision of the policy in ques-[333]tion. Under the language of *that clause the plaintiff in error contends that the general rule is altered, and that unless the reinsured has paid over the money on account of the loss, to the original insured, the reinsurer is not bound to pay under this particular contract of reinsurance. Language somewhat like that used in the eleventh subdivision has been construed in other cases. In Blackstone v. Alemannia F. Ins. Co., supra, the language used was "loss, if any, payable *pro rata*, and at the same time with the reinsured." The court of appeals of New York held that the first part of the clause relieved the defendant from paying the full amount of the loss, and made it liable only for its *pro rata* share, so that, the defendant's reinsurance being for half the loss, the defendant was only held liable to pay half the loss. Continuing, the court said: "In regard to the latter branch of the clause in question, which says that the loss is payable 'at the same time with the reinsured,' it is not possible to conclude from it that actual payment by the reinsured is, in fact, to precede or to accompany payment by the reinsurer. It looks to the time of payability, and not to the fact of payment. It has its operation in fixing the same period for the duty of payment by the reinsurer as was fixed for payment by the reinsured. To give to it the construction contended for by the defendant would, in substance, subvert the whole contract of reinsurance as hitherto understood in this state."

In Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364, a clause in the reinsurance policy stated that "loss, if any, payable at the same time and *pro rata* with the insured;" and it was held that such language simply gives to the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the reinsurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay. Speaking of this clause, Judge Blodgett said:

"The reinsuring company is to have the benefit of any deduction by reason of other insurance or salvage, that the *original com-[334]pany would have, and also to have the benefit of any time for delay or examination which the original company might claim, so that the liability of the reinsuring company shall be coextensive only with the liability, and not with the ability, so to speak, of the original company.

"The original company may have reinsured for the purpose for which reinsurance is usually, if not universally, accomplished, —for the purpose of supplying itself with a fund with which to meet its obligations. It may have placed its own funds entirely out of its control; it may have divided its capital among its stockholders; and may depend solely upon the reinsurance to make good its liability to policy holders.

"The intention of this clause was to make the reinsuring company's liability coextensive, and only coextensive, with the liability of the original insurance company.

"For instance, suppose an insurance company in the city of Chicago wishes to go out of business. It has money enough to reinsure all its risks, and does so, and goes out of the insurance business. That company does not keep a fund on hand any longer for the purpose of meeting losses as they fall in, but depends upon its reinsurance.

"Now, it is to my mind absurd to say, if a loss occurs on one of those reinsured policies, that the company primarily liable is to have its claim against the reinsuring company limited by its ability to meet its obligations to its original policy holders. The very object of making the policy of reinsurance was to place the company in funds with which to make its policy holders whole, and that is defeated if the construction which is insisted upon by the assignee in this case is the true one.

"The fair, liberal construction, it seems to me, of this clause, and the salutary one, is to assume that the true intent of it—the judicial meaning—is that the liability of the reinsurance company is to be no greater than that of the original company; that they are not to be compelled to pay any faster than the original company would be compelled to pay; that they are to have the benefit of any [335]defense which the original company *would have had. Any deduction—any equity—which the original company would have had against the original insured is to inure to the benefit of the reinsuring company.

"I am of opinion that the Republic is liable on these policies to the extent of the adjusted losses, even if the Lorillard had not paid a cent."

In Cashau v. Northwestern Nat. Ins. Co. 5 Biss. 476, Fed. Cas. No. 2,499, in the reinsurance policy there was a clause that the reinsurer shall "pay *pro rata* at and in the same time and manner as the reinsured." It was held that the reinsurer was to have all the advantages of the time and manner of payment specified in the policy of the reinsured, but that it had no reference to the insolvency of the reinsured. The court in that case said:

"The insolvency of the original insurer is no defense, in whole or in part, to a suit against the reinsurer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. . . . The condition in that policy that, 'in case of loss the company shall pay *pro rata* at and in the same time and manner as the reinsured,' cannot mean that, in case of the insolvency of the Fulton company, the defendant shall only be obliged to pay the *pro rata* of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the reinsured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton company,—otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue."

Bearing in mind what the contract of reinsurance, pure and simple, means, and how these contracts have been enforced in the past when some special language has been introduced in regard to the payment under a reinsurance policy, the question arises whether, by the use of the language of the eleventh subdivision, the contract of reinsur-[336]ance, while still *bearing that name, has been so changed as to deprive it of its chief value. As is stated by Judge Johnson, in regard to the language used in 56 N. Y., supra, to give this language this construction will, in substance, subvert the whole contract of reinsurance as hitherto understood. We agree with the court below, that the language of the eleventh subdivision, taken in connection with the fact that it is used in a contract designated by the parties as one of reinsurance, means that the reinsuring company shall not pay more than its ratable proportion of the actual liability payable on the part of the reinsured, after deducting all liability of other reinsurers.

To hold otherwise is to utterly subvert the original meaning of the term "reinsurance," and to deprive the contract of its chief value. The losses are to be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the reinsured company under its contracts. This means that such losses, payable *pro rata*, are to be paid upon the same condition as are the losses of the insurer payable under its contract. And the liability of the reinsurer shall not be in excess of the liability of the insurer under its original contracts, after deducting therefrom any and all liability of other reinsurers of the contract of the insurer or of any part thereof. It is the ratable proportion for which the other reinsurers are liable, that provision is made for deducting, and the liability of the insurer means such liability after that deduction, and does not mean there must be an actual payment of such liability by the insurer before it can have any benefit of the contract of reinsurance which is made with defendant.

Subdivision 10 of the contract does not result in any different conclusion.

This subdivision does not and cannot mean that there is to be no liability unless the reinsured should pay the loss sustained. The reinsured company under its provisions is bound to forward to the reinsuring company a statement of the date and the probable amount of loss or damage, and it is provided that after the reinsured company shall have adjusted, accepted *proofs of, or paid[337] such loss or damage, it shall forward the proof of its loss and claim and a copy of the receipt taken for payment. It means that if the loss or claim has been in fact paid, then a copy of the receipt is to be sent; but it does not mean that there must be payment before any liability on the part of the reinsuring company exists.

We do not think that the language of these two subdivisions was intended to entirely nullify and tear up by the roots the construction given to the contract of reinsurance for so many years throughout the civilized world and upon which its chief value is based. The nature of the contract is accurately described in its commencement. It is described as a "compact of reinsurance;" and there has been no doubt as to the meaning of such contract for the last two centuries. The judgment of the Court of Appeals is right, and is affirmed.

UNITED STATES, Appt.,
v.
CERECEDO HERMANOS Y COMPAÑIA.

(See S. C. Reporter's ed. 337–339.)

Duties — on wines.

1. Wines imported in cases of 24 bottles, each bottle containing more than one pint and less than one quart, are dutiable at $1.60 per dozen bottles, under the tariff act of July 24, 1897 (30 Stat. at L. 174, chap. 11, U. S. Comp. Stat. 1901, p. 1654), ¶ 296, providing that the duties shall be, "in bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or 24 bottles or jugs containing each not more than one pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 5 cents per pint or fractional part thereof."

Statutes — departmental construction.

2. Great weight should be given to the construction placed by the department charged with its execution upon a statute whose meaning is doubtful.

Statutes — legislative construction — re-enactment.

3. The re-enactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.

[No. 152.]

Submitted March 5, 1908. Decided April 6, 1908.

APPEAL from the District Court of the United States for the District of Porto Rico to review a judgment which affirmed the decision of the Board of Appraisers, in favor of a protest against the classification of imports for duties. Reversed.

The facts are stated in the opinion.

Assistant Attorney General **Sanford** submitted the cause for appellant.

No appearance for appellees.

Mr. Justice **McKenna** delivered the opinion of the court:

The appellee imported into Porto Rico from France 30 cases of red wine, 24 bottles to the case, and each bottle containing more than one pint and less than a quart of wine.

The wine was classified by appraisers at the port of San Juan under paragraph 296 of the present tariff act [30 Stat. at L. 174, chap. 11, U. S. Comp. Stat. 1901, p. 1654] and the reciprocity treaty with France of May 30, 1898, as being dutiable at $1.25 per dozen bottles, making a total of $75. Upon this classification the entry was liquidated and the duty paid.

The appellee in due time protested against the classification and the decision of the collector, stating that "the wine in question has been assessed at $1.25 per dozen bottles, when it should be by cases of 24/2 bottles."

The board of appraisers decided against the collector and in favor of the protest, saying:

"The wine in question, being contained in cases of 24 bottles, and each bottle containing over a pint, was clearly subject to duty at $1.60 per case; and any excess beyond this quantity found in such bottles would be subject to a duty only of 5 cents per pint or fractional part thereof."

The district court affirmed the decision of the board of appraisers.

The only question in the case is the construction of paragraph 296, the material portions of which are as follows:

"In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or 24 bottles or jugs containing each not more than one pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 5 cents per pint or fractional part thereof. . . ."

*It is the contention of the government **[339]** that the paragraph separates still wines in bottles into three classes and fixes a specific rate of duty on each, as follows:

"(a) Bottles 'containing each not more than one pint,' which are to be assessed as full pints at $1.60 per 24 bottles, or at the rate of 6⅔ cents per pint; (b) bottles 'containing each not more than one quart and more than one pint,' which are to be assessed as full quarts at $1.60 per dozen bottles; that is, at the same rate of 6⅔ cents per pint; and (c) bottles containing 'any excess beyond these quantities,' which are to be assessed at the rate of $1.60 per dozen, plus 5 cents per pint or fractional pint on the excess over a quart contained in each bottle."

We think the contention is right, and needs no comment to make it clear.

Counsel for the government also points out that the provisions of the tariff act of 1875 and subsequent acts were substantially similar to paragraph 296, and that the Treasury decisions thereunder were in accordance with the interpretation for which the government now contends. The first of these decisions was made in 1879. Re De Luze, T. D. 4,060. The ruling was repeated in 1893. Re Sheldon, T. D. 14,461. And again in 1899. Re Wyman, T. D. 20,843.

We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247. And we have decided that the re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction. United States v. G. Falk & Bro. 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191.

Judgment reversed.

Mr. Justice **White** and Mr. Justice **Peckham** concur solely because of the prior administrative construction.

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[340] *J. B. THOMPSON, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY, by T. C. Albritton, Revenue Agent.

(See S. C. Reporter's ed. 340–348.)

Constitutional law — due process of law in tax proceedings.

1. Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either.

State taxation — of distilled spirits in bonded warehouses.

2. The taxation of distilled spirits in bonded warehouses in the state, provided for by Ky. act of March 29, 1902, under which the warehouseman is made liable for the tax and is given a lien on the property for the amount paid, is within the power of the state, where the legislation does not contemplate the collection of the taxes so long as the spirits are in the custody or under the lien of the Federal government.

Constitutional law — equal protection of the laws — taxation of spirits in bond.

3. The equal protection of the laws is not denied by the taxation of distilled spirits in bonded warehouses in the state, provided for by Ky. act of March 29, 1902, under which the warehouseman is made liable to pay the tax, and is given a lien on the property for the amount paid.

[No. 160.]

Argued March 9, 1908. Decided April 6, 1908.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Franklin Circuit Court, in that state, for the recovery of interest on deferred taxes assessed on distilled spirits stored in a bonded warehouse. Affirmed.

See same case below, 29 Ky. L. Rep. 705, 94 S. W. 654.

Statement by Mr. Justice **McKenna**:

This is an action to collect interest on deferred taxes assessed for the years 1898 to 1902, both inclusive, on distilled spirits, which were stored in the warehouse of plaintiff in error.

The petition of the commonwealth contains a cause of action for each year; and it is alleged in each that plaintiff in error was the owner or proprietor of a bonded warehouse in which distilled spirits were stored, and, as required by law, reported the quantity of spirits on which the government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which *such spirits were assessed for taxation [341] and the number of packages and their value as assessed. And it is alleged that by such reports, which were verified as the law directs, there was shown to be due the commonwealth of Kentucky, "as taxes, exclusive of any interest, the sum of ——— dollars" for the particular year. It is further alleged that "the sum reported as taxes due was incorrect, in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse." The amount for each year is alleged. The petition was amended by order of the court and made specific as to the tax rate assessed by the commonwealth for the period of years covered by the petition. The amendment also stated the valuation fixed by the state board of valuation on distilled spirits, and the time when the spirits were placed in bond, when withdrawn, and the amount of taxes paid thereon by plaintiff in error.

The answer of the defendant, plaintiff in error here, is very voluminous. It denies that plaintiff in error was indebted to the commonwealth for taxes and interest for any of the years mentioned in the petition, beyond that which was duly paid to the commonwealth and duly credited by it, "as set out in the petition," denies that there is due any interest "from any date whatever," or any penalty or penalties. It is alleged with much circumstantiality that plaintiff in error made reports required of him by the law of the state upon blank forms furnished by the auditor of public accounts, who was charged with the duty

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NOTE.—As to due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

of supervising the collection of all taxes on distilled spirits, and adjusting and settling the claims and accounts therefor, and that that officer verified and approved the reports, and accepted the amounts of taxes paid with the reports, and issued receipts for and on behalf of the commonwealth. And it is alleged that the auditor and treasurer having accepted the principal sum of taxes without any interest or penalty, in full satisfaction of the commonwealth's claim, to permit it to recover any other or further sum "would be inequitable, unconscionable, [342] and unjust," and that any recovery *would be a total loss to plaintiff in error. That the law was construed by all the officers of the state government since its enactment in 1892 to only require the payment of the principal sum of the taxes. And that such officers have so construed the law and the subsequent act, known as the revenue law, which was enacted March 29, 1902, in such manner that no interest or penalties were exacted of plaintiff in error, or any other owner or proprietor of a bonded warehouse. It is also alleged that plaintiff in error was not the owner of said spirits, but that they were owned by nonresidents of the state; that under the law the person who paid the taxes thereon was entitled to a lien to secure the amount so paid, and would have been entitled to a lien for the payment of interest and penalties if any had been exacted, and, to enforce the same, possession could have been taken; but, relying upon the construction placed upon the law as aforesaid, and believing that all claims of the state had been fully satisfied, plaintiff in error permitted the owner thereof to withdraw the same and ship it out of the state of Kentucky without the payment of any interest or penalties; that such spirits have long since been consumed and the lien thereon lost. And it is alleged that some of the owners are insolvent and others dead, and hence any recovery against plaintiff in error will be a total loss to him.

There are a number of argumentative allegations that the spirits, while in the bonded warehouse, were in the possession of the United States, and not, therefore, in the possession of plaintiff in error, or within the jurisdiction of the state of Kentucky, or subject to taxation by that state or any of the municipalities, or subject to any process of the courts of the state. And it is further alleged or argued that, if the law be construed as the state in this action seeks to construe it, such law would be an "unwarranted interference with the scheme and plan of the United States government, which has been in force for forty years," and would deprive plaintiff in error and all owners of distilled spirits "of the rights and privileges secured and guaranteed by the Constitution of the United *States," and [343] rights secured by the 14th Amendment, which provides that "no state shall . . . abridge the privileges or immunities of citizens of the United States, nor . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. **J. B. Thompson**, *in propria persona*, argued the cause, and, with Mr. Phil B. Thompson, Jr., filed a brief for plaintiff in error:

When the state acted, and one of its great executive departments, acting for it, settled with the plaintiff in error, giving a receipt in full for all the taxes that he had collected, or that were claimed, and which had been paid over under the direction of the state, if a loss ensued as to interest on taxes by reason of a reconstruction of the law, growing out of a change made in it by a subsequent statute, this loss must fall upon the state, and not upon the taxpayer, who has been compelled to pay the taxes upon the property of another, and has long since released the property to that other, upon which, by the terms of the statute, he is given a lien for the taxes due and for the interest and penalties that may accrue.

United States v. Farrell, 8 Biss. 259, Fed. Cas. No. 15,073; Clinkenbeard v. United States, 21 Wall. 65, 22 L. ed. 477.

The mere presence or actual physical existence of property in the state does not confer jurisdiction to tax property asserted to be in the state, which is beyond the jurisdiction of the state.

Buck v. Beach, 206 U. S. 402, 51 L. ed. 1112, 27 Sup. Ct. Rep. 712.

That the Federal government has power to levy a tax on distilled spirits for revenue purposes cannot be controverted; and if it does that, its power over the subject-matter is supreme, and therefore exclusive.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

Can the state have power to impose a tax on distilled spirits in the custody of the Federal government, and not have power to collect the taxes so imposed while the property is so held?

Knowlton v. Rock County, 9 Wis. 418; Harris v. Wood, 6 T. B. Mon. 641; United States v. Rickert, 188 U. S. 438, 439, 47 L. ed. 536, 537, 23 Sup. Ct. Rep. 478.

Governmental possession and control arrest and suspend the power of the state to tax.

Com. v. E. H. Taylor Jr. Co. 101 Ky. 331, 41 S. W. 11.

This property is not the subject of taxation by the state until the lien of the Federal government is satisfied, its custody ended, and possession surrendered to the owner.

Harris v. Dennie, 3 Pet. 292, 7 L. ed. 683; Clark v. Peaslee, 1 Cliff. 545, Fed. Cas. No. 2,831; Re Clifford, 2 Sawy. 428, Fed. Cas. No. 2,893; McCullough v. Large, 20 Fed. 311; Fischer v. Daudistal, 9 Fed. 145.

A state cannot, by legislative enactment, deprive a person of his property without due process of law; nor so deprive him through the medium of a constitutional convention, any more than it can through an act of the legislature.

Re Ziebold, 23 Fed. 791; Clark v. Mitchell, 69 Mo. 627.

The property of a private citizen cannot be taken from him and given to another citizen by the exercise of legislative power in any form. If the law under which the tax is levied is void, any property taken to satisfy it is taken without due process of law.

Beekman v. Saratoga & S. R. Co. 3 Paige, 73, 22 Am. Dec. 679; Dundee Mortgage-Trust Invest Co. v. School Dist. No. 1, 10 Sawy. 52, 19 Fed. 359.

If the taxing power be in no position to render services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36.

While the actual physical existence of real and personal estate within the geographical boundaries or territorial limits of the state must exist before the state can tax, the state cannot, on this account alone, subject such property to taxation.

Buck v. Beach, supra; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; 1 Cooley, Taxn. 129; Re New York Indians (Fellows v. Denniston) 5 Wall. 761, 18 L. ed. 708; Moore v. Sweetwater County, 2 Wyo. 8; Auditor General v. Williams, 94 Mich. 180, 53 N. W. 1097; Moore v. Beason, 7 Wyo. 292, 51 Pac. 875; Gay v. Thomas, 5 Okla. 1, 46 Pac. 578; Wagoner v. Evans, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730; United States v. Rickert, supra; Low v. Austin, 13 Wall. 29, 20 L. ed. 517; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; License Cases, 5 How. 575, 12 L. ed. 288; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; People v. National F. Ins. Co. 27 Hun, 188; Blount v. Monroe, 60 Ga. 61.

No state can impose taxation on persons, property, or other subject-matter of taxation which are not within its jurisdiction (1 Cooley, 129); nor upon property over which it has no dominion.

People v. McCreery, 34 Cal. 456; State Tax on Foreign-held Bonds, 15 Wall. 300–319, 21 L. ed. 179–186; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385–396, 47 L. ed. 513–518, 23 Sup. Ct. Rep. 463; Union Refrigerator Transit Co. v. Kentucky, supra.

While the whisky is in bonded warehouses in the custody of the United States government, its right to the possession of the property is supreme. It is not liable to any of the processes of the state courts, it cannot be reached by judgment, distress warrant, or execution (Drake, Attachm. 6th ed. § 281, and Taylor v. Carryl, 24 Pa. 259); and there is no power in the state to subject it either to the demands of the state or to the claim of creditors until the lien of the government for its taxes has been fully discharged and the possession of the property surrendered to the owner.

Com. v. E. H. Taylor Jr. Co. supra; Drake, Attachm. 6th ed. § 281; Harris v. Dennie; Clark v. Peaslee; Re Clifford; McCullough v. Large; and Fischer v. Daudistal,—supra; 21 Ops. Atty. Gen. 73; Wisconsin C. R. Co. v. Price County, 133 U. S. 496–504, 33 L. ed. 687–690, 10 Sup. Ct. Rep. 341; United States v. Rickert, 188 U. S. 438, 439, 47 L. ed. 536, 537, 23 Sup. Ct. Rep. 478; Coe v. Errol, supra; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 152, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

Articles imported from foreign countries are not the subject of taxation by a state; and such articles and the duties paid thereon do not lose their character as imports, so as to become the subject of state taxation, as a part of the mass of property of the state, until they have passed from the control of the importer, or have been broken up by him from the original cases; and the state tax is void whether imposed upon them distinctly as imports, or as constituting a part of the importer's property.

Low v. Austin; Brown v. Maryland; License Cases; Cook v. Pennsylvania; People v. National F. Ins. Co.; and Blount v. Monroe,—supra.

The present case is not distinguishable in principle from those just cited.

McCullough v. Large, 20 Fed. 311.

The courts of the state need not be resorted to for the punishment of thieves for the larceny of spirits from a distillery bonded warehouse. This offense is amply covered by the Federal statute.

United States v. Farrell, 8 Biss. 259, Fed. Cas. No. 15,073, 99 U. S. 221, 25 L. ed. 321.

If the state was resorted to, it would not confer the powers of taxation where they did not already exist.

Buck v. Beach, 206 U. S. 407, 51 L. ed. 1114, 27 Sup. Ct. Rep. 712.

Three facts must exist before the state has power to tax: The situs—not the mere presence or actual physical existence—of the property must be within the geographical boundaries and territorial limits of the state. The property must also be within her jurisdiction and subject to the dominion of the state, its laws and its processes for the enforcement of its laws. The person required to pay the tax must have the custody, possession, and control of the property taxed.

Louisville & J. Ferry Co. v. Kentucky and State Tax on Foreign-held Bonds, supra; 1 Cooley, Taxn. 129; People v. McCreery, supra; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; Buck v. Beach, 206 U. S. 406, 51 L. ed. 1113, 27 Sup. Ct. Rep. 712; Coc v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

A decision of a state court upon a constitutional question, growing out either of the Constitution of the state itself or any law passed by the state, is not binding upon this court, where complaint is made that the rights of the complainant under the 14th Amendment have been violated by such Constitution or law.

Cooley, Const. Lim. 7th ed. p. 418; 2 Story, Const. 4th ed. Appx.; Slaughter-House Cases, 16 Wall. 58, 21 L. ed. 402; Doyle v. Continental Ins. Co. 94 U. S. 542, 24 L. ed. 152.

Mr. **John W. Ray** argued the cause, and, with Mr. Napoleon B. Hays, filed a brief for defendant in error:

Property in the hands of a receiver of a United States court is subject to taxation.

Central Trust Co. v. Wabash, St. L. & P. R. Co. 26 Fed. 11; George v. St. Louis Cable & W. R. Co. 44 Fed. 117; Ex parte Chamberlain, 55 Fed. 704; Walters v. Western & A. R. Co. 68 Fed. 1002.

The same rule is held as to receivers of state courts.

Spalding v. Com. 88 Ky. 135, 10 S. W. 420.

Property in the hands of an assignee or a trustee in bankruptcy is liable for state taxation; yet it is out of the jurisdiction of the state courts.

Re Sims, 118 Fed. 357; United States v. Herron, 20 Wall. 251, 22 L. ed. 275; Swarts v. Hammer, 194 U. S. 441, 48 L. ed. 1060, 24 Sup. Ct. Rep. 695.

If the government aided the distiller in order to obtain the revenue, the position would not be more favorable to the exemption claimed than was that of the Pacific railroads, which were held not to be exempt from state taxation, although they had been assisted by the United States, and were obliged to transport troops for the United States, as well as to render other public service.

Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

It is enough that this property is within the territorial jurisdiction of Kentucky.

Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. ed. 242, 25 Sup. Ct. Rep. 50.

Plaintiff in error claims exemption or immunity from taxation; yet shows no express or implied law sustaining such contention.

Gray, Limitations of Taxing Powers, § 1321; Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456.

The case of Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318, is decisive of the case at bar.

Anderson County v. Kentucky Distilleries & Warehouse Co. 146 Fed. 999.

Mr. Justice **McKenna** delivered the opinion of the court:

The court of appeals of Kentucky opened its opinion in this case by saying that the whole question presented was whether the statute of the state "imposing a tax on distilled spirits in bonded warehouses" violated the Federal Constitution, and particularly the 14th Amendment thereof. It was also said that the validity of the statutes under the Constitution of the state had been construed and decided in Com. v. E. H. Taylor, Jr. Co. 101 Ky. 325, 41 S. W. 11; Com. v. Walker, 25 Ky. L. Rep. 2122, 80 S. W. 185; Com. v. Rosenfield Bros. 118 Ky. 374, 80 S. W. 1178, 82 S. W. 433. And the court quoted from appellant's brief (plaintiff in error here) as follows:

"It is not necessary on this appeal that the court shall either overrule, modify, or change in any manner its opinion rendered in the case of Com. v. Rosenfield Bros. In accordance with the previous opinion of the court in the case of Com. v. E. H. Taylor, Jr. Co. supra, it was held in the Rosenfield Case that the law which imposed the tax and interest—the matter in controversy in this action—is not in conflict with the Constitution of the state of Kentucky. It has never been held that this law is not in [344] conflict *with the Constitution and laws of the United States, and this is the question we now present." [29 Ky. L. Rep. 705, 94 S. W. 654.]

Plaintiff in error, however, seems to broaden his contentions here, and attacks the construction of the state statutes made in Com. v. Rosenfield Bros. and urges either a different construction than there made, or a disregard of that construction, as constituting extortion against him, or as depriving him of his property without due process of law. The basis of the contention is that he had paid taxes demanded of him under a different construction, and received the receipt therefor, and that the state is estopped to make further demands upon him. The hardship of his situation is strongly presented. He was required, he urges, to report for assessment and pay taxes on property belonging to another. He made the report and paid all the taxes demanded of him. Having completely discharged his legal obligations, as he supposed, he delivered the property to its owner and lost the lien which the statute gave him, and which constituted the legal justification, as he contends, of the charge upon him, and he is now subjected to liability for interest and penalties for which he has no security or power to enforce reimbursement. A new demand is made upon him, he says, "special in its character and retroactive in its effect, in violation of the Constitution of the state of Kentucky and of the 14th Amendment of the Constitution of the United States." But these contentions, so far as they rest upon a supposed change in the law, were rejected, in Com. v. Rosenfield Bros., supra, the court deciding that interest was due under the law of 1892, under which the taxes were demanded and paid, and as well as under the law of 1902.

A summary of the statutory provisions will make clear the decision. Section 4105 of the statute of 1892 requires "every owner or proprietor of a bonded warehouse" to make a report between certain dates to the auditor of public accounts of the kind and quantity of spirits in such warehouse on the 15th day of September. The auditor [345] of public accounts is required *to submit the same to the board of valuation and assessment, which board is to fix the value of the spirits for the purpose of taxation under the act, and to assess the same accordingly. Notice is required to be given to the owner or proprietor of the warehouse of the amount so fixed, and certify the value of the spirits assessed for said taxes to the auditor of public accounts, and that officer certifies to the county clerks of the respective counties the amount liable for county, city, town, or district taxation, and the date when the bonded period will expire. The report is filed in the office of the county clerk and certified to the proper collecting officer. The person or corporation having custody of the spirits on the 15th September in the year the assessment is made is made liable for the taxes "due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest, or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from date of payment."

Section 4110 provides as follows:

"Taxes on distilled spirits which may be assessed while in a bonded warehouse, and on which the United States government tax has not been paid or will not become due before the 1st day of March after the assessment, shall be due on the 1st day of January, May, and September next after the said government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear [legal] interest as other taxes."

The statute of 1902 strikes out the words "as other taxes," and inserts the words "until paid." Upon this change the controversy turns. The court of appeals in Com. v. Rosenfield Bros., supra, said there was a change in words only, not one in substance or meaning; and unless this be so, it was said, the legislature had taken "great pains to insert into every section relating to the subject-matter words which meant nothing." And again: "We do not know how the legislature could have made it plainer that state taxes on whisky *in bond [346] should bear interest than by the language used in the section aforesaid." The section had been quoted. This was the court's conclusion "as an original proposition." But it cited as "direct authority" Com. v. E. H. Taylor, Jr. Co. 101 Ky. 327, 41 S. W. 11, where the "very question arose." To the contention that the warehouseman has lost his lien through the construction put upon the act by the state's fiscal officers, and that the state was therefore estopped from collecting the interest, the court replied: "It may be true that this will work a hardship upon the distiller, but it was his duty, under the law, to pay the taxes and the accrued interest, and we cannot, in his behalf, waive the time-honored and conclusive presumption that he knew the law; and especially is this true since 1897, when the case of Com. v. E. H. Taylor, Jr. Co. was decided, thus establishing beyond all question that taxes on whisky in bond bore interest on the assessments made during the bonded period. Waiving this, however, it is elementary that the state is not estopped by the laches of its officers."

But from this situation this court cannot give relief. Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a state as against their interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. We do not mean to indicate that the decision of the court was wrong. It would, indeed, be difficult to resist the force of its reasoning. At any rate, it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security.

The assignments of error repeat frequently and dwell upon the fact of the power of the Federal government over the spirits and the distillery, and its custody of them, and it is urged that such power is exclusive of the exercise of any other power whatever, and such custody has the effect to withdraw, in legal contemplation, the property from [347] the jurisdiction of *the state, though it is actually present in the state, making it, indeed, as though it were outside of the territorial limits of the state. And it is hence concluded that plaintiff in error by the law of Kentucky is made to pay taxes on property belonging to another person outside of the jurisdiction of the state; and it is contended the decision of the court giving the laws these effects denies plaintiff in error the equal protection of the laws, and deprives him of his property without due process of law.

There are many elements involved in the contention, and it is not easy, without extending this opinion to a great length, to give them separate and individual discussion. We will therefore consider only the main one,—to wit, the power of the Federal government over the spirits and the warehouse, and the absolute want of power in the state to tax them or subject them to its process. This is the basic principle of the contentions of plaintiff in error; "for," he says, "the warehouseman cannot be made liable for the tax on the property if the property itself is not liable for the tax." There is further argument to the effect that. by reason of the control of the Federal government, the state cannot give, in all events and against all possibility of the exercise of that control, to the warehouseman, the means to enforce the lien conferred by the statute to reimburse himself, and he should therefore "be by that fact discharged from all liability on account of such assessment." But these contentions rest upon an exaggerated view of the control of the Federal government and the effect of the Kentucky statute. The scheme of the statute is simple, and it is an exercise of the power which, we said in Carstairs v. Cochran, 193 U. S. 10, 16, 48 L. ed. 596, 597, 24 Sup. Ct. Rep. 318, the state undoubtedly possessed, "to tax private property having a situs within its territorial limits." And this was said in response to contentions having the same ultimate foundation as those urged in the case at bar. The proposition was indeed considered as elemental, and as requiring nothing more than the illustration of cases. There many be instances where property, though within the territorial *limits of a state, is not [348] subject completely to the jurisdiction of the state, and counsel has cited a number of such instances. Where their example applies they will be followed. It does not apply in the present case. There is no conflict between the state and Federal purpose. There is no question of the supremacy of the latter and its complete fulfilment. "The state does not propose," the court of appeals said, "to collect the taxes so long as the spirits are in the custody or under the lien of the Federal government." There is actual accommodation, therefore, of the power of the state to the rights of the Federal government, and a harmonious exercise of the respective sovereignties of each, preserving to each necessary power. This is what Carstairs v. Cochran decides. See also Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. ed. 242, 25 Sup. Ct. Rep. 50.

A word more may be necessary as to the contention that the statutes in controversy, as interpreted by the court of appeals of the state, deny to plaintiff in error the equal protection of the laws. The ground of this contention is not explicitly distinguished in the assignments of errors from the grounds of the other contentions, and in the brief of counsel the contention is made to depend upon the view, rejected by the court of appeals of the state, that the act of 1902 made a change in the law, and that only the owners of distilled spirits in bond are required to pay interest "upon taxes settled at the time they were due." The effect of the act of 1902 has been considered and it is only necessary to add that the distinction made by the taxing statutes of the state between distilled spirits in bond and other property does not constitute a discrimination condemned by the 14th Amendment. The power of the state to classify persons and property in its legislation is well established, and the power is not transcended by the statutes under review. Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272.

Judgment affirmed.

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[349]*HUDSON COUNTY WATER COMPANY, Plff. in Err.,
v.
ROBERT H. McCARTER, Attorney General of the State of New Jersey.

(See S. C. Reporter's ed. 349-358.)

Waters — riparian rights — diverting water beyond state.

1. No agreement of private riparian owners can sanction the diversion of an important stream outside the boundaries of the state in which it flows.

Constitutional law — police power — prohibiting diverting water beyond state.

2. The police power of the state justifies the enactment of N. J. Laws 1905, chap. 238, under which a riparian owner may be prevented from diverting the waters of a stream of such state into any other state, for use therein.

Constitutional law — due process of law — equal protection of the laws — prohibiting diverting water beyond state.

3. Neither due process of law nor the equal protection of the laws is denied by N. J. Laws 1905, chap. 238, under which a riparian owner may be prevented from diverting the waters of a stream of the state into any other state, for use therein.

Constitutional law — impairing contract obligations.

4. The obligations of a contract to divert the waters of the Passaic river into another state, for use therein, are not unconstitutionally impaired by the enactment, in the exercise of the police power, of N. J. Laws 1905, chap. 238, under which such a diversion of water beyond the state is forbidden.

Commerce — state interference — prohibiting diverting water beyond state.

5. Commerce between the states of New York and New Jersey is not unlawfully interfered with by N. J. Laws 1905, chap. 238, under which a riparian owner may be forbidden to divert the waters of the Passaic river beyond the state, under a contract to furnish a water supply for the city of New York.

Constitutional law — privileges and immunities — forbidding diverting water beyond state.

6. Privileges of citizens of New Jersey are not denied to the citizens of other states by N. J. Laws 1905, chap. 238, under which a riparian owner may be prevented from diverting the waters of a stream of that state into any other state, for use therein.

[No. 184.]

Argued March 18, 19, 1908. Decided April 6, 1908.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a decree which affirmed a decree of the Court of Chancery of that state, enjoining the diversion of the water of the Passaic river under a contract to furnish a water supply for the city of New York. Affirmed.

See same case below, 70 N. J. Eq. 695, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489.

The facts are stated in the opinion.

Messrs. **Gilbert Collins** and **Richard V. Lindabury** argued the cause and filed a brief for plaintiff in error:

Water when reduced to possession is a commodity which may be sold, like any other.

Syracuse v. Stacey, 169 N. Y. 245, 62 N. E. 354; New Jersey Suburban Water Co. v. Harrison, 72 N. J. L. 194, 62 Atl. 767.

When a statute interfering with interstate commerce is founded on the police power of the state, the question always arises whether the act goes beyond the necessity for its exercise. This question is judicial. The reasonableness of the statute is an element of the inquiry whether it encroaches upon the national authority.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 473, 24 L. ed. 531; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 300, 43 L. ed. 702, 707, 19 Sup. Ct. Rep. 465; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539.

The courts must look at the substance of things when they inquire whether the legislature has transcended its authority.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

A statute which might otherwise be a proper and reasonable exercise of the police power will nevertheless be void if it discriminates against citizens of other states.

Walling v. Michigan, 116 U. S. 446, 455, 29 L. ed. 691, 694, 6 Sup. Ct. Rep. 455; Minnesota v. Barber, 136 U. S. 313, 325, 34 L. ed. 455, 459, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 575, 6 L.R.A.

579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Benedict v. Columbus Constr. Co. 49 N. J. Eq. 38, 23 Atl. 485.

The act is void because it denies equal privileges to citizens of another state.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Re Watson, 15 Fed. 511; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Connolly v. Union Sewer Pipe Co. 184 U. S. 560, 46 L. ed. 690, 22 Sup. Ct. Rep. 431.

A state cannot change the common law, either by judicial legislation or by act of the legislature, so as to take property without due process of law. In New Jersey, the common law determines the right to divert running water, and vests it in the riparian owners as a right to be enjoyed by them in common, subject, only, to such modifications of the right as they may create by contract or grant among themselves.

Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Loeb v. Columbia Twp. 179 U. S. 472, 492, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

In Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243, 50 L. ed. 170, 173, 26 Sup. Ct. Rep. 23, this court, on writ of error to the supreme court of Florida, sustained the interpretation by the state court of the state Constitution in its effect upon a contract, but treated that interpretation as subject to review, and not conclusive.

When the question of impairment of a contract by state statute is raised, the court will not accept as final the interpretation of the statute or contract given by the state court whose judgment is under review, but will itself interpret in order to see whether the contract has been impaired.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575.

We claim the right to have our case considered here fully on the merits, as a common-law question, unhampered by any consideration of modern state policy.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 432, 14 L. ed. 997, 1003; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

Running water is incapable of ownership, and neither the state nor the riparian owners have any title in it until it is appropriated.

Sweet v. Syracuse, 129 N. Y. 335. 27 N. E. 1081, 29 N. E. 289; Syracuse v. Stacey, 169 N. Y. 245, 62 N. E. 354; Society for establishing useful Manufactures v. Morris Canal & Bkg. Co. 1 N. J. Eq. 189, 21 Am. Dec. 41.

Only a riparian proprietor can object to diversion from a running stream.

Cobb v. Davenport, 32 N. J. L. 369; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 638; Higgins v. Flemington Water Co. 36 N. J. Eq. 543; Albright v. Cortright, 64 N. J. L. 337, 48 L.R.A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; Grey ex rel. Simmons v. Paterson, 60 N. J. Eq. 389, 48 L.R.A. 717, 83 Am. St. Rep. 642, 45 Atl. 995; Strobel v. Kerr Salt Co. 164 N. Y. 320, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142; Pierson v. Speyer, 178 N. Y. 270, 102 Am. St. Rep. 499, 70 N. E. 799.

Such proprietor may grant or waive his right, and cannot object to diversion, unless he shows substantial injury to his property therefrom.

Shreve v. Voorhees, 3 N. J. Eq. 34; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 370; Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 377, 41 Atl. 385; Mason v. Hill, 5 Barn. & Ad. 25; Race v. Ward, 4 El. & Bl. 702; Miner v. Gilmour, 12 Moore, P. C. C. 156.

Mr. **Robert H. McCarter** argued the cause and filed a brief for defendant in error:

The court will take judicial notice that the Passaic river is a fresh-water stream, flowing into the ocean through New York bay; and that at the point of diversion (Little Falls) it is not navigable, but becomes so a short distance above the city of Newark.

Browne v. Scofield, 8 Barb. 239; Peyroux v. Howard, 7 Pet. 324, 8 L. ed. 700; The Montello (United States v. The Montello) 11 Wall. 411, 20 L. ed. 191; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770.

The defendant, claiming to exercise the valuable right to divert large quantities of water of a running stream, bases its right so to do entirely upon squatter sovereignty, notwithstanding the fact that such conduct amounts, in law, to a nuisance, which any lower riparian proprietor can enjoin, or he can sue to recover his damages.

East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631.

No authority can be found which sanctions the right of the East Jersey Water Company to divert daily millions of gallons of water from the Passaic river, at this or any other point, without the consent of the lower owners, and to apply the same to municipal or other purposes.

United States v. Rio Grande Dam & Irrig.

Co. 174 U. S. 690, 702, 43 L. ed. 1136, 1141, 19 Sup. Ct. Rep. 770.

The state, as successor to the Crown in England, is the absolute owner of the bed of the stream and of the banks thereof up to high-water mark, so far as it is navigable.

Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269; Cobb v. Davenport, 32 N. J. L. 369.

The rights of the private proprietors in the running stream above the point of navigability, whose title goes to the thread, being limited and usufructuary only, the residue of interest or property in the great mass of running water resides in the state as trustee for the public; and the state has not only the right to preserve, but it is charged with the duty, as such trustee, of preserving, the same for the common benefit of all its citizens.

The state, as a lower owner, is entitled to preserve the integrity of the stream so that it will come to it unimpaired in quantity.

Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 631; Atty. Gen. v. Jamaica Pond Aqueduct Corp. 133 Mass. 361; Coosaw Min. Co. v. South Carolina, 144 U. S. 550. 36 L. ed. 537. 12 Sup. Ct. Rep. 689; Story, Eq. Jur. §§ 922, 923; Kerr, Inj. 262; 1 Joyce, Inj. 120; Missouri v. Illinois, 180 U. S. 208, 243, 45 L. ed. 497, 513, 21 Sup. Ct. Rep. 331.

The damage or injury to a lower private riparian owner seeking an injunction in cases of this character need not be great.

1 High. Inj. 795; Hulme v. Shreve. 4 N. J. Eq. 116; Shields v. Arndt, 4 N. J. Eq. 234; Higgins v. Flemington Water Co. 36 N. J. Eq. 538; Corning v. Troy Iron & Nail Factory, 40 N. Y. 191; Mudge v. Salisbury, 110 N. Y. 413, 18 N. E. 249; Garwood v. New York C. & H. R. R. Co. 83 N. Y. 400, 38 Am. Rep. 452; Weiss v. Oregon Iron & Steel Co. 13 Or. 496, 11 Pac. 255.

Time may sometimes run against a state in the acquisition of rights; and hence it is of importance to a state to prevent the acquisition of title by prescription.

Missouri v. Illinois, 200 U. S. 496, 520, 50 L. ed. 572, 578, 26 Sup. Ct. Rep. 268; Gould, Waters, § 37; Hale, De Jure Maris, chap. 5; Oppenheim, International Law, § 243; Hargrave's Law Tracts, 18; Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132; Boston v. Richardson, 105 Mass. 371; Church v. Meeker, 34 Conn. 421; Palmer v. Hicks, 6 Johns. 133; 2 Kent, Com. 427.

The state, without regard to its lower proprietorship, is entitled to an injunction as successor to the Crown and as representative of the public.

Hargrave's Law Tracts, chaps. 2, 5; Smith v. Rochester, 92 N. Y. 477. 44 Am. Rep. 393; Farnham, Waters, §§ 133, 138. 138d, 140a, 141; Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L.R.A. 826, 21 Atl. 1090; State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 627, 49 N. E. 809; Atty. Gen. v. Jamaica Pond Aqueduct Corp. supra; Coosaw Min. Co. v. South Carolina, 144 U. S. 566, 36 L. ed. 543, 12 Sup. Ct. Rep. 689; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; Kansas v. Colorado, 206 U. S. 46, 99, 51 L. ed. 956, 975, 27 Sup. Ct. Rep. 655; Georgia v. Tennessee Copper Co. 206 U. S. 236, 237, 51 L. ed. 1044, 27 Sup. Ct. Rep. 618; Allen v. Wyckoff. 48 N. J. L. 90, 57 Am. Rep. 548, 2 Atl. 659; Magner v. People, 97 Ill. 333; American Exp. Co. v. People, 133 Ill. 649, 9 L.R.A. 138, 23 Am. St. Rep. 641, 24 N. E. 758; State v. Geer, 61 Conn. 144, 13 L.R.A. 804, 3 Inters. Com. Rep. 732, 22 Atl. 1012, Affirmed in 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; State v. Northern Pacific Exp. Co. 58 Minn. 403, 59 N. W. 1100; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; People v. O'Neil, 110 Mich. 324, 33 L.R.A. 696, 68 N. W. 227; Roth v. State, 51 Ohio St. 209, 46 Am. St. Rep. 566. 37 N. E. 259; State v. Medbury, 3 R. I. 138; Dunham v. Lamphere, 3 Gray, 268; Com. v. Manchester, 152 Mass. 230, 9 L.R.A. 236, 23 Am. St. Rep. 820, 25 N. E. 113, Affirmed in 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.

The state may confine to its own citizens the right to share in or enjoy the common property belonging to all of its citizens, just as it may so confine the delegation of its sovereign power to exercise the right of eminent domain; and no provision of the Federal Constitution prevents it.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062; State v. Corson, 67 N. J. L. 178, 50 Atl. 780; State v. Lee, 70 N. J. L. 368, 57 Atl. 142, Affirmed in 59 Atl. 1118, 207 U. S. 67, ante, 106, 28 Sup. Ct. Rep. 22; Haney v. Compton, 36 N. J. L. 507.

The commerce clause of the Constitution applies to only such commodities as are properly the subject of commerce.

State v. Northern Pacific Exp. Co. supra; State v. Harrub, 95 Ala. 176, 15 L.R.A. 761, 4 Inters. Com. Rep. 99, 36 Am. St. Rep. 195, 10 So. 752.

If the state has enough interest in its waters to protect them from contamination or pollution (State ex rel. Board of Health

v. Diamond Mills Paper Co. 63 N. J. Eq. 111, 51 Atl. 1019; Affirmed in 64 N. J. Eq. 793, 53 Atl. 1125), it would seem that it could also preserve its quantity as well.

See also Com. ex rel. McCormick v. Russell, 172 Pa. 506, 33 Atl. 709.

The law under consideration is passed as a part of the police power of the state, and consequently is free from any of the constitutional objections that are here sought to be raised against it.

Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Field v. Barber Asphalt Paving Co. 194 U. S. 623, 48 L. ed. 1154, 24 Sup. Ct. Rep. 784; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Cook v. Marshall County, 196 U. S. 261, 272, 49 L. ed. 471, 475, 25 Sup. Ct. Rep. 233; Dobbins v. Los Angeles, 195 U. S. 233, 49 L. ed. 174, 25 Sup. Ct. Rep. 18; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an information alleging that the defendant (the plaintiff in error), under a contract with the city of Bayonne, in New Jersey, has laid mains in that city for the purpose of carrying water to Staten island, in the state of New York. By other contracts it is to get the water from the Passaic river, at Little Falls, where the East Jersey Water Company has a large plant by which the water is withdrawn. On May 11, 1905, the state of New Jersey, reciting the need of preserving the fresh water of the state for the health and prosperity of the citizens, enacted that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." By a second section a proceeding like the present was authorized, in order to enforce the act. Laws of 1905, chap. 238, p. 461. After the passage of this statute the defendant made a contract with the city of New York to furnish a supply of water adequate for the borough of Richmond, and of not less than 3,000,000 gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic river out of the state. There are allegations as to the amount of water [354] and the probable *future demand, upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other states, and denies to them the equal protection of the laws. An injunction was issued by the chancellor (70 N. J. Eq. 525, 61 Atl. 710), the decree was affirmed by the court of errors and appeals (70 N. J. Eq. 695, 65 Atl. 489), and the case then was brought here.

The courts below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor; and, on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the court of errors and appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the state. It reinforced the state's rights by the state's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations, that, as against the rights of riparian owners merely as such, the state was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute *owners of the [355] stream, on the ground that it authorized a suit by the state in their interest, where it does not appear that they all have released their rights. See Kansas v. Colorado, 185 U. S. 125, 142, 46 L. ed. 838, 844, 22 Sup. Ct. Rep. 552. But we prefer to put the authority, which cannot be denied to the state, upon a broader ground than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas v. Colorado, 185 U. S. 125, 141, 142, 46 L. ed. 838, 844, 845, 22 Sup. Ct. Rep. 552, s. c. 206 U. S. 46, 99, 51 L. ed. 956, 975, 27 Sup. Ct. [356] Rep. 655; *Georgia v. Tennessee Copper Co. 206 U. S. 230, 238, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618. What it may protect by suit in this court from interference in the name of property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case. Geer v. Connecticut, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600.

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain *unim- [357] paired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the 14th Amendment is disposed of by what we have said. That under article 1, § 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter. Knoxville Water Co. v. Knoxville, 189 U. S. 434, 438, 47 L. ed. 887, 892, 23 Sup. Ct. Rep. 531; Manigault v. Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.

The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See Asbell v. Kansas [209 U. S. 251, ante, 778, 28 Sup. Ct. Rep. 485]. The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. Within the boundary, citizens of New York are [358]as free *to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the Court of Errors and Appeals was right.

Decree affirmed.

Mr. Justice **McKenna** dissents.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appt.,
v.
MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

(See S. C. Reporter's ed. 358–365.)

Corporations — consolidation — effect on contract exemption from taxation.

A contract exemption from taxation, made by a municipality under authority of law, for a valuable consideration, with one of the constituent railway companies, does not pass to a consolidated company organized after the adoption of Miss. Const. 1890, § 181, requiring the property of corporations to be taxed like that of individuals.

[No. 97.]

Argued February 28, 1908. Decided April 6, 1908.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi to review a decree sustaining a demurrer to, and dismissing, a bill to enjoin the collection of taxes on railway property. Affirmed.

The facts are stated in the opinion.

Mr. **Edward Mayes** argued the cause, and, with Messrs. J. M. Dickinson and Mayes & Longstreet, filed a brief for appellant.

Mr. **Hannis Taylor** argued the cause, and, with Mr. George Anderson filed a brief for appellees.

Mr. Justice **Day** delivered the opinion of the court:

The case originated in a bill in equity filed by the Yazoo & Mississippi Valley Railroad Company against the mayor and aldermen of the city of Vicksburg, to enjoin the collection of certain municipal taxes on the property of the railroad company assessed for the year 1901.

The bill was demurred to; the court below sustained the demurrer and rendered a final decree dismissing the bill. The case, involving constitutional questions, was appealed directly to this court.

The allegations of the bill show that on February 22, 1884, the legislature of Mississippi passed an act authorizing the city of Vicksburg to enter into a contract with the Memphis & Vicksburg Railway Company, of which the following is the pertinent section:

"That the city of Vicksburg, through its board of mayor and aldermen, and the Memphis & Vicksburg Railroad Company or such other railroad as said Memphis & Vicksburg *Railroad Company may hereafter[361] become merged into, or a part of, by consolidation or otherwise, be and are hereby respectively authorized and empowered to enter into such contract or contracts with each other relative to the location and maintaining at such city of the machine shops of said railroad company, as they may mutually agree upon, together with such limitation, conditions, privileges, immunities, exemptions from city taxation, settlement of all claims . . . and such other things as may be decided and mutually agreed on between said city of Vicksburg and said railroad company," etc.

Under this authority, on August 11, 1885, a contract was made with the Louisville, New Orleans, & Texas Railway Company, one of whose constituent companies was the Memphis & Vicksburg Railroad Company, named in the act above set forth. The pertinent parts of that contract are as follows:

"Second. Said city agrees to and does hereby exempt from all municipal taxation for a period of ninety-nine years all of the property used or which shall or may be used for tracks, switches, depots, machine shops, rolling stock, and any and all other railway purposes (except only buildings used for residences or stores) of the Louisville, New

Orleans, & Texas Railway Company or of its successors, or of any company into which it may from time to time be merged by consolidation or otherwise, or of any company which, upon foreclosure or reorganization, may become the owners of its line of railroad within said city. . . .

"Sixth. The general or main building, repairing and machine shops of the Louisville, New Orleans, & Texas Railway Company, or its successors, [shall be] located and shall be permanently kept and maintained within the present limits of the city of Vicksburg, north of Fairground street, and any failure so to do shall forfeit to the city all lands granted to said railway company by the city, and all lands purchased by said railway company for and on [362] which to locate said shops *as hereinafter in this section prescribed, and shall also annul and forfeit all the privileges and immunities granted by this contract, including the right to locate and keep its freight depot south of Clay street," etc.

The railway company, it is averred, complied with the act and now insists upon its exemption from taxation.

The complainant, the Yazoo & Mississippi Valley Railroad Company, consolidated on October 24, 1892, with the Louisville, New Orleans, & Texas Railway Company, and in this consolidation undertook to acquire for the appellant the exemption from taxation under the contract of August 11, 1885, hereinbefore referred to.

The learned counsel for the appellant concedes that unless this case can be distinguished in principle from Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240, the decree of the circuit court must be affirmed.

The Adams Case came here on writ of error to review the judgment of the supreme court of Mississippi in the same case. 77 Miss. 194, 60 L.R.A. 33, 24 So. 200, 317, 28 So. 956. The Mississippi court, whose judgment was affirmed in this court, held that a grant of exemption from taxation to a railroad company was void under the Constitution of 1869 of that state, and that the organization of a consolidated company under the Constitution of 1890 cut off an exemption from taxation granted to a constituent company prior to the adoption of that Constitution. This judgment was affirmed, as we have said, in this court, which, speaking by Mr. Justice Brown, held that the consolidation of October 24, 1892, created a new corporation, and that while it might be true that the exemption in question would pass to the consolidated company by the terms of the legislation under review, yet, when the constitutional provision of 1890 took effect, the consolidated corporation, organized under that Constitution, was no longer entitled to the exemption. That Constitution contained certain clauses which were then under review, as follows:

"Sec. 180. All existing charters or grants of corporate *franchises under which organizations [363] have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article," etc.

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent, as property of individuals, etc. Exemptions from taxation, to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

This court held that even if the legislature, in the several acts of consolidation, had expressly provided that the new corporation should be exempted from taxation, such laws would be nullified by the provision of the Constitution of 1890, requiring that the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.

Conceding the force of the decision in the Adams Case, the learned counsel for the railroad company undertakes to differentiate that case from this upon the ground that the legislation of the state of Mississippi (act of February 22, 1884) authorized a contract to be made with the railroad company for an exemption from taxation upon valuable considerations to be performed by the company, and that the grant in the Adams Case was a mere legislative exemption from taxation; and the counsel insists that the validity of such legislation as is now under consideration has been sustained by the supreme court of Mississippi in a case decided by that court after its decision in Yazoo & M. Valley R. Co. v. Adams, 77 Miss. in the case of Adams v. Tombigbee Mills, 78 Miss. 676, 29 So. 470, in which an act of the legislature granting an exemption to certain factories for the manufacture of cotton or woolen goods, etc., for a period of six years from the completion of the factory, was sustained. But an examination of the opinion in that case convinces us that the Mississippi court had no intention to *depart [364] from its ruling in the case in 77 Miss., for that case is expressly distinguished in the opinion, and, among other things in the course of the opinion, the court say:

"This appellee never lost its exemption by consolidating with any other corporation. It has always retained 'the precise corporate existence' it originally had. Its exemption was therefore continued by § 181 of the Constitution of 1890, subject to legislative repeal, but it has never been repealed." 78 Miss. 692.

And again, on page 693:

"But a very different state of case existed, as already pointed out, as to the exemption denied in Yazoo & M. Valley R. Co. v. Adams, 77 Miss. 194, 60 L.R.A. 33, 24 So. 200, 317, 28 So. 956."

We think a reading of the opinion makes it clear that the supreme court of Mississippi differentiated the cases, and did not intend to depart from its ruling in the former case when similar circumstances were brought to its attention.

Apart from the ruling of the Mississippi court, we think it is entirely clear that the effect of organizing the consolidated corporation after the adoption of the Mississippi Constitution of 1890 was to bring the new corporation within the terms and limitations of that Constitution, which prohibited exemption of corporate property from taxation. The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision.

This subject was before this court and fully considered in the recent case of Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469, wherein it was held that where a corporation was incorporated under a general act creating certain obligations, it could not receive by transfer from another company an exemption inconsistent with its own charter or the Constitution and laws of the state then applicable, and this even though the legislative authority undertook to transfer the exemption by words which clearly included it.

In that case previous decisions of this [365]court are collated *on page 254. The court, speaking by Mr. Justice Moody, said:

"The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the Constitution, in general laws, or in the charter itself."

The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new Constitution. When it saw fit to enter into the consolidation and form a new corporation in 1892, the Constitution then in force in the state became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law.

We find no error in the judgment of the Circuit Court for the Southern District of Mississippi, and the same is affirmed.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Petitioner,
v.
JOHN M. SHAW and Alexander Davidson, Respts.

(See S. C. Reporter's ed. 365-385.)

Stockbrokers — margins — owner or pledgee.

1. A stockbroker is not the owner of the shares of stock which he purchases and carries for his customers on margin, but is essentially, if not strictly, as understood at common law, a pledgee.

Bankruptcy — preference by stockbroker — return of margined stocks.

2. No preferential transfer, forbidden by the bankruptcy act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), § 60a, as amended by the act of February 5, 1903 (32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1031), § 13, results from the action of a stockbroker who has pledged certain stocks with the consent of the customer for whom he was carrying them on margin, in redeeming the stocks and turning them over to such customer on demand when insolvent, even if the theory be adopted that the broker is the owner, carrying the shares upon a conditional contract of sale.

Bankruptcy — preference by stockbroker — return of excessive margins.

3. The return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference, forbidden by the bankruptcy act of July 1, 1898, § 60a, as amended by the act of February 5, 1903, § 13, where the customer had demanded settlement, and, on the following day, the sum paid over was taken into account in the settlement before turning over to the customer stock belonging to him, according to the understanding of the parties.

[No. 122.]

Argued January 17, 20, 1908. Decided April 6, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York, entered on a verdict directed in favor of defendants in a suit brought by a trustee in bankruptcy to recover certain alleged preferences. Affirmed.

See same case below, 77 C. C. A. 643, 147 Fed. 659.

The facts are stated in the opinion.

Mr. John Brooks Leavitt argued the cause, and, with Mr. Henry Arnold Richardson, filed a brief for petitioner:

The contract was made and performed in Massachusetts, under whose law broker and customer are parties to an executory contract whereby the broker is obligated to deliver to his customer on demand specified stocks at a price certain.

Wood v. Hayes, 15 Gray, 375; Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446; Chase v. Boston, 180 Mass. 458, 62 N. E. 1059.

If the broker does not comply, the customer has a claim provable in insolvency.

Lothrop v. Reed, 13 Allen, 294.

And if an insolvent broker uses his own assets to carry out such a contract, it is a preference under the insolvent law.

Weston v. Jordan, 168 Mass. 401, 47 N. E. 133.

A claim so arising under a Massachusetts contract is provable in bankruptcy without the formality of a useless demand.

Re Swift, 105 Fed. 493, Affirmed in 50 C. C. A. 264, 112 Fed. 319; Watson v. Merrill, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 364.

Even under the law of New York, the respondents should be considered as creditors of the insolvent broker. In that state, broker and customer are parties to an executed contract whereby the latter becomes the owner of specified stocks, and if he has availed himself of the broker's credit to aid in their purchase, he is deemed to have pledged the certificates to the broker for the amount of the latter's advances.

Markham v. Jaudon, 41 N. Y. 235; Stewart v. Drake, 46 N. Y. 449; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; Stenton v. Jerome, 54 N. Y. 480; Gruman v. Smith, 81 N. Y. 25; Capron v. Thompson, 86 N. Y. 418; Caswell v. Putnam, 120 N. Y. 154, 24 N. E. 287; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790, 141 N. Y. 71, 38 Am. St. Rep. 762, 35 N. E. 939; Minor v. Beveridge, 141 N. Y. 399, 38 Am. St. Rep. 804, 36 N. E. 404; Hurd v. Taylor, 181 N. Y. 231, 73 N. E. 977; Content v. Banner, 184 N. Y. 121, 76 N. E. 913; Leo v. McCormack, 186 N. Y. 330, 78 N. E. 1096.

And even though the broker is not bound to keep on hand the identical certificates (Taussig v. Hart, 58 N. Y. 425), yet if he puts it out of his power, by sale or rehypothecation on general loan, to deliver the identical or similar certificates, he is guilty of conversion (Lawrence v. Maxwell, 53 N. Y. 19).

If such a rehypothecation on general loan is wrongful, the customer has a provable claim in bankruptcy.

Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9.

If rightful, it must all the more be provable.

The New York theory should not be adopted, for it is based on an assumption which has no foundation in express agreement, and is directly contrary to custom.

Dos Passos, Stock Brokers, 2d ed. chap. III.; 2 Cook, Corp. 5th ed. §§ 457, 467.

If parties by their conduct render an accounting necessary, and at the close of their dealings state their account, by which it appears that one owes the other money, and on its tender the other must deliver property of greater value than the money, this of, by, and in itself constitutes the latter a debtor, for on a liquidation of damages, upon a failure to comply, the balance would be against him.

Re Topliff, 114 Fed. 323.

Payments of money fall within the category of transfers of property.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906. See also Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Yaple v. Dahl-Millikan Grocery Co. 193 U. S. 526, 48 L. ed. 776, 24 Sup. Ct. Rep. 552.

Mr. Louis Marshall argued the cause and filed a brief for respondents:

The delivery to the respondents of the shares of stock which Brown was carrying for them, and which remained under his control, was not a preferential transfer of the bankrupt's property.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

The question under consideration is not one of local law, but of general commercial law, and is to be decided by the Federal courts on principles of general jurisprudence, irrespective of the decisions of the courts of the state where the transaction under investigation had its inception, there being here no question as to the validity of the contracts between Brown and the respondents, under the local law of Massachusetts, whether statutory or otherwise.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Boyce v. Tabb, 18 Wall. 548, 21 L. ed. 757; Oates v. First Nat. Bank, 100 U. S. 246, 25 L. ed. 583; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 29, 30, 26 L. ed. 67; Burgess v. Seligman, 107 U. S. 34, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Pana v. Bowler, 107 U. S. 541, 27 L. ed. 429, 2 Sup. Ct. Rep. 704; Smith v. Alabama, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 443, 32 L. ed. 792, 9 Sup. Ct. Rep. 469; Baltimore & O. R. Co. v. Baugh, 149 U. S. 371, 37 L. ed. 774, 13 Sup. Ct. Rep. 914; Washburn & M. Mfg. Co. v. Reliance M. Ins. Co. 179 U. S. 1, 15, 45 L. ed. 49, 58, 21 Sup. Ct. Rep. 1.

When a broker purchases for a customer stock upon a margin, the legal title to the stock vests in the customer. The relation of debtor and creditor exists between the customer and the broker as to the unpaid balance of the purchase money; and the stock being in the possession of the broker, it is deemed pledged to him as security for such unpaid balance. The relation of pledgeor and pledgee therefore arises, with this qualification of the usual rule applicable to such relation, that it is not necessary for the broker to retain in his possession the identical stock purchased by him on his customer's order, but it is sufficient if he has in his possession or under his control a quantity of the stock in question equal to that purchased, which he can deliver to the customer when the account is closed.

Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 113, 26 Atl. 874, 28 Atl. 104; Stewart v. Drake, 46 N. Y. 449; Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80; Taussig v. Hart, 58 N. Y. 425; Gruman v. Smith, 81 N. Y. 25; Capron v. Thompson, 86 N. Y. 418; Caswell v. Putnam, 120 N. Y. 154, 24 N. E. 287; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790, 141 N. Y. 73, 38 Am. St. Rep. 762, 35 N. E. 939; Minor v. Beveridge, 141 N. Y. 399, 38 Am. St. Rep. 804, 36 N. E. 404; LeMarchant v. Moore, 150 N. Y. 209, 44 N. E. 770; Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. Supp. 42, Affirmed in 180 N. Y. 561, 73 N. E. 1132; Hurd v. Taylor, 181 N. Y. 231, 73 N. E. 977; Tompkins v. Morton Trust Co. 91 App. Div. 279, 86 N. Y. Supp. 520, Affirmed in 181 N. Y. 578, 74 N. E. 1126; Content v. Banner, 184 N. Y. 121, 76 N. E. 913; Kennedy v. Budd, 5 App. Div. 140, 39 N. Y. Supp. 81; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219; Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425; Andrews v. Clerke, 3 Bosw. 585; Taylor v. Ketchum, 5 Robt. 507; Chamberlain v. Greenleaf, 4 Abb. N. C. 178; Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170; Child v. Hugg, 41 Cal. 519; Thompson v. Toland, 48 Cal. 99; Cashman v. Root, 89 Cal. 373, 12 L.R.A. 511, 23 Am. St. Rep. 482, 26 Pac. 883; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; Wynkoop v. Seal, 64 Pa. 361; Esser v. Linderman, 71 Pa. 76; Hopkins v. O'Kane, 169 Pa. 478, 32 Atl. 421; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 269; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842; Re Bolling, 147 Fed. 786; Galigher v. Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. Rep. 335; Crawford v. Burke, 195 U. S. 176, 194, 49 L. ed. 147, 154, 25 Sup. Ct. Rep. 9; 1 Dos-Passos, Stock Brokers & Stock Exchanges, 2d ed. pp. 179–200.

Even if the Massachusetts rule were applied, it is urged that the respondents were entitled, on payment of the unpaid purchase money, to require a delivery of the shares of stock which Brown was carrying for them, and which he had on hand at the time when the amount owing by the respondents was tendered and the delivery of the shares was demanded,—especially in view of Brown's insolvency.

Johnson v. Brooks, 93 N. Y. 337; Todd v. Taft, 7 Allen, 371; 2 Story, Eq. Jur. § 728; 8 Pom. Eq. Jur. § 1402; Stuyvesant v. New York, 11 Paige, 414; Storer v. Great Western R. Co. 2 Younge & C. Ch. Cas. 48; Wilson v. Furness R. Co. L. R. 9 Eq. 28; Southern Exp. Co. v. Western North Carolina R. Co. 99 U. S. 200, 25 L. ed. 321; Williams v. Montgomery, 148 N. Y. 527, 43 N. E. 57; Butler v. Wright, 186 N. Y. 261, 78 N. E. 1002; New England Trust Co. v. Abbott, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432.

A trusteee in bankruptcy has no better title to property coming into his hands or disposed of by the bankrupt before the adjudication, than the bankrupt; and even where property of which the bankrupt has the nominal title comes into his hands, he takes it subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which were available against the bankrupt, except in the cases of levies, judgments, attachments, or other judicial liens created against property within four months preceding the commencement of the proceedings in bankruptcy, and except also in cases where the disposal of property by the bankrupt is declared by law to be fraudulent and void.

Loveland, Bankruptcy, 3d ed. 439; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690;

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567.

Messrs. E. S. Theall, Francis Fitch and John A. L. Campbell also filed a brief for respondents:

The New York rule has been long settled and steadily adhered to. It has practically become a rule of property in most of the states. It has been followed by the courts of the state of New York, from the time of the decision in Markham v. Jaudon, 41 N. Y. 235, in the following cases:

Stewart v. Drake, 46 N. Y. 449; Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Capron v. Thompson, 86 N. Y. 418; Caswell v. Putnam, 120 N. Y. 154, 24 N. E. 287; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790, 141 N. Y. 73, 38 Am. St. Rep. 762, 35 N. E. 939; Minor v. Beveridge, 141 N. Y. 399, 38 Am. St. Rep. 804, 36 N. E. 404; Hurd v. Taylor, 181 N. Y. 231, 73 N. E. 977; Content v. Banner, 184 N. Y. 121, 76 N. E. 913.

The rule has been adopted in many other states.

Child v. Hugg, 41 Cal. 519; Thompson v. Toland, 48 Cal. 99; Cashman v. Root, 89 Cal. 373, 12 L.R.A. 511, 23 Am. St. Rep. 482, 26 Pac. 883; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 269, 89 Am. Dec. 779; Wynkoop v. Seal, 64 Pa. 361; Esser v. Linderman, 71 Pa. 76.

The alleged difficulties in the way of the New York rule are more seeming than real. They are predicated principally upon the right of the broker—either through custom or express contract—to pledge the customer's securities in his own loans and the fact that, for the same reason, he is not required to retain the identical certificate purchased, but satisfies his obligation by keeping on hand or under his control a like amount of the stock.

Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Stewart v. Drake, 46 N. Y. 453; Caswell v. Putnam, 120 N. Y. 157, 24 N. E. 287.

To say that Brown acquired title to the stocks and bonds pledged as margin seems an absurdity. It is a plain case of a special deposit for a specific purpose; and in case of misappropriation, equity would have entertained a bill to reach the property, or compel the bailee to respond in damages if it could not be reached.

Manhattan Bank v. Walker, 130 U. S. 267, 271, 32 L. ed. 959, 961, 9 Sup. Ct. Rep. 519.

Brown, being in the lawful possession of the defendants' property, transferred it to them upon their demand. He was never in default. The act certainly does not require that the bankrupt shall commit a deliberate tort, or infer, contrary to the fact, that he has done so. But if there was a debt, Brown did not transfer his property, but the respondents', to apply upon it. This rule is not merely stated, but consistently applied, in New York, by holding the broker liable for a conversion where he sells stock of the customer without a proper notice and opportunity to redeem.

Wright v. Bank of the Metropolis, 110 N. Y. 237, 1 L.R.A. 289, 6 Am. St. Rep. 536, 18 N. E. 79; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; Content v. Banner, supra.

The Massachusetts rule is not controlling.

New York C. R. Co. v. Lockwood, 17 Wall. 357–368, 21 L. ed. 627–636; Myrick v. Michigan C. R. Co. 107 U. S. 102, 109, 110, 27 L. ed. 325, 327, 328, 1 Sup. Ct. Rep. 425; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397–443, 32 L. ed. 788–792, 9 Sup. Ct. Rep. 469; Washburn & M. Mfg. Co. v. Reliance M. Ins. Co. 179 U. S. 1, 15, 45 L. ed. 49, 58, 21 Sup. Ct. Rep. 1.

Under the so-called "Massachusetts" rule, the result would be the same.

Wood v. Hayes, 15 Gray, 378; Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446; Weston v. Jordan, 168 Mass. 401, 47 N. E. 133; Chase v. Boston, 180 Mass. 458, 62 N. E. 1059; Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057.

Conceding that the rights of the defendants with reference to the securities embraced in the account were, prior to June 26, 1903, based upon contract, they still had an equity which will be protected.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Johnson v. Brooks, 93 N. Y. 337; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Sabin v. Camp, 98 Fed. 974.

The present bankrupt act makes no provision for proving contingent liabilities; but, assuming that this may be done, as under previous statutes (see Collier, Bankruptcy, 5th ed. p. 489), such an obligation is not provable where it is wholly uncertain whether the contract or engagement will ever give rise to an actual duty or liability.

Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232.

The underlying idea is that the bankrupt shall not deplete his estate to the prejudice of other creditors.

New York County Nat. Bank v. Massey, 192 U. S. 138, 146, 48 L. ed. 380, 383, 24 Sup. Ct. Rep. 199.

A transfer of his property, of itself, may be perfectly innocent.

Clark v. Iselin, 21 Wall. 360, 373, 22 L. ed. 568, 572; Sawyer v. Turpin, 91 U. S. 114, 120, 121, 23 L. ed. 235, 237; Stewart v. Platt, 101 U. S. 731, 743, 25 L. ed. 816, 819.

The petitioner has no right to confine the transaction to what took place on June 26. The whole of it must be considered, and the defendants' equities, as thereby established, respected.

Thompson v. Fairbanks, 196 U. S. 516, 524, 526, 49 L. ed. 577, 585, 586, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, supra; Yeatman v. New Orleans Sav. Ins. 95 U. S. 764, 766, 24 L. ed. 589, 590; Hanselt v. Harrison and Sabin v. Camp, supra.

Primarily, at least, Brown's object in paying the money was to get back property in which he had an interest. Of itself, it did not prefer the defendants, or have any tendency so to do; and even if its indirect result was to prefer them, there would still be no violation of statute.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Swarts v. Siegel, 114 Fed. 1001.

[371] *Mr. Justice **Day** delivered the opinion of the court:

This case comes here upon a writ of certiorari to the United States circuit court of appeals for the second circuit. The petitioner, Richardson, brought suit in the district court of the United States for the southern district of New York, as trustee in bankruptcy of J. Francis Brown, against John M. Shaw and Alexander Davidson, respondents, to recover certain alleged preferences.

Brown, the bankrupt, was a stockbroker transacting business in Boston. The respondents, John M. Shaw and Alexander Davidson, were partners and stockbrokers, transacting business in New York as John M. Shaw & Company, and, as customers of Brown, they transacted business with him on speculative account for the purchase and sale of stocks on margin. The account was carried on in Brown's books in the name of "Royal B. Young, Attorney," as agent of Shaw & Company.

The transactions between Brown and Shaw & Company were carried on for several months, from February to June, 1903. A debit and credit account was opened February 10, when Shaw & Company deposited with Brown $500 as margin, which was credited to them on the account, and Brown purchased for them certain securities at a cost of $3,987.50, which was charged to them on the account.

By agreement between the parties it was understood and agreed that all securities carried in the account or deposited to secure the same might be carried in Brown's general loans and might be sold or bought at public or private sale, without notice, if Brown deemed such sale or purchase necessary for his protection. On the accounts rendered by Brown the following memorandum was printed: "It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection."

*Until the account was closed on June 26, [372] 1903, Shaw & Company from time to time paid to Brown various other sums of money as margins, which were credited to them. They also transferred to him various securities as margins in place of cash. They were charged with interest upon the gross amount of the purchase price, and credited with interest upon the margins they had deposited with Brown. If at any time the total amount of margins in securities or money exceeded 10 per cent, they had the right to withdraw the excess. Brown was at no time left with a margin less than 10 per cent. Shaw & Company kept a "liberal margin," at times rising to 23½ per cent.

According to the agreement the securities carried in this account or deposited to secure the same might be carried in Brown's general loans, and such securities were so pledged by him, and Young, as agent of Shaw & Company, was informed of the fact. The stocks were figured at the market price every day and statements rendered to Young.

The bankrupt, Brown, transacted much of his general business with Brown, Riley, & Company, of Boston. He pledged his general securities with that company.

On June 24, 1903, Young, the agent of Shaw & Company, as above stated, learned of Brown's precarious financial condition, and demanded payment of $5,000 cash from Brown's agent, Fletcher. At that time the margins already paid by Shaw & Company exceeded the agreed 10 per cent, and Fletcher returned to them $5,000 of such margin.

On the following day, June 25, Young demanded a final settlement from Brown. At that time Brown was insolvent within the meaning of the bankrupt law, and had been for the two preceding months. On June 26 the liquidation of this account was effected as follows: Brown, the bankrupt, indorsed to Brown, Riley, & Company a note of $5,000, made by one of his debtors, and gave them a check for $1,200, thereby increasing his margin on the general loan, and agreed that $10,664.13 should be charged [373]against his margin and credited *to Shaw & Company, and a check was given by them, through the Beacon Trust Company, to the order of Brown, Riley, & Company, for $34,919.62, and the securities to the value of $45,583.75 were turned over to them. None of the certificates of stock which Brown delivered to Shaw & Company were the identical certificates which they had delivered to Brown as margin. Two certain bonds, known as the "Shannon bonds," had been deposited with Brown.

Among the creditors (customers) of Brown on the final day of settlement there were a number of general customers upon transactions in purchase and sale of stocks by Brown as broker, similar to the transactions in the purcnase and sale of stocks by Brown as broker for Shaw & Company.

On July 27, 1903, Brown made an assignment, and was adjudicated a bankrupt within four months, and petitioner in this case, Henry Arnold Richardson, was elected trustee.

It was conceded by plaintiff's counsel that it was the custom of the market to deliver shares from broker to customer of the same amount without regard to whether they were the identical shares received.

This suit was brought to recover the $5,000 paid to Shaw & Company June 24, 1903, which sum, it is alleged, was paid to them as excessive margins, and, it is alleged, enabled them to obtain a preference as one of the creditors of Brown. The second cause of action in the suit states that Shaw & Company are indebted to Brown's estate in the sum of $10,664.13, being the amount he transferred for their benefit, as above set forth.

At the close of the plaintiff's case he requested to go to the jury upon the issue of defendants' knowledge of Brown's insolvency. The court held that no preference was shown, and directed a verdict for defendants. The judgment was affirmed. 77 C. C. A. 643, 147 Fed. 659, 665.

The ground on which the counsel for the petitioner predicates the alleged preferences in this case is that when the stockbroker Brown was approached for the set-[374]tlement of the transactions *with Shaw & Company, being insolvent and dealing with several customers, as to each of whom he had pledged the stocks carried for them, and, under the understanding of the parties, being under obligation to each of them to redeem the stocks from the loan for which they were pledged, this obligation created a right of demanding the pledged stocks and securities on the part of each of the customers, which put the broker in the debtor class and the customers into the creditor class, so that, if the broker used his assets to carry out such obligation to a particular customer, whereby the latter was able to redeem his stock from such pledge upon payment only of the amount of his indebtedness to the broker, with the result that the broker could not carry out similar obligations to other customers in like situation, a preference is created under § 60 of the bankrupt act, and this, says the learned counsel in his brief, under any theory concerning the relation of broker and customer, is "the main proposition upon which we hang our appeal."

This case, therefore, requires an examination of the relations of customer and broker under the circumstances disclosed in this record; at least, so far as it is necessary to determine the question of preference in bankruptcy upon which the case turns. There has been much discussion upon this subject in the courts of the Union. The leading case, and one most frequently cited and followed, is Markham v. Jaudon, 41 N. Y. 235,—a case which was argued by eminent counsel and held over a term for consideration. The opinion in the case is by Chief Judge Hunt, afterwards Mr. Justice Hunt of this court. He summarized the conclusions of the court as follows:

"The broker undertakes and agrees—

"1. At once to buy for the customer the stocks indicated.

"2. To advance all the money required for the purchase beyond the 10 per cent furnished by the customer.

"3. To carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent is kept good, or *until[375] notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker.

"4. At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

"5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or,

"6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract the customer undertakes—

"1. To pay a margin of 10 per cent on the current market value of the shares.

"2. To keep good such margin according to the fluctuations of the market.

"3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.

"The position of the broker is twofold. Upon the order of the customer he purchases the shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds, for the benefit of the customer, 90 per cent of the purchase money. Quite as clearly he does not, in this, act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser until a sale is made by the order of the purchaser or upon his own action. In thus holding or carrying he stands also upon a different ground from that of a broker or agent whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of a broker as such. In so doing he enters upon a new duty, obtains other rights, and is subject to additional responsibilities. . . . In my judgment the contract between the parties to [376] this action *was in spirit and in effect, if not technically and in form, a contract of pledge."

The case has been approved in other cases in New York, some of which are: Stewart v. Drake, 46 N. Y. 449; Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; Content v. Banner, 184 N. Y. 121, 76 N. E. 913; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219. And approved in other states: Cashman v. Root, 89 Cal. 373, 12 L.R.A. 511, 23 Am. St. Rep. 482, 26 Pac. 883; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; Wynkoop v. Seal, 64 Pa. 361; Esser v. Linderman, 71 Pa. 76.

The subject was fully considered in a case which leaves nothing to be added to the discussion (Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104), in which the conclusions in Markham v. Jaudon were adopted and approved. These views have been very generally accepted as settled law by the text writers on the subject. 1 Dos Passos, Stock-Brokers, 2d ed. 179-200; Jones, Pledges, § 496; Mechem, Agency, § 936.

Mr. Jones, in his Work on Pledges, § 496, summarizes the law as follows:

"The broker acts in a threefold relation: First, in purchasing the stock he is an agent; then, in advancing money for the purchase, he becomes a creditor; and finally, in holding the stock to secure the advances made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advances."

In 1 Dos Passos on Stock-Brokers, 2d ed. at page 196, the author says:

"Upon the whole, while it must be conceded that there are apparently some incongruous features in the relation, there seems to be neither difficulty nor hardship in holding that a stockbroker is a pledgee; for although it is true that he may advance all or the greater part of the *money em- [377] braced in the speculation, if he acts honestly, faithfully, and prudently, the entire risk is upon the client. . . . To introduce a different rule would give opportunities for sharp practices and frauds, which the law should not invite."

The rule thus established by the courts of the state where such transactions are the most numerous, and which has long been adopted and generally followed as a settled rule of law, should not be lightly disturbed, and an examination of the cases and the principles upon which they rest leads us to the conclusion that in no just sense can the broker be held to be the owner of the shares of stock which he purchases and carries for his customer. While we recognize that the courts of Massachusetts have reached a different conclusion, and hold that the broker is the owner, carrying the shares upon a conditional contract of sale, and, while entertaining the greatest respect for the supreme judicial court of that state, we cannot accept its conclusion as to the relation of broker and customer under the circumstances developed in this case. We say this, recognizing the difficulties which can be pointed out in the application of either rule.

At the inception of the contract it is the customer who wishes to purchase stocks, and he procures the broker to buy on his account. As was said by Mr. Justice Bradley, speaking for the court in Galigher v. Jones, 129 U. S. 193-198, 32 L. ed. 658, 659, 9 Sup. Ct. Rep. 335, a broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines the agency.

The dividends on the securities belong to the customer. The customer pays interest upon the purchase price, and is credited with interest upon the margins deposited. He has the right at any time to withdraw his excess over 10 per cent deposited as margin with the broker. Upon settlement of the account he receives the securities. In this case the broker assumed to pledge the stocks, not because he was the owner thereof, but because, by the terms of the contract, printed upon every statement of account, he obtained the right from the customer to pledge the securities upon general loans, and in [378]like *manner he secured the privilege of selling when necessary for his protection.

The risk of the venture is entirely upon the customer. He profits if it succeeds; he loses if it fails. The broker gets out of the transaction, when closed in accordance with the understanding of the parties, his commission and interest upon the advances, and nothing else. That such was the arrangement between the parties is shown in the testimony of the broker's agent, who testified: "If these stocks carried for J. M. Shaw & Company made a profit, that profit belongs to Shaw & Company over and above what he owed us."

When Young, the agent of Shaw & Company, demanded the stocks, their right of ownership in them was recognized, and, while pledged, they were under the control of the broker, were promptly redeemed, and turned over to the customer. Consistently with the terms of the contract, as understood by both parties, the broker could not have declined to thus redeem and turn over the stock, and, when adjudicated a bankrupt, his trustee had no better rights, in the absence of fraud or preferential transfer, than the bankrupt himself. Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 51 L. ed. 1117, 1122, 27 Sup. Ct. Rep. 720; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. ed. 577, 586, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481.

It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; but this contention loses sight of the fact that the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.

A certificate of the same number of shares, although printed upon different paper and [379]bearing a different number, represents *precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Taussig v. Hart, 58 N. Y. 425; Skiff v. Stoddard, 63 Conn. 198, 218, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104. As was said by the court of appeals of New York in Caswell v. Putnam, 120 N. Y. 153, 157, 24 N. E. 287, "one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon, or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind and value as another."

Nor is the right to repledge inconsistent with ownership of the stock in the customer. Skiff v. Stoddard, 63 Conn. 216, 219, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104; Ogden v. Lathrop, 65 N. Y. 158. It was obtained in the present case by a contract specifically made, and did not affect the right of the customer, upon settlement of the accounts, to require of the broker the redemption of the shares and their return in kind.

It is true that the right to sell, for the broker's protection, which was not exercised in this case, presents more difficulty, and is one of the incongruities in the recognition of ownership in the customer; nevertheless it does not change the essential relations of the parties, and certainly does not convert the broker into what he never intended to be and for which he assumes no risk, and takes no responsibility in the purchase and carrying of shares of stock.

The broker cannot be converted into an owner without a perversion of the understanding of the parties, as was pertinently observed in the very able discussion already referred to in Skiff v. Stoddard, 63 Conn. 216, 21 L.R.A. 111, 26 Atl. 879: "So long as the *interpretation of the contract pre-[380] serves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of the agreement, and its corollary that the customer derives no right, title, or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of the necessary attempt in some way to transform the customer, who enjoys all the incidents and assumes all the risks of ownership, into a person who in fact has no right, title, or interest, and to create out of the broker, who enjoys none of the incidents of ownership, and assumes not a particle of its responsibility, a person clothed with a full title and an absolute ownership."

We reach the conclusion, therefore, that, although the broker may not be strictly a pledgee, as understood at common law, he is essentially a pledgee, and not the owner of the stock, and turning it over upon demand to the customer does not create the relation of a preferred creditor, within the meaning of the bankrupt law.

We cannot consent to the contention of the learned counsel for the petitioner, that the insolvency of the broker at once converts every customer having the right to demand pledged stocks, into a creditor who becomes a preferred creditor when the contract with him is kept and the stocks are redeemed and turned over to him.

In the absence of fraud or preferential transfer to a creditor the broker had a right to continue to use his estate for the redemption of the pledged stocks. As this court said in Cook v. Tullis, 18 Wall. 332-340, 21 L. ed. 933-937:

"There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without [381] any purpose *to defraud or delay his creditors or give preference to anyone, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

The bankrupt act, in § 60a, provides: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445, as amended by 32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1907, p. 1031.]

A creditor is defined to include anyone who owns a demand or claim provable in bankruptcy. Sec. 1, sub. 9, bankruptcy act 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3419). It is essential, therefore, in order to set aside the alleged preference, that Shaw & Company, at the time of the transfer should have stood in the relation of creditor to the bankrupt. Of course, if the New York rule based upon Markham v. Jaudon is correct, and the broker was the pledgee of the customer's stock, there can be no question that, in redeeming these stocks for the purpose of satisfying the pledge, no preferential transfer under the bankruptcy act resulted.

In our view we think no different result is reached, so far as a preference in bankruptcy is concerned, if the Massachusetts cases could be taken to lay down the correct rule of the relations between broker and customer.

That rule is said to have its origin in Wood v. Hayes, 15 Gray, 375, decided in 1860, in which the opinion, though by Chief Justice Shaw, is very brief. It was therein held that the broker was a holder of the shares upon conditional contract *to deliver [382] them to the customer upon the payment of so much money, and until the money was paid the right to have performance did not accrue.

In Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446, the right of the broker was considered after the customer had refused to pay the necessary margin, and after the customer had requested the broker to do the best he could for him and to sell the stock at the broker's board without notice, and it was held that under such circumstances the broker was not liable for conversion.

In Weston v. Jordan, 168 Mass. 401, 47 N. E. 133, the question was as to the relation between customer and broker after the broker had parted with the shares after repeated demands by the customer and refusal by the broker to deliver the shares, and it was held that a valid cause of action arose in favor of the customer, whether for breach of contract, or for conversion, it matters not.

In Chase v. Boston, 180 Mass. 459, 62 N. E. 1059, the opinion is by Chief Justice Holmes, and the question directly decided is whether a broker who held shares of stock in his own name, and which he carried for his customer on margin, was required to pay a city tax upon the value. It was held that he was. In that case the learned justice said:

"No doubt, whichever view be taken, there will be anomalies, and no doubt it is possible to read into either a sufficient number of implied understandings to make it consistent with itself. Purchases on margin certainly retain some of the characteristics of ordinary single purchases by an agent, out of which they grew. The broker buys and is expected to buy stock from third persons to the amount of the order. Rothschild v. Brookman, 5 Bligh, N. R. 165, 2 Dow & C. 188; Taussig v. Hart, 58 N. Y. 425. He charges his customer a commission. He credits him with dividends and charges him with assessments on stock. However the transaction is closed, the profit or loss is the customer's. But none of these features is decisive."

And while the rule dating back to the decision of Chief Justice Shaw in 15 Gray was recognized as the law of Massachusetts, [383]*there is nothing in the case decisive of the question now before us.

The case most relied upon as showing the preference is Weston v. Jordan, supra. It was held in that case that Wheatland, the broker (Weston was his assignee in insolvency) had become a debtor to the customer Jordan, having parted with the control of the shares and substituting none others for them after repeated demands for them by the customer. And it was held that when the insolvent broker went into the street and bought that kind of stocks with his own money, and the customer took the stocks, knowing of such purchase, the transaction amounted to a preference; and in course of the discussion Mr. Justice Allen, referring to the contention of counsel that the Massachusetts rule should be reconsidered in view of the rules adopted in New York and other states, said:

"The defendant seeks to have these decisions reconsidered; but the facts of the present case do not call for such reconsideration of the general doctrine. Even if at the outset Jordan were to be deemed a pledgeor, and Wheatland a pledgee, of the shares, that relation was changed by what happened afterwards. . . . After Wheatland had parted with the control of the shares, and *after repeated demands for them by Jordan, and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland, either for breach of contract or for a conversion; it matters not which.*"

The facts in the present case are entirely different from those disclosed in the case just cited. In the present case there was no demand for the return of the stocks which was refused by the broker; but, recognizing the obligation of the contract, when the stocks were demanded the broker proceeded to redeem them from the pledge which he had made of them under the right given by the contract between the parties, and turned them over to the customer. In such case the relation of debtor and creditor did not arise as it might upon the refusal, as in Weston v. Jordan, to turn over the stocks upon demand.

*After an examination of the Massachusetts cases, Judge Lowell held in Re Swift, 105 Fed. 493, while following the Massachusetts rule as between broker and customer, that no cause of action arose until after demand by the customer. And the same view was taken in the same case upon review in the court of appeals for the first circuit in an opinion by Judge Putnam, 50 C. C. A. 264, 112 Fed. 315. While both courts held that under the law, as defined in the Massachusetts cases, bankruptcy excused demand, they held that the customer did not become a creditor upon insolvency, but only after demand and refusal or its equivalent. [384]

How then stood the parties at the time of the demand for the return of these shares of stock? They were held upon a contract, which required the broker, upon demand, to turn over the shares purchased, or similar shares, to the customer upon payment of advancements, interest, and commissions. These stocks were redeemed and turned over to him; as a consequence the relation of debtor and creditor as between the broker and customer did not arise.

Upon the principles heretofore discussed, we think the payment of the $5,000, on June 24, was not a preferential payment to a creditor. The customer had demanded settlement, the broker had paid the $5,000, and on the following day this sum was taken into account in settling the account before turning over to the customer the stock belonging to him, according to the understanding of the parties.

We find no error in the judgment of the Court of Appeals, and the same is affirmed.

Mr. Justice **Holmes**:

If I had been left to decide this case alone I should have adhered to the opinion which, upon authority and conviction, I helped to enforce in another place. I have submitted a memorandum of the reasons that prevailed in my mind to my brethren. and, as it has not convinced them, I presume that *I am wrong. I suppose that it is possible to say that, after a purchase of stock is announced to a customer, he becomes an equitable tenant in common of all the stock of that kind in the broker's hands; that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims; and that the nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out. It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to [385] receive it from the bankrupt, on paying whatever remained to be paid. A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt.

EDWARD S. THOMAS, Lloyd M. Howell, and Ashbel P. Fitch, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennet, individually and as Jacob Berry & Company, Petitioners,

v.

ANNA D. TAGGART et al.

(See S. C. Reporter's ed. 385–392.)

Contracts — construction — written and printed provisions.

1. The written provisions of a contract will, in case of any repugnancy, prevail over its printed provisions.

Bankruptcy — assets.

2. A title which is good as against a bankrupt and his creditors at the time the trustee's title accrues does not pass to the trustee, and such property or its proceeds, if sold, should be restored to the true owner.

Bankruptcy — recovery of property pledged with bankrupt.

3. Securities held by stockbrokers as collateral to their customers' accounts may, where the latter are not indebted to the brokers, be recovered by such customers from the trustees in bankruptcy of the brokers' estate.

Bankruptcy — recovery of pledge — waiver by filing claim.

4. Filing a claim and participating in the bankruptcy proceedings does not waive the right of a customer of stockbrokers to recover from the trustees of their bankrupt estate certain stock held as collateral to such customer's account, but on which he was not indebted, where he expressly reserved, in his proof of claim, whatever rights he might have in such stock.

[No. 197.]

Argued January 17, 20, 1908. Decided April 6, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York, awarding to various claimants certain securities or the proceeds thereof in the possession of trustees in bankruptcy. Affirmed.

See same case below, 79 C. C. A. 124, 149 Fed. 176.

The facts are stated in the opinion.

Mr. **Abram I. Elkus** argued the cause, and, with Mr. Carlisle J. Gleason, filed a brief for petitioners:

The case presented by Mrs. Taggart is that of a sale and agreement to exchange, rather than that of a bailment and pledge; and consequently her rights are those of a creditor, not of a pledgeor.

Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. ed. 974; Norton v. Woodruff, 2 N. Y. 153; Carpenter v. Griffin, 9 Paige, 310, 37 Am. Dec. 396.

By reason of this express contractual right of wide disposition, the case is stipulated out of the New York doctrine that the broker is the pledgee, the customer the pledgeor, in stock transactions, as exemplified by Markham v. Jaudon, 41 N. Y. 235.

Furthermore, Markham v. Jaudon, supra, and the other cases which have followed it, down to and including Leo v. McCormack, 186 N. Y. 330, 78 N. E. 1096, have concerned themselves with the customer's and broker's relations as to stock purchased for the customer's order. There is every reason in principle why securities deposited as margin should stand on a different basis, being, as they are, a credit on account to the customer, and intended to give the broker something to work with in opening an account.

Having chosen to file his claim in bankruptcy, Mr. Hall is bound by that election, irrespective of any intention to preserve his right to the other and inconsistent remedy.

Bowker Fertilizer Co. v. Cox, 106 N. Y. 555, 13 N. E. 943; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Conrow v. Little, 115 N. Y. 387, 5 L.R.A. 693, 22 N. E. 346; Terry v. Munger, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; Mills v. Parkhurst, 126 N. Y. 89, 13 L.R.A. 472, 26 N. E. 1041; Droege v. Ahrens & O. Mfg. Co. 163 N. Y. 466, 57 N. E. 747.

The filing of the proof of claim, and the voting thereon for trustee, even at an informal election, are inconsistent with the claim of ownership to the stock, and bar any later reclamation proceedings for the property.

Le Marchant v. Moore, 150 N. Y. 218, 44 N. E. 770; Re Bloss, Fed. Cas. No. 1,562; New Bedford Sav. Inst. Co. v. Fairhaven Bank, 9 Allen, 180; Ex parte Solomon, 1 Glyn & J. 25; Haxtun v. Corse, 2 Barb. Ch. 531; Loveland, Bankr. 2d ed. p. 339.

Mr. **Graham Sumner** argued the cause, and, with Messrs. Thomas Thacher and Edwin M. Lawrence, filed a brief for respondents:

The words written in ink across the face of the paper are most important in determining the nature of the instrument. They are deemed to show the final intention of the parties, and, by well-settled rules of law, supersede and prevail over the printed matter, in the interpretation of the instrument.

Hagan v. Scottish Union & Nat. Ins. Co. 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; Kratzenstein v. Western Assur. Co. 116 N. Y. 57, 5 L.R.A. 799, 22 N. E. 221.

A person receiving, without knowledge of the contents, a document purporting to be a contract, does not become bound by its provisions, unless he knows, or has reason to suppose that the document is offered as a contract.

Springer v. Westcott, 166 N. Y. 117, 59 N. E. 693; Bostwick v. Baltimore & O. R. Co. 45 N. Y. 712; Bosoian v. Hubbard, 121 App. Div. 510, 106 N. Y. Supp. 178.

The difference between a bailment and a sale is well understood. If the property delivered is ultimately to be returned in the same or a different form, or if its product or proceeds are to be returned, then the transaction is a bailment. It is only when something other than the property delivered, or its product or proceeds, may be returned, that the transaction becomes a sale.

Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 110, 116, 24 L. ed. 973, 974; Sturm v. Boker, 150 U. S. 312, 329, 330, 37 L. ed. 1093, 1100, 14 Sup. Ct. Rep. 99; Mallory v. Willis, 4 N. Y. 76, Distinguishing Norton v. Woodruff, 2 N. Y. 153; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; Sattler v. Hallock, 160 N. Y. 291, 46 L.R.A. 679, 73 Am. St. Rep. 686, 54 N. E. 667.

In a concrete or literal sense, "margin" means cash or any security which the customer may give the broker to protect him against loss on the customer's transactions. If the customer gives cash as margin, he reduces *pro tanto* the amount which he must pay in order to obtain the securities held by the broker for his account. If he gives securities as margin, he increases *pro tanto* the value of the securities held by the broker for his account. In either case the effect is to increase the figurative margin.

Hopkins v. O'Kane, 169 Pa. 479, 32 Atl. 421; Taylor's Estate, 192 Pa. 304, 73 Am. St. Rep. 812, 43 Atl. 973.

The relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was pledgeor and pledgee, and not debtor and creditor.

Markham v. Jaudon, 41 N. Y. 235; Baker v. Drake, 66 N. Y. 522, 23 Am. Rep. 80; Gruman v. Smith, 81 N. Y. 25; Taussig v. Hart, 58 N. Y. 425; Caswell v. Putnam, 120 N. Y. 153, 24 N. E. 287; Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Stewart v. Drake, 46 N. Y. 449; Stenton v. Jerome, 54 N. Y. 480; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; LeMarchant v. Moore, 150 N. Y. 209, 44 N. E. 770; Content v. Banner, 184 N. Y. 121, 76 N. E. 913; Kennedy v. Budd, 5 App. Div. 140, 39 N. Y. Supp. 81; Tompkins v. Morton Trust Co. 91 App. Div. 280, 86 N. Y. Supp. 520, Affirmed in 181 N. Y. 578, 74 N. E. 1126; Capron v. Thompson, 86 N. Y. 418; Whitlock v. Seaboard Nat. Bank, 29 Misc. 85, 60 N. Y. Supp. 611; Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. Supp. 42, Affirmed in 180 N. Y. 561, 73 N. E. 1132; Strickland v. Magoun, 119 App. Div. 113, 104 N. Y. Supp. 425; Gilpin v. Howell, 5 Pa. 41, 45 Am. Dec. 720; Wynkoop v. Seal, 64 Pa. 361; Esser v. Linderman, 71 Pa. 76; Hopkins v. O'Kane, 169 Pa. 478, 32 Atl. 421; Van Horn v. Gilbough, 10 W. N. C. 347; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842; Denton v. Jackson, 106 Ill. 433; Cashman v. Root, 89 Cal. 373, 12 L.R.A. 511, 23 Am. St. Rep. 482, 26 Pac. 883; Richardson v. Shaw, 77 C. C. A. 643, 147 Fed. 659; Re Bolling (D. C. Va.) 147 Fed. 786; Leahy v. Lobdell, F. & Co. 26 C. C. A. 75, 54 U. S. App. 35, 80 Fed. 665; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219.

Mr. **George E. Hall** also argued the cause and filed a brief for respondents:

A power to sell is not a power to pledge; and an agent to sell has no authority to pledge.

Merchants' Bank v. Livingston, 74 N. Y. 223; Henry v. Marvin, 3 E. D. Smith, 71; Halliwell. Stocks & Stock Brokers, p. 681; Story, Agency, § 78.

The Hanover National Bank had actual notice from the certificate and the power of attorney that Hall, and not Berry & Company, had title thereto, and that Berry & Company had no authority to pledge it for a loan.

Merchants' Bank v. Livingston, supra.

The question here is largely one of contract, and not the construction of laws of various states, and as the contract provided that the stock was to be held as collateral in the New York office, and there being no reason why it should be further held for such purpose, it should be returned forthwith, its mission as security being fulfilled.

Hennequin v. Clews, 111 U. S. 676-682, 28 L. ed. 565-568, 4 Sup. Ct. Rep. 576.

If the Hanover National Bank had any claim on the certificate by reason of the wrongful attempt of Berry & Company to pledge it, the same is now satisfied in full, and the certificate is held by the trustees free from any lien. Under such circumstances the law is well settled that the owner is entitled to his certificate.

Union P. R. Co. v. Schiff, 78 Fed. 216; LeMarchant v. Moore, 150 N. Y. 209, 44 N. E. 770; Smith v. Savin, 141 N. Y. 326, 36 N. E. 338; Farwell v. Importers & T. Nat. Bank, 90 N. Y. 483; Rhinelander v. National City Bank, 36 App. Div. 11, 55 N. Y. Supp. 229; Tompkins v. Morton Trust Co. 91 App. Div. 274, 86 N. Y. Supp. 520.

It has been held that a stock broker has the right to hypothecate stock bought on margin by him for his customer. Yet in such cases the title to the stock vests in the customer immediately upon its purchase, subject to the broker's lien for any unpaid balance; and upon payment of such balance the customer is entitled to, and may reclaim, his certificate.

Union P. R. Co. v. Schiff and Tompkins v. Morton Trust Co. supra; Douglas v. Carpenter, 17 App. Div. 329, 45 N. Y. Supp. 219.

Hall, by filing his proof of claim, did not make an election of remedies, or waive his right to reclaim his certificate.

Mould v. Importers & T. Nat. Bank, 72 App. Div. 30, 76 N. Y. Supp. 148; LeMarchant v. Moore and Rhinelander v. National City Bank, supra.

Mr. Hugo S. Mack also filed a brief for respondents.

Mr. Justice **Day** delivered the opinion of the court:

This case was argued and submitted with Richardson v. Shaw, No. 122, just decided [209 U. S. 365, ante, 835, 28 Sup. Ct. Rep. 512]. To the extent which the case involves the same general questions as to the legal relations of stockbrokers and customers, we need not repeat the discussion had in Richardson v. Shaw, by which the conclusion was reached that, under the usual contract for a speculative purchase of stock, the customer is considered the pledgeor and the broker the pledgee.

In this case it is necessary to notice certain specific features not arising in the case just referred to. The petitioners, Edward S. Thomas, Lloyd M. Howell, and Ashbel P. Fitch, are the trustees in bankruptcy of Jacob Berry and Harold L. Bennet, individually and as partners as Berry & Company. Several persons, among others Anna D. Taggart, Harris Filson, William C. Bowers, and George E. Hall, made claims to **[387]** recover *certain certificates of stock, as against the trustees in bankruptcy, or to have a lien on the funds, the proceeds of other stocks in the hands of the trustees. The claims were referred to a referee in bankruptcy, and, upon hearing, he found in favor of certain of the claimants, among others Mrs. Taggart, Filson, Hall, and Bowers. The report of the referee was confirmed by the district judge on October 4, 1905, and the trustees were directed to turn over certain certificates of stock and proceeds of other certificates to the claimants. Upon appeal, the order and judgment of the district court was affirmed by the circuit court of appeals for the second circuit (79 C. C. A. 124, 149 Fed. 176), and the case is now here upon a writ of certiorari.

From the findings of the referee it appears that certificates of stock were pledged with the Hanover National Bank by Berry & Company the day before the failure. This pledge was to secure a demand loan of $45,000. Subsequently the bank returned to the trustees all funds and stocks over and above its loans. It returned in cash $6,310.41 and certain shares of stock.

Taking up the several claims, we will first notice that of Anna D. Taggart. She claims two certificates for 83 shares of United States Steel stock, preferred, which were returned by the Hanover Bank unsold to the trustees in bankruptcy. The receipt given to Mrs. Taggart at the time of the deposit is in the words following:

Sep. 14, 1904.

Received from Anna D. Taggart 83 shs. U. S. Steel pfd. No. A30563-C15546. The same to be a general deposit, and this receipt is given and received with mutual understanding that Jacob Berry & Company may hold the same as margin and as a security for or apply the deposit in part payment of or on account of losses or any other transactions in the purchase or sale of stocks, bonds, securities, or commodities made by them for your account.

This receipt is given and received upon the further understanding *and agreement **[388]** in consideration of Jacob Berry & Company executing such orders for the purchase or sale of stocks, bonds, securities, or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Company may repledge, rehypothecate, or loan any or all of said stocks, bonds, securities, or commodities held by them on account thereof as margin or otherwise; may substitute similar stocks, bonds, securities, or commodities therefor, and that said Jacob Berry & Company may, without notice, upon the approximate exhaustion of margin, sell, or buy, as the case may be, any stocks, bonds, securities, or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that, in case of contracts for future delivery, that said Jacob Berry & Company may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchases or sales may be made upon the Consolidated Stock & Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other exchange in the city of New York where such stocks, bonds, securities, or commodities are dealt in.

No. A30563—33 shs.
No. c15546—50 " Geo. M. Davis, Mgr.

Across the face of this receipt was written, in ink, the words "as collateral on account." The question is, Mrs. Taggart not being indebted to the trustees, but having a balance due from the estate to her, did these shares of stock belong to the trustee in bankruptcy as part of the bankrupt's estate, or were they the property of the claimant, Mrs. Taggart? The learned court of appeals construed the receipt as consisting of two parts,—the first paragraph, relating to the shares of steel stock especially deposited, and the second, to the stocks, bonds, and securities or commodities purchased upon her account by the brokers, concerning which they were given the right to repledge, rehypothecate, or loan, and the right to substitute therefor similar stocks, bonds, and securities.

[389] *In the Richardson Case, supra, we have discussed the legal relation existing between customer and a broker who has the right to pledge and hypothecate securities purchased for the customer and substitute similar securities therefor, with the obligation to respond at all times to the demand of the customer for the redemption of the stocks, and we need not here repeat what is therein said.

We are of the opinion that the circuit court of appeals correctly construed this receipt. It was the evident purpose of the parties that the 83 shares of United States Steel stock, preferred, were to be held, as the receipt shows, as security for losses in purchase or sale of stocks, bonds, or securities on account of the customer, and the separate paragraph of the receipt, giving the right to repledge, etc., and substitute similar stocks, bonds, and securities, had reference to the stocks, securities, etc., obtained in executing the orders for purchase made by the customer. And this construction of the receipt is, we think, placed beyond contradiction when effect is given to the words written across the face of the printed receipt as "collateral on account." It is a well-settled rule of law, that, if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. Hagan v. Scottish Union & Nat. Ins. Co. 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862.

This being the situation as to Mrs. Taggart's claim, we think the court properly held that she was entitled to recover her shares of stock. They were not the property of Berry & Company, but were held as collateral to her account, upon which she is not indebted to the brokers. The certificates were returned to the trustees, who had no better right in them than the bankrupt.

The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass, and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale take the place *of the property. Loveland, Bankruptcy, 3d ed. § 152; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481. [390]

We will next consider the claim of Harris Filson.

Filson claims a lien on the fund as the owner of two certificates for 10 shares each of preferred stock of the Atchison, Topeka, & Santa Fé Railroad Company.

Filson identified the certificates by their numbers, and produced Berry & Company's receipts therefor. The bankrupts, Berry & Company, had hypothecated them with the Hanover Bank, which sold them for $2,072.50, which the claimant seeks to recover.

The master finds that Filson had a speculative account with Berry & Company, and "was trading on both sides of the market." On the morning of November 25 his account showed that he had bought, on margin, 70 shares of stock, including 40 shares of Pennsylvania Railroad, and that he had sold "short" 50 shares of stock, including 20 shares of "Atchison preferred," and 10 shares of "Erie, first preferred." The account also showed a cash credit of $3,105.97. The claimant testified that he called at the office of Berry & Company on November 25 to arrange to take out of the account the 40 shares of Pennsylvania, which he had previously bought on margin on November 17. He took with him one of the 10-share certificates of Atchison, Topeka, & Santa Fé, and asked the cashier to figure up the account and let him know if the deposit of the Atchison certificate would leave sufficient margin to withdraw the Pennsylvania stock. He was told that it was not sufficient, as the withdrawal of the Pennsylvania stock would leave a credit balance of only $300 or $400. Filson then went to his safe-deposit box and took out two additional certificates for 10 shares of Atchison and 10 shares of Erie, and delivered them, together with other certificates, to Berry & Company on their usual receipt, which was, in, form, the same as the receipt given to Mrs. Taggart, above quoted.

The next day Berry & Company failed, [391]Filson never received *his Pennsylvania stock, and on November 26 no certificate of Pennsylvania stock came into the hands of the receiver in bankruptcy, nor was deposited in any bank as collateral.

Upon the principles stated, we are clearly of the opinion that Filson had a valid claim for the value of his shares of Atchison stock in controversy.

As to two shares of New York, New Haven, & Hartford stock, claimed by William C. Bowers, the facts require no additional discussion. These shares were pledged and the same receipt given as above described. The shares were pledged to the Hanover Bank and returned unsold to the trustees. As Bowers was not indebted on the account for which they were held as security, the shares belonged to him.

George E. Hall seeks to recover a certificate for 10 shares of common stock of the United States Steel Corporation, returned to the trustees by the Hanover Bank, unsold.

On November 1, 1904, Hall deposited certain securities, including the steel stock, with the New Haven manager of Berry & Company, and took a receipt, specifying that they were held "as collateral." Berry & Company hypothecated them with the Hanover Bank. Hall had a speculative account with Berry & Company at the time, and the securities were deposited in lieu of cash margin for the account. By a prior order in the bankruptcy proceeding the claimant has recovered from the trustees certain stocks found to be his property, but which had not been hypothecated with Berry & Company.

No lien or claim on the stock in question is asserted by the trustees, and Hall was not indebted to Berry & Company on November 25, 1904. Hall filed a claim in bankruptcy on December 19, 1904, for $1,850, which included the value of all his stocks in the hands of Berry & Company, valued at $1,600, and a cash balance of $250 due him. In the proof of his claim, Hall sets forth the following statement relative thereto:

"Said deponent hereby stipulates that, by filing notice of this claim, he does not waive [392]any right of action that he now *has to recover possession of said certificates or the value thereof against either of the bankrupts or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, when said bankrupts knew that said certificates were not their property, and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature, or description against said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts, or either of them."

In this claim the essential question is as to the effect of Hall's proof of his claim in bankruptcy as a waiver of his right to recover the shares of stock covered by the receipt. We are of the opinion that, in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy, which now prevents his recovery of the certificates of stock in question. It is true that he voted at the first meeting of the creditors on December 19, 1904, upon an informal ballot for trustee in bankruptcy, and, at the formal election of trustees on December 21, 1904, Mr. Hall did not vote, though the referee finds that he participated actively at the meetings held for the election of trustee. We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which should preclude him, after he had discovered that the shares had been returned to the assignee in bankruptcy, from reclaiming them as his own property.

We find no error in the judgment of the Circuit Court of Appeals for the Second Circuit, and the same is affirmed.

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*J. B. BEADLES, Plff. in Err. and Appt.,[393]
v.
A. E. SMYSER, Mayor, G. R. Byers et al., City Councilmen, and W. R. Fry, City Treasurer, of the City of Perry, Noble County, Oklahoma.

(See S. C. Reporter's ed. 393-405.)

Error to territorial supreme court — amount in controversy.

1. The amount of all the judgments against a municipality concerning which relief was sought, and which were directly adjudicated to be barred by the statute of limitations, and not simply the judgment fund in the hands of the treasurer, is the amount in controversy, for the purpose of a writ of error from the Federal Supreme Court to a territorial supreme court, to review a judgment denying relief by mandamus, where the prayer was for a continuous levy of taxes by the municipal officers for the amount permitted by law annually to be applied in payment of the judgments.

Estoppel — of municipal corporation.

2. A municipality cannot assert the dormancy, under 2 Wilson's Okla. Stat. 1903, § 4635, of certain judgments against it for failure to issue execution thereon within

five years, where, during most of that period, the municipality was carrying out its contract arrangement with its judgment creditors to pay such judgments in the order of their rendition, out of the judgment fund, the effect of which was to prevent the judgment creditors from taking such steps as the law permitted to collect their judgments by execution or mandamus.

Municipal corporations — powers — arrangement with judgment creditors.

3. A municipality authorized by 1 Wilson's Okla. Stat. 1903, § 466, to levy an annual tax to create a judgment fund, may make a valid agreement with its judgment creditors to pay the judgments against it out of such fund, in the order of their rendition.

[No. 150.]

Argued March 4, 1908. Decided April 6, 1908.

IN ERROR to and APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Noble County, in that territory, denying a writ of mandamus to compel the levy of taxes by municipal officers to satisfy judgments against the municipality. Reversed and remanded for further proceedings.

See same case below, 17 Okla. 162, 87 Pac. 292.

The facts are stated in the opinion.

Mr. **A. G. C. Bierer** argued the cause, and, with Messrs. S. H. Harris and Frank Dale, filed a brief for plaintiff in error and appellant:

The statute of limitation is no defense in mandamus proceedings. Duke v. Turner, 204 U. S. 623, 51 L. ed. 652, 27 Sup. Ct. Rep. 316.

It is only in the absence of statutory provision for the payment of judgments against municipalities that they may be collected by execution at all, even if the municipality has any private property out of which the judgment may be collected.

2 Dill. Mun. Corp. 4th ed. § 576, p. 674; Hart v. New Orleans, 12 Fed. 292; State ex rel. Courter v. Buckles, 8 Ind. App. 282, 52 Am. St. Rep. 476, 35 N. E. 846; Laredo v. Benavides (Tex. Civ. App.) 25 S. W. 482; Murphree v. Mobile, 108 Ala. 663, 18 So. 740; Holladay v. Frisbie, 15 Cal. 631; State ex rel. Young v. Royse, 3 Neb. (Unof.) 262, 91 N. W. 560; Alter v. State, 62 Neb. 239, 86 N. W. 1080; Dill. Mun. Corp. § 100.

It is a general rule that a judgment, in order to be revived, must be one on which execution could at some time have issued.

18 Enc. Pl. & Pr. p. 1058; Turner v. Dupree, 19 Ala. 198.

The sole purpose of a revivor of a judgment is that an execution may issue upon it.

Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Irwin v. Nixon, 11 Pa. 425, 51 Am. Dec. 559; Rice v. Moore, 48 Kan. 590, 16 L.R.A. 198, 30 Am. St. Rep. 318, 30 Pac. 10; Freeman, Executions, § 81; Bankers L. Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; Brockway v. Oswego Twp. 40 Fed. 612.

Statutes of limitation do not run against municipal obligations of the character of judgments in Oklahoma.

Barnes v. Turner, 14 Okla. 284, 10 L.R.A. (N.S.) 478, 78 Pac. 108; Duke v. Turner, 204 U. S. 625, 51 L. ed. 653, 27 Sup. Ct. Rep. 316; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363.

The dormancy statute could not have run, because the city had all the time recognized these as valid judgments, and had been levying taxes for the payment of these judgments; and certainly no judgment can become dormant while it is being paid. Part payment is always sufficient to take a case or demand out of the operation of a statute of limitation or dormancy, and the recognition of a judgment as a valid and binding obligation is likewise sufficient.

United States v. County Court, 99 U. S. 582, 25 L. ed. 331; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Atchison, T. & S. F. R. Co. v. Territory, 11 N. M. 669, 72 Pac. 14; Darsey v. Mumpford, 58 Ga. 119; United States ex rel. Field v. Oswego Twp. 28 Fed. 55.

We could not have had mandamus to compel the city of Perry to levy a tax to pay these judgments, because it was annually levying all the tax—5 mills per year—which it had any power or authority to levy under the statutes of this territory.

State ex rel. Young v. Royse, supra; United States v. County Court, 99 U. S. 592, 25 L. ed. 333.

The city has not only, by its express agreement with the judgment creditors, estopped itself from claiming the dormancy of these judgments, if they ever could have become dormant, but it has proceeded throughout all the years of their existence to make all of the levy which an execution in the nature of a mandamus, as the courts put it, could have enforced.

Brockway v. Oswego Twp. supra.

The city of Perry recognized these judgments as valid judgments, and continued to levy taxes to provide money in the judgment fund to pay them; and mandamus, which is the only execution against a municipality, could not have issued until the city refused to recognize and pay them in 1905.

United States ex rel. Field v. Oswego Twp., and Alter v. State, supra.

Mandamus is the appropriate remedy.

Turner v. Guthrie, 13 Okla. 26, 73 Pac. 283; Duke v. Turner, 204 U. S. 623, 51 L. ed. 652, 27 Sup. Ct. Rep. 316; Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635; Ward v. Piper, 69 Kan. 773, 77 Pac. 699; Knox County Court v. United States, 109 U. S. 229, 27 L. ed. 914, 3 Sup. Ct. Rep. 131; United States ex rel. Harshman v. Brown, 41 Fed. 481; Abernethy v. Medical Lake, 9 Wash. 112, 37 Pac. 306; Ralls County Court v. United States, 105 U. S. 733, 26 L. ed. 1220; McCowan v. Ford, 107 Cal. 177, 40 Pac. 231.

The controversy, as shown by the pleadings, evidences a case where more than $5,000, exclusive of interest and costs, is involved.

Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

Messrs. A. N. Whiteside and H. B. Martin submitted a brief for appellees and defendants in error, which was not filed because the authors were not members of the bar of the Supreme Court of the United States:

A judgment against a city of the first class under the statutes of Oklahoma becomes dormant after five years from the date of its rendition, if execution shall not be sued out within that time; and such judgment cannot be revived without the consent of the judgment debtor, unless it be revived within one year from the time it becomes dormant.

Beadles v. Fry, 15 Okla. 428, 2 L.R.A. (N.S.) 855, 82 Pac. 1041.

These statutes were adopted from the state of Kansas.

In Angell v. Martin, 24 Kan. 334, it is held that a dormant judgment cannot be revived without the consent of the plaintiff, unless such revivor is applied for within one year after the same has become dormant.

And the supreme court of Kansas has steadfastly adhered to the same doctrine in a long line of cases down to the present time, and it has held also the doctrine that statutory revivor is exclusive of all other remedies.

Myers v. Kothman, 29 Kan. 19; Tefft v. Citizens' Bank, 36 Kan. 457, 13 Pac. 783; Mawhinney v. Doane, 40 Kan. 681, 20 Pac. 488; Tibbetts v. Deck, 41 Kan. 492, 21 Pac. 586; Bradford v. Central Kansas Loan & T. Co. 47 Kan. 587, 28 Pac. 702; Raff v. State, 48 Kan. 45, 28 Pac. 986; Chicago, K. & W. R. Co. v. Butts, 55 Kan. 661, 41 Pac. 948; New Hampshire Bkg. Co. v. Ball, 57 Kan. 812, 48 Pac. 137; Reaves v. Long, 63 Kan. 700, 66 Pac. 1030; Steinbach v. Murphy, 70 Kan. 487, 78 Pac. 823. See also, United States ex rel. Field v. Oswego Twp. 28 Fed. 55; Dempsey v. Oswego, Twp. 2 C. C. A. 110, 4 U. S. App. 416, 51 Fed. 97; McAleer v. Clay County, 42 Fed. 665; State ex rel. Craig v. School Dist. No. 2, 25 Neb. 301, 41 N. W. 155; Alter v. State, 62 Neb. 243, 86 N. W. 1080.

The rule ordinarily followed in construing statutes is to adopt the construction of the court of the country by whose legislature a statute was originally adopted.

Coulam v. Doull, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253.

An execution can be issued upon a judgment against a township, and, at least, property not used for public purposes can be levied upon and sold thereunder.

Ware v. Pleasant Grove Twp. 9 Kan. App. 700, 59 Pac. 1089.

Where the legislature has granted a right or extended a privilege to every member of a class, and made no exception, the conclusive presumption is that it intended to make none; and it is not the province of the court so to do.

Lafayette County v. Wonderly, 34 C. C. A. 360, 92 Fed. 313; M'Iver v. Ragan. 2 Wheat. 25, 4 L. ed. 175.

A proceeding in mandamus to compel the levy of a tax to pay a judgment is in the nature of an execution.

Chanute v. Trader, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67.

A judgment against a municipality should be regarded as within the provision of the statutes providing for a revival, by scire facias or an action of debt, of judgments on which execution was not issued within twelve months after rendition.

Houston v. Emery, 76 Tex. 283, 13 S. W. 264.

Mr. Justice **Day** delivered the opinion of the court:

This is a proceeding to review the judgment of the supreme court of the territory of Oklahoma, affirming the judgment of the district court of Noble county, in that territory, denying a peremptory writ of mandamus to the plaintiff in error, also plaintiff below, seeking to compel the recognition of certain judgments and the levy of taxes by the city officers of the city of Perry, a city of the first class, in Noble county. The action was begun March 12, 1906, in the district court, upon a petition which set forth the ownership in the plaintiff of judgments against the city of Perry, rendered, with two exceptions, in the year 1898; the other two rendered in January and March, 1899, and aggregating the sum of $16,304.51, including interest and costs.

The petition avers that these judgments were rendered on warrants issued by the city of Perry upon the general fund of the city; that, no funds having been provided for the payment of plaintiff's and certain other judgments, on December 3, 1901, the judgment creditors of the city entered into an [397]*agreement with the city treasurer of the city by signing a certain paper writing, to wit:

"I, the undersigned, judgment creditor, holding judgment against the city of Perry, Noble county, Oklahoma territory, hereby ask that the city treasurer pay all judgments against the city of Perry in order of rendition, hereby waiving right to payment *pro rata*, if such right exists, and this waiver shall apply to all grantees and assigns. Said judgments are in amounts and dates as follows:" [Here follows a list of the judgments.]

At that time the outstanding unpaid judgment indebtedness of the city of Perry amounted to $22,000, all of the owners of which, excepting the sum of $4,000, signed the agreement; that the waivers thus signed were presented to the city council of the city, which adopted the following resolution:

"Whereas, the judgment creditors holding judgments against the city of Perry have practically all signed written waivers of the right, if such right exists, to payment of said judgments *pro rata*, and therein consent to the payment of said judgments in the order of their rendition against said city:

"Therefore, be it resolved, that the city treasurer is hereby authorized and directed to pay the said judgments existing against the city of Perry, in the order of their rendition, out of the funds now on hand, and as they shall accrue in the judgment fund."

That thereafter the city treasurer followed the plan thus outlined of paying judgments up to the early part of the year 1905, and the judgments prior to those sued upon by the plaintiff were paid off in that way. And it is averred that under the laws of the territory of Oklahoma a judgment fund must be created to satisfy a judgment against a municipality, and a judgment of that kind can be paid in no other way. And that under the laws of Oklahoma no execution can be levied upon a judgment against the municipality, and that during the time since the rendition of the judgments the city of Perry [398]*has had no property subject to levy upon execution, and that the judgments of the plaintiff could not have been paid, and taxes levied for that purpose, because there had not been sufficient money in the judgment fund of the city of Perry to pay the judgments or any part thereof. That under the agreement of December 3, 1901, payments of judgments against the city have been made, but, in the order of rendition, the fund has been paid upon judgments prior to the plaintiff's. That under the law of the territory, during the life of the said judgments, at least since the year 1899, it has been the duty of the city of Perry to levy annually a tax not to exceed 5 mills on the dollar on all the property of the said city, to create a judgment fund; and that said city has made said levy annually, and paid judgments down to the early part of 1905, since which time the city treasurer of the city of Perry, under the direction of the mayor and city council, has declined to pay the plaintiff's judgments or any proportion of the same, and that there has accumulated in the hands of the city treasurer $2,286.96, the judgment fund of said city. And that at all times down to the beginning of the year 1905 the city of Perry has recognized the binding force and validity of said judgments; that the mayor and council and treasurer of said city decline and refused to recognize the validity of the plaintiff's judgments or pay any part thereof, and deny any liability thereon, solely on the ground that the same have become dormant and barred by the statute of limitations of the territory of Oklahoma. And other averments are made as to the inability of the plaintiff to otherwise collect his money upon the judgments than by payment by a levy at 5 mills on the dollar of the taxable property of the city. And the plaintiff prayed a writ of mandamus against the mayor, city council, and treasurer of said city, commanding them to recognize the said judgments and to continue to make the 5-mill levy allowed by the law for the judgment fund for the payment of said judgments against the city, as provided by law.

An alternate writ of mandamus was issued, reciting the allegation *of the petition. [399] to which the defendants filed an amended answer, in which they set up that each and all of the judgments set out in the alternate writ of mandamus have become dormant because no execution was issued on any of said judgments, and no proceeding begun for the revival of any of them, and the same were barred by the statute of limitations of the territory.

The plaintiff filed a motion for judgment upon the amended answer, and prayed the issuance of a peremptory writ of mandamus upon the ground that the amended answer failed to state any legal reason why said peremptory writ should not be issued. The defendants moved the court for judgment on the pleadings, on the ground that all the judgments were barred by the statute of limitations. The court sustained the motion of the defendants, and entered final judgment in the defendants' favor, upon the ground that all the judgments set out in the alternate writ of mandamus have become domant and are barred by the statute of limitations.

Upon proceedings in error in the supreme court of the territory of Oklahoma this judgment was affirmed on the authority of Beadles v. Fry, 15 Okla. 428, 2 L.R.A. (N.S.) 855, 82 Pac. 1041. The present case is reported, 17 Okla. 162, 87 Pac. 292.

The question is first made as to the jurisdiction of this court, because it is averred that the sum of $5,000 is not involved; but we are of the opinion that the issue made and decided involved the validity of the $16,000 and upwards, of judgments described in the petition and amended writ. The prayer of the petitioner was for a continuous levy of taxes for the amount permitted by law, to be applied in payment of the judgments. The answer set up that all the judgments were barred by the statute of limitations, and the district court of Noble county determined that the judgments and each and all of them set out in the petition and alternate writ of mandamus had become dormant and were barred by the statute of limitations. This judgment was affirmed by the supreme court of Oklahoma.

[400] *Appeals and writs of error are allowed from the supreme court of Oklahoma to this court where the value of the property or the amount in controversy, to be ascertained by the affidavit of either party or other competent witness, exceeds $5,000. 1 U. S. Rev. Stat. Supp. 724.

We think the judgment in this case involves the validity of all the plaintiff's judgments, and that the amount in controversy is not simply the fund in the hands of the treasurer, but the amount of all the judgments concerning which relief was sought and which were directly adjudicated to be barred by the statute of limitations.

The question made in the case is, Are the judgments dormant by the statute of limitations of the territory of Oklahoma for failure to issue execution thereon for the period of five years, and because the same were not revived within one year after they became dormant? The statutes of Oklahoma in § 4635, 2 Wilson's Revised & Annotated Statutes of 1903, provide as follows:

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

Section 4623 is as follows:

"An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor unless in one year from the time it could have been first made."

And § 4630 provides:

"If a judgment become dormant it may be revived in the same manner as is prescribed for reviving actions before judgment."

It is contended by the counsel for the appellant that this case is governed by the ruling of this court in Duke v. *Turner, 204 [401] U. S. 623, 51 L. ed. 652, 27 Sup. Ct. Rep. 316. We are of opinion that the question here involved was not determined in that case. There was no question of a judgment becoming dormant under the statute of limitations for want of execution within five years. The point decided in that case was that the petition for mandamus was not a civil action within the meaning of the Oklahoma Code, barred by the three-year statutes of limitations, and the question was whether the relator had slept upon his rights for such an unreasonable time as to prejudice the rights of the defendant and preclude relief by mandamus. In this case the underlying question is not as to whether a writ of mandamus is the proper remedy, but is whether the judgment is dormant by reason of the statute of limitations, and incapable of being enforced against the municipality.

The supreme court of Oklahoma held that the statute made no exception, and that notwithstanding the averment of the petition that the city of Perry had no property liable to be reached on execution, that unless execution were issued within the five years, or the judgment revived within one year, it had become dormant for failure to comply with the law.

There is some difference of view in the opinion of the courts upon the subject of executions against municipalities, and in some of them it is held that property of a municipality may be reached on execution which is held for profit, and not charged with any public trust or use. It was held in this court that the public property of a municipal corporation cannot be seized upon execution. Klein v. New Orleans, 99 U. S. 149, 25 L. ed. 430.

Judge Dillon, in his work on Municipal Corporations, 4th ed. vol. 2, § 576, notices the differences of ruling on the subject, and states as his own conclusion:

"On principle, in the absence of statutable provision, or legislative policy in the particular state, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgment should be enforceable by execution against the *strictly private property of the corpora- [402]

tion, but not against any property owned or used by the corporation for public purposes, such as public buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution."

Accepting the decision of the supreme court of Oklahoma, rendered in 15 Okla., supra, construing the statute so as to permit the issuance of execution against the municipality, with the right to levy upon the private property of the corporation if it has any,—could the city take advantage of the failure to issue execution under the circumstances shown in this case? This subject was briefly disposed of in the opinion in that court, and of it the learned court said (15 Okla. 436, 2 L.R.A.(N.S.) 858, 82 Pac. 1041):

"It is alleged that this agreement and resolution of the city council prevented the running of the statutes. This resolution was passed at a time when the plaintiff's judgments were in full force and effect. The city council did not attempt to renew its liability on these judgments. Without expressing our views as to whether such judgments should be paid *pro rata*, or in order of priority as to date, we are of the opinion that the council could not change the law, and, if the resolution purported to change it, it would be void; and if it was in conformity with the law it would not change the relation of the parties."

That the principles of right and justice, upon which the doctrine of estoppel *in pais* rests, are applicable to municipal corporations, is recognized by text-writers and in well-considered cases. In 1 Dillon on Municipal Corporations, 4th ed., in a note to § 417, that learned author says:

"Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, will work an estoppel."

And this case does not rest on the ground [403]of equitable estoppel *alone. The manner of liquidation of these judgments was the subject of express contract between the parties.

In the present case, by the action of the city council, the judgment creditors were so placed that during the time, at least, while the city council were carrying out the arrangement of December 3, 1901, in good faith, they could not, consistently with fair dealing and the terms of the contract on their part, issue an execution to seize the property of the municipality; had they undertaken to do so a court of equity would have promptly restrained such proceedings.

It is averred, and not denied, that up until the year 1905 the city council made a levy each year for the largest amount which the statute permitted, to create a judgment fund out of which to pay, and out of which was regularly paid, the outstanding judgments against the city, and that these payments continued until the plaintiff's judgments were reached, which were next in order. While thus acting to the limit to which the law permitted, and in good faith carrying out the arrangement between the parties, it is perfectly apparent that the plaintiff was not in a position to seize by execution any property of the municipality.

If it could be held, as the authorities indicate (2 Dill. Mun. Corp. 4th ed. § 850, note 1), that, when execution cannot be issued on a judgment against a municipality, mandamus may take its place, the action of the city council in making the arrangement in question would have equally prevented the plaintiff from availing himself of that writ.

In this case the agreement made by the parties in December, 1901, was being continuously carried out until 1905. And during that time the city of Perry was doing all it could be compelled by mandamus to do in levying taxes to the full amount required by law for the payment of judgments against the city. The court would have no power by mandamus to compel the levy of taxes which the law did not authorize. United States v. County Court, 99 U. S. 592, 25 L. ed. 333.

As we have said, the principles of natural justice and fair *dealing are alike applicable[404] to municipal corporations as to individuals, and to permit the city to escape the payment of judgments whose validity is not otherwise questioned, for failure to issue execution or sue out a writ of mandamus during the time when the action of the city officers was such as to prevent the exercise of the right, would be to permit the action of the representatives of the city, who have had the benefit of the contract during the time both parties were observing its obligations, to work a gross injustice upon the creditors holding valid judgments against the municipality.

We have been referred to no case precisely in point. Analogous cases are not altogether wanting. In Mercantile Trust Co. v. St. Louis & S. F. R. Co. 69 Fed. 193, it was held that a stay of execution in the record prevented the judgment becoming dormant. In Marshall v. Minter, 43 Miss. 678, it was held that the statute did not run during the time an injunction was in force, sued out by the adverse party and afterwards dissolved.

It is not argued at the bar in this case that the arrangement with judgment cred-

itors was void for want of power in the municipality to make the arrangement of December, 1901, and we fail to see any valid reason why the municipality might not enter into this arrangement. It was permitted by law to make an annual levy of 5 mills on the dollar. 1 Wilson's Rev. & Anno. Stat. 1903, § 466. If the judgment creditors and the municipality saw fit to make an arrangement by which the amount of this annual levy might be distributed by the consent of the creditors among them in accordance with the priority of their judgments, we perceive no reason why this may not be legally done. The effect of this arrangement was to prevent the judgment creditor from taking such steps as the law permitted to collect his judgment, and, upon principles of common right and justice, it would not do to permit the city to carry out such an arrangement during nearly all the five years' period, and then meet its obligation by a plea of the statute of limitations upon
[405] the ground that the judgments *had become dormant, while both parties were recognizing their binding obligation and doing all that the law permitted to effect their satisfaction, and had entered into a contract which prevented the judgment creditors from taking steps to avail themselves of their right to collect their judgments by execution or by writ of mandamus.

For these reasons the judgment of the Supreme Court of Oklahoma Territory is reversed, and the cause remanded to the Supreme Court of the State of Oklahoma for further proceedings in accordance with this opinion.

WARE & LELAND, a Copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey, Plffs. in Err.,

v.

MOBILE COUNTY. (No. 173.)

WARE & LELAND, a Copartnership, and J. H. Ware, E. F. Leland, Charles W. Lee, and F. J. Fahey, Plffs. in Err.,

v.

STATE OF ALABAMA. (No. 174.)

(See S. C. Reporter's ed. 405–413.)

Commerce — state taxation of buying and selling futures.

The business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting them to other states, is not interstate commerce, so as to be exempt from state taxation, where, in those cases in which contracts for purchases for future delivery result in an actual delivery, the property is bought in the state to which the orders are transmitted, and there held for the purchaser, and in those cases in which there is a delivery upon a contract of sale made by the broker, the seller is at liberty to acquire the property in the market where delivery is required or elsewhere.

[Nos. 173, 174.]

Submitted March 10, 1908. Decided April 6, 1908.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Mobile Circuit Court, in that state, in favor of plaintiff in an action by Mobile county to recover a license tax on the business of buying and selling futures. Affirmed. Also,

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Mobile Circuit Court, in that state, in favor of plaintiff in an action by the state to recover a license tax on the business of buying and selling futures. Affirmed.

See same case below, 146 Ala. 163, 14 L.R.A.(N.S.) 1081, 41 So. 153.

The facts are stated in the opinion.

NOTE. — For state taxation as affecting interstate commerce—see notes to Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

State taxation of contracts for futures to be executed in other states as interference with interstate commerce.

The only other case in which the question stated has been decided is that of Alexander v. State, 86 Ga. 246, 10 L.R.A. 859, 12 S. E. 408, which holds that a state tax on the business of buying and selling futures is not a tax on interstate commerce, although the business is carried on by the agent of a citizen of another state, who solicits orders within the state imposing the tax, to be executed out of it, the court saying: "This court, and many other courts in this country, have held that this business is gambling. Cunningham v. National Bank, 71 Ga. 400, 51 Am. Dec. 266; National Bank v. Cunningham, 75 Ga. 366; Walters v. Comer, 79 Ga. 796, 5 S. E. 292; Embrey v. Jennison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; 8 Am. & Eng. Enc. Law, p. 1005, and cases cited. If, therefore, the business of buying and selling futures is gambling, it is not protected by the interstate commerce clause of the Constitution of the United States. As was well said by the Solicitor General in the argument of this case, that clause protects interstate commerce, but does not protect interstate gambling."

Mr. **Burwell B. Boone** submitted the cause for plaintiffs in error:

It has been held by this court that a telegraph company, whose business is the transmission of messages from one state to another, and which is invested with the powers and privileges conferred by Congress, cannot be forced by the state, as a condition of doing business in its jurisdiction, to pay a license tax, the same being free from the control of state regulations, except such as are strictly of a police character.

Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1383.

Commerce with foreign countries and among the states, which Congress can regulate, includes not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Lottery Case (Champion v. Ames) 188 U. S. 351, 47 L. ed. 499, 23 Sup. Ct. Rep. 321.

We perceive no difference in principle between the business of a telegraph company in sending telegraphic messages from one state to another, and the business of the plaintiffs in error which consists exclusively in securing the business, from citizens of one state, and telegraphing it to them in other states.

Transportation as independent business is commerce, irrespective of the purpose to sell or retain the goods, which the owner may entertain with regard to them after they shall have been delivered.

Hanley v. Kansas City Southern R. Co. 187 U. S. 619, 47 L. ed. 335, 23 Sup. Ct. Rep. 214.

A license tax imposed by a city upon commercial brokers doing business within the municipality is not applicable to brokers who represent nonresident principals exclusively; and, if so applied, that the tax is an invasion of the commerce clause of the Constitution of the United States, and is unconstitutional and void.

Stratford v. Montgomery, 110 Ala. 619, 20 So. 127.

A privilege tax imposed by a state statute upon residents of that state as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the state, as agents for nonresident parties, firms, or corporations, for goods to be shipped by such nonresident principals to such jobbers or dealers, is an unconstitutional invasion of the commerce clause of the Constitution of the United States.

Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Stratford v. Montgomery, supra.

That the contracts for the purchase and sale of commodities were made by the brokerage firm of Ware & Leland, the plaintiffs in error, through their agent in Mobile, Alabama, to be executed in cities without the state of Alabama, does not change the character of the commerce.

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets to be carried.

Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

No appearance for defendants in error.

Mr. Justice **Day** delivered the opinion of the court:

These cases were submitted together, and are in all respects similar, and involve the constitutional validity of subd. 40 of an act of the legislature of Alabama imposing license taxes, "to better provide for the revenue of the state." General Acts 1903, p. 207, which reads as follows:

"For each person engaged in the business of buying and selling futures for speculation or on commission, either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges, and sometimes called 'bucket shops,' in towns and cities of 20,000 inhabitants or more, $500; in all other towns and cities, $250; but this shall not be held to legalize any contract which would otherwise be invalid."

In case No. 173 the action was brought by Mobile county for the recovery of the defendants' license tax for the year 1903, for engaging in the business of buying and selling futures on commission for other persons in the city of Mobile. The other case (174) was an action by the state. Plaintiffs recovered in the circuit court and both judgments were affirmed by the supreme court. 146 Ala. 163, 41 So. 153.

The cases were submitted upon an agreed statement of the facts as follows:

"During the whole of the year 1903 defendants had an office in the city of Mobile, in the county of Mobile and state *of Alabama; they also had offices in the city of New York in the state of New York, and in the city of New Orleans in the state of Louisiana, and in the city of Chicago in [407] the state of Illinois, each of which offices was connected by private telegraph wires with said Mobile office. Said Mobile, Alabama, office was in the charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other way: They would undertake, through their agent, to buy or sell a cotton future contract for a customer in the cotton exchange in New York or in New Orleans, as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware & Leland, either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the transaction was commenced by a purchase or sale of the cotton Ware & Leland would immediately furnish to the customer a memorandum thereof, partly written and partly printed, upon which the following stipulations were printed: 'On all marginal business, we reserve the right to close transactions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed, it being understood and agreed in all trades that actual delivery is contemplated;' and 'All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations, and customs of the exchange on which the order is placed, and the rules, regulations, and requirements of the board of managers of said exchange, and all amendments that may be made thereto.' Such agent would thereupon transmit such order by their private telegraph line to the defendants' office in the city without the state of Alabama selected for such transaction; that such order would be thereupon [408]*executed by defendants by the purchase or sale, as directed, of a future cotton contract for such customer in the cotton exchange of the city to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by defendants in this cause; that said contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction defendants remitted the same to its agent in Mobile, who paid it over to the customer; if a loss was made, it was taken by the agent out of the customer's margin, or if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers.

"No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made where the contracts were executed, to wit: in New York, New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to defendants for the customer on a purchase by him, it was held by the defendants for account of the customer at the place of delivery, either New York, New York, or in New Orleans, Louisiana, until ordered sold by the customer, and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale and there delivered through defendants to the buyer.

"A similar future grain business was done by defendants at their said office in Mobile, Alabama, for customers through their office in Chicago, in the state of Illinois,—said orders being executed on the Chicago, Illinois, board of trade, and subject to its rules and regulations, which contemplated and *provided for the actual receipt or delivery [409] of grain bought or sold therein,—such delivery to be made in Chicago, Illinois.

"During the whole of the year 1903 said city of Mobile, Alabama, was a city of more than 20,000 inhabitants.

"Defendants paid to plaintiff a license tax of $100 for doing such business in said city for the year 1903, which payment was made prior to the 4th day of March, 1903; they have not paid any further license tax to plaintiff for doing such business in said year."

Upon the trial of the action, in addition to the foregoing agreed facts, the counsel for the plaintiff admitted that the rules and regulations of the New York cotton exchange, New Orleans cotton exchange, and Chicago board of trade, respectively, provided "that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery, executed and entered into in said exchange or board of trade, it should be stipulated, agreed, and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable."

The sole question here presented is whether the statute in question is an attempt to regulate interstate commerce; for, if the plaintiffs in error are shown by the foregoing agreed facts to be engaged in interstate commerce, then the statute is void, as an attempt by a state to regulate the commerce which the Constitution of the United States places within the exclusive control of Federal authority.

Interstate commerce must be such as takes place between states, as differentiated from commerce wholly within a state. It must have reference to interstate trade or dealing; and if the regulation is not such, and comprehends only commerce which is internal, the state may legislate concerning it. In each case the recurring question is, On which side of the line does the commerce under investigation fall?

It is unnecessary to review the former [410] decisions of this court, *as that has been done in very recent cases, such as the Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, where it was held that the transportation of lottery tickets was interstate commerce, and, as such, subject to regulation by act of Congress. In that case the Federal act prohibiting the transmission of lottery tickets was sustained because of the actual carriage in interstate traffic of the tickets themselves; and, in concluding the opinion of the majority of the court, Mr. Justice Harlan said:

"The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that, under its power to regulate commerce among the several states, Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

And in Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, it was held that a telegraph company whose business is the transmission of messages from one state to another, invested with the powers and privileges conferred by Congress, could not be compelled to pay a license tax by the state. And in Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708, it was held that interstate telegraphic communications, conducted by companies organized for that purpose, was commerce within the regulating power of Congress. The Pensacola Case was affirmed in Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067, in which case Mr. Chief Justice Waite, speaking for the court, said, p. 464: "A telegraph company occupies the same relation to commerce, as *a carrier of messages, [411] that a railroad company does as a carrier of goods."

While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade.

As in the cases involving insurance policies, it has been held that issuing them in one state and sending them to another, to be there delivered to the insured upon payment of premium, is not a transaction of interstate commerce. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

In Paul v. Virginia, Mr. Justice Field, delivering the opinion of the court, said:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law.

They do not constitute a part of the commerce between the states any more than a [412]contract for the purchase *and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

In Hooper v. California, supra, it was said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a state by a person employed to solicit for them in another state, the goods to be shipped from the one state to the other, is interstate commerce. Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; similar cases are Rearick v. Pennsylvania. 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159, and Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229. In these cases goods in a foreign state are sold upon orders for the purpose of bringing them to the state which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between states and delivered from vendor to purchaser by means of interstate carriage.

But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that [413]such contracts are *the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.

We are of the opinion that the Supreme Court of Alabama correctly held that the transactions of the plaintiffs in error were not interstate commerce, and the judgments in both cases are affirmed.

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*JOHN M. LONGYEAR, Plff. in Err., [414]
v.
WILLIAM TOOLAN and Alexander McMillan.

(See S. C. Reporter's ed. 414–418.)

Constitutional law — due process of law — notice of proceedings to foreclose tax lien.

The notice by publication of the pendency of proceedings to sell land to satisfy a lien for unpaid taxes, prescribed by Mich. Laws 1893, No. 206, satisfies the requirement of due process of law made by U. S. Const., 14th Amend., where the delinquent taxpayer, who has had an opportunity to be heard upon the assessment, cannot fail, if he exercises due vigilance, to learn of the pendency of the proceedings, and that full opportunity to defend is afforded to him.

[No. 177.]

NOTE.—As to due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

Argued March 13, 1908. Decided April 6, 1908.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Clinton County, in that state, directing a verdict for plaintiffs in an action of ejectment. Affirmed.

See same case below, 144 Mich. 55, 121 Am. St. Rep. 603, 107 N. W. 699.

The facts are stated in the opinion.

Mr. **Edward Cahill** argued the cause and filed a brief for plaintiff in error:

It has been held that notice by publication is sufficient where the statute itself contains a notice of the time and place where the owner of property can be heard in defense of his title; but in such cases the substantial notice is not by publication, but is in the statute itself.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

When notice by statute is relied on to supply the place of process, it must contain the elements of notice, and must be as definite and certain in all the essentials of notice as any other legal process. If a statute is deficient in respect to prescribing with certainty the time and place of hearing, the defect cannot be supplied by publication of the notice, unless the statute also fixes definitely the time and place when and where the publication shall be made, and so furnishes, by reference, a means of certainty. What is required is notice; and notice, to be of value, must possess certainty, or furnish the means of certainty to the person entitled to it.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Davidson v. New Orleans, 96 U. S. 108, 24 L. ed. 621; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Pittsburgh C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

Due process requires a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. A judicial proceeding without process is a travesty. Due proces of law in judicial proceedings means notice or summons by which a party is tendered his day in court.

Rouse, H. & Co. v. Donovan, 104 Mich. 239, 27 L.R.A. 577, 53 Am. St. Rep. 457, 62 N. W. 359.

The supreme court of Michigan has recognized in numerous cases the importance to the taxpayer of opportunity for review, and has set aside taxes when it has appeared that this provision of the tax law had been disregarded.

Auditor General v. Chandler, 108 Mich. 569, 66 N. W. 482; First Nat. Bank v. St. Joseph, 46 Mich. 526, 9 N. W. 838; Williams v. Saginaw, 51 Mich. 120, 16 N. W. 260; Peninsula Iron & Lumber Co. v. Crystal Falls Twp. 60 Mich. 510, 27 N. W. 666; Caledonia Twp. v. Rose, 94 Mich. 216, 53 N. W. 927.

No court is authorized to render a judgment or decree against any one, or against his estate, until after due notice, by service of process, to appear and defend.

Hollingsworth v. Barbour, 4 Pet. 466, 7 L. ed. 922; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Noyes v. Hillier, 65 Mich. 636, 32 N. W. 872; Prince v. Clark. 81 Mich. 167, 45 N. W. 663; Grand Rapids v. Powers, 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; Caledonia Twp. v. Rose, supra.

Mr. **Harris E. Thomas** argued the cause, and Mr. Charles W. Nichols filed a brief for defendants in error:

This court has decided that a law which provides only for substituted service, where the tax can be tested by judicial proceedings, is due process of law within the 14th Amendment.

Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825.

This court has also held, in administrative proceedings, that the law complies with the 14th Amendment, even though the statute does not fix the time and place of hearing, and the only notice is by publication, which notice fixes the time and place of hearing.

King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

Where life and liberty are involved, due process requires that there be a regular course of judicial proceeding, which implies that the party to be affected shall have notice and an opportunity to be heard. This requirement applies also where title or possession of property is involved. But where the taking of property is the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to the party at all is necessary may depend upon the character of the tax and the manner in which its amount is determinable.

Hagar v. Reclamation Dist. No. 108, 111

U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; Kentucky Railroad Tax Cases, 115 U. S. 322, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The levy and collection of taxes are not necessarily judicial proceedings; and the fact that the state has permitted them, to some extent, to be administered by the courts, does not make it necessary that such administration should be according to strict judicial technicalities.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 282, 15 L. ed. 376; Black, Tax Titles, § 166.

The assessment and collection of taxes are legislative and administrative, saving only the fixing of a valuation upon the property assessed.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 710, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

It was not the intention that the 14th Amendment should subvert the systems of the states pertaining to general and special taxation; and the Federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624.

Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to these matters, is and always has been regarded as due process of law.

Kelly v. Pittsburgh, 104 U. S. 80, 26 L. ed. 659.

The necessity of revenue for the support of government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessment. In judging what is due process of law respect must be had to the cause and object of the taking, whether under the taxing power or the power of eminent domain; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, or unjust, it may be declared not to be due process.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

A state has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed and advertised.

Witherspoon v. Duncan, 4 Wall. 217, 18 L. ed. 342.

In determining whether one has been deprived of the protection of due process of law, the court will be governed by the substance, and not by mere form; and it is not necessary that the proceedings should be by a particular mode, but only that there should be a regular course of proceedings in which notice is given and an opportunity to defend.

Simon v. Craft, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836.

In the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, and opportunity to defend, are essential. But laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality.

Turpin v. Lemon, 187 U. S. 58, 47 L. ed 74, 23 Sup. Ct. Rep. 20.

And even in cases of taxation for local improvements, in which the reasons for requiring personal service of notice are much greater than in the collection of general taxes, this court has held that substituted service by publication is sufficient.

King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Lent v. Tillson, 140 U. S. 316-328, 35 L. ed. 419-425, 11 Sup. Ct. Rep. 825. See also Wright v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Paulsen v. Portland, supra; Merchants & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

Where the assessors gave public notice by posting for all persons to appear before them within certain periods and submit a statement of their personal property for taxation, and a party failed to do so, and was assessed for property he did not own, it was held that he had had sufficient notice.

Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574.

Where the state seeks, directly or by authorization to others, to sell lands for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court; and a notice which permits all interested who are so minded, to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether found within the jurisdiction or not, is due process of law within the 14th Amendment to the Constitution.

Bells Gap R. Co. v. Pennsylvania, 134 U. S. 232-239, 33 L. ed. 892-895, 10 Sup. Ct. Rep. 533; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 282, 15 L. ed. 376; Davidson v. New Orleans, 96 U. 97, 98, 24 L. ed. 616; State Railroad Tax Cases, 92 U. S. 614, 23 L. ed. 673; Cooley, Const. Lim. 356; Cooley, Taxn. 47-53; Leigh v. Green, 193 U. S. 92, 48 L. ed. 629, 24 Sup. Ct. Rep. 390.

The astuteness of judicial refinement should not be carried to an extent that will render tax laws inoperative, and add to the difficulties of collecting taxes.

De Treville v. Smalls, 98 U. S. 525, 25 L. ed. 175.

If the law makes provision for the publication of a notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who exercise ordinary diligence in looking after their interests in the lands, it is all that can be required.

Cooley, Taxn. 527.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to the supreme court of Michigan. That court rendered judgment for the defendants in error, who were the original plaintiffs, against the plaintiff in error, who was the original defendant, in an action of ejectment to recover a certain lot of land. The defendant was at one time the owner of the land in dispute, but it was conveyed to the plaintiffs by a deed given in pursuance of a sale for taxes. The title to the land depends upon the validity of the tax title, which was upheld by the court below. The issue in this court is narrowed to the question whether the sale of the land for the enforcement and collection of the taxes, which it is conceded were duly levied, violated the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

The method in Michigan of the assessment and collection of taxes on real property is as follows: On or before the 3d Monday in May the supervisor of the township makes a tax roll, on which each parcel of real property is described, and the name of its owner, if known, set opposite. The supervisor then estimates the true cash value of the property. On the Tuesday next following the 3d Monday of May the supervisor submits his assessment roll to a board of review for correction and approval. On the 4th Monday of May and the day following the board sits, and, at the request of any taxpayer, has the power to correct the assessment on his property. The members of the board have authority to administer the oath and to examine witnesses. The assessment roll is then finally made up and certified. The supervisor then proceeds to assess taxes in accordance with the assessment roll, and from the 1st day of December following they become a lien upon the property until payment. Act 206 of the Laws of 1893 provides for *the enforcement and collection of delin- [416] quent taxes by sale. All lands, the taxes upon which have remained unpaid for a year, after the lands have been returned to the auditor general or the county treasurers as delinquent, are declared to be subject to sale in satisfaction of the tax lien. The law provides (§ 61) that "as soon as practicable after the 1st day of June . . . the auditor general shall prepare and file in the office of the county clerk . . . a petition addressed to the circuit court for said county, in chancery, stating therein, by apt reference to lists or schedules annexed thereto, a description of all lands in such county upon which taxes have remained unpaid for more than one year prior to . . . the 1st day of May of the year in which the petition is filed, and the total amount of such taxes. . . . Such petition shall pray a decree in favor of the state of Michigan against said land for the payment of the several amounts so specified therein, and, in default thereof, that such lands be sold." The petition is then entered in "a substantial record book," with a list of the lands and the taxes upon them. The circuit judge thereupon makes an order that the petition will be brought to hearing and decree at a time and place named, at which all persons interested who desire to contest the lien of the state may appear and file their objections; and that, in default of appearance, a decree as prayed for will be entered. The petition, with the order thereon, must then be published at least once a week for four weeks next prior to the time fixed for hearing, in some newspaper published and circulating in the county, to be designated by the auditor general. If there is no such newspaper, or none such can be secured, the petition and order must be printed and furnished to each voter in the county, and copies posted in three public places in each township. The foregoing publication is declared by the law to be "equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon, and of the sale of the lands under the decree, and shall give the court jurisdiction" *to proceed to a decree. [417] An appeal to the supreme court may be taken by either party. On the 1st Monday of December following, the county treasurer begins to make the sales decreed by the court, must report them to the clerk of the court, and eight days after the sales are reported to the clerk of the court are given for objections to the sale, which may be set aside as is the practice in cases of sales in equity on the foreclosure of mortgages. The sale is then confirmed, subject to a right of redemption, which may be exercised at any time within one year from the sale. The sale, however, may be set aside within one year after the owner has notice of the sale, if the taxes have been paid or the property was exempt.

The sale in the case at bar was made after proceedings which, in all respects, conformed to the statute. The single objection made in behalf of the plaintiff in error is that the statute denies to him, then being a resident of the state, the due process of law required by the Constitution, in that it substitutes notice by publication of the proceedings for sale for personal service. It has been shown that the Michigan law provides a board of review, which holds sessions on days fixed by the law, where every person whose property is on the provisional assessment roll submitted by the supervisor may be heard to correct the assessment. It would seem that this opportunity for hearing, coupled with the provision for setting aside the sale within one year after notice of it, which has been stated, satisfies the requirement of due process of law made by the 14th Amendment, and that the state may be left to enforce the collection of the taxes as it chooses. But we pass this question without deciding it, simply observing that, in Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83, it was said, p. 537, that the 14th Amendment was not violated "if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection." If it be assumed that the delinquent taxpayer, who has already had an opportunity to be heard upon the assessment of the [418] *tax upon his property, is entitled to further notice of the pendency of proceedings to sell the land in satisfaction of the tax lien, then the statute before us requires a sufficient notice. It is no objection that the notice was only by publication. In the case of Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390, a case of publication, the authorities were reviewed, and it was said, p. 92: "Where the state seeks directly, or by authorization to others, to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the 14th Amendment to the Constitution." Moreover, the case at bar cannot be distinguished from Winona & St. P. Land Co. v. Minnesota, supra. There a statute similar to the one now before us was held to afford due process of law. The only distinction suggested is that the Minnesota statute fixed more definitely than the Michigan statute the time of filing the petition, of making the order for hearing, and of the hearing itself. But those times are fixed with sufficient certainty here. The owner of property whose taxes, duly assessed, have remained unpaid for more than one year, must be held to the knowledge that proceedings for sale are liable to be begun as soon as practicable after the 1st day of June, and that the law contemplates that they will be ended before December 1, when the sales will be made by the county treasurer. The proceedings are inscribed on the public records and otherwise made notorious. If he exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him. This satisfies the demands of due process of law, and the judgment is affirmed.

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*CAROLYN FOSTER STICKNEY, as Executrix, and Robert I. Jenks and John G. Hannah, as Executors of the Last Will and Testament of Joseph Stickney, Deceased, and Carolyn Foster Stickney, Individually and as Widow and Devisee, Plffs. in Err., [419]

v.

OTTO KELSEY, Comptroller of the State of New York.

(See S. C. Reporter's ed. 419-422.)

Error to state court — scope of review — non-Federal questions.

1. Assignments of error which simply allege in various forms that the state court

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NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

erred in its decision of the cause present no Federal question for consideration by the Supreme Court of the United States on a writ of error to the state court.

Error to state court — Federal question — necessity of decision below.

2. The decision of a state court will not be deemed to present a question respecting due process of law which will sustain a writ of error from the Supreme Court of the United States, on the theory that such decision gave retroactive effect to a statute passed since the argument of the appeal before the state court, where the language of the court's opinion may equally well be interpreted as a declination to pass upon a question not necessary to the decision, which had been set at rest for the future by legislation.

[No. 196.]

Submitted March 20, 1908. Decided April 6, 1908.

IN ERROR to the Surrogates' Court in and for the County of New York in the State of New York, to review a judgment imposing a transfer tax upon property devised by will, entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had in turn affirmed the order of the Surrogates' Court, fixing such tax. Dismissed for want of jurisdiction.

See same case below in Appellate Division, 110 App. Div. 294, 97 N. Y. Supp. 336; in Court of Appeals, 185 N. Y. 107, 77 N. E. 993.

The facts are stated in the opinion.

Mr. **Edward Mitchell** submitted the cause for plaintiffs in error.

Mr. **David B. Hill** submitted the cause for defendant in error.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to a surrogates' court of the state of New York. The judgment brought under review was entered in obedience to a judgment of the court of appeals of that state. The judgment imposed a transfer tax upon certain real property devised by the will of Joseph Stickney, deceased. The tax was properly assessed if an act purporting to be passed on March 16, 1903 (1 Sessions Laws of 1903, p. 165), was a duly enacted law of the state. It appears that, by the Constitution of the state, laws of the nature of this one require for their due enactment a majority vote in each legislative chamber when three fifths of the members are present. The presiding officers of both branches of the legislature, in certifying that this bill was duly passed by a majority vote, failed to certify that three fifths of the members were then present. *The defendant in error was permitted, **[420]** over the objection of the plaintiffs in error, to prove that the journals of the two houses showed that the requisite number of members were, in point of fact, present. This the court of appeals held to be sufficient to show that the statute was validly enacted. The first five assignments of error in this court simply allege in various forms that the court of appeals erred in its decision of the cause. These assignments may be summarily overruled upon the plain ground that they present no Federal question. It must not, however, be understood that we intimate that any form of assignment would have given this court the authority to review the determination of the highest court of a state of the proper method of proving the existence of its own laws. South Ottawa v. Perkins, 94 U. S. 260, 24 L. ed. 154; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Post v. Kendall County, 105 U. S. 667, 26 L. ed. 1204; Re Duncan (Duncan v. McCall) 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458.

There is, however, a sixth assignment of error. For its understanding it is necessary to make a further statement of facts. When certified copies of the journals of the two houses were offered in evidence, for the purpose of showing that, at the time of the passage of the bill, three fifths of the members were in fact present, notwithstanding the omission of the presiding officers to certify to their presence, counsel for plaintiffs in error made the following objection: "I object on the ground that the paper offered is incompetent, irrelevant, and immaterial; that the original journal, if produced, is not a record, either at common law or by the statute, and cannot be introduced in evidence, and cannot be resorted to by the court for the purpose of either validating or impeaching any law; and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three fifths, and the conclusive evidence is that there was only a majority present, and not three fifths." The objection was overruled, the evidence was admitted, and an exception was taken. It will be observed that no objection *was taken **[421]** that the original journals were not produced, but only that, if produced, they were not admissible to add to or vary the certificates of the presiding officers, which were conclusive as to the numbers present. The judgment of the surrogate, which was in writing, and of the appellate division of the supreme court, proceeded upon this view of the objection, and treated the question exactly as if the original journals had been offered. But the judgment of the court of appeals indicates that there it was objected, for the first time, as far as the record discloses, that the original journals were not produced, and that the certified copies were not competent evidence of their contents. The inference that such a question was raised can only be drawn from the concluding part of the opinion. After deciding that the presence of the requisite number of members could be proved by recourse to the journals, and that the journals showed the fact, the court said: "It is contended, however, that the authenticity of the journals of the legislature, certified copies of which were put in evidence, was not established, and that, with the failure of any original record, certified extracts therefrom were not competent. Without expressing any opinion on this objection, it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of chapter 240 of the Laws of 1906, which, in express terms, declares the printed copies to be the original journals of the two houses, and makes them, or copies thereof, competent evidence when certified by the respective clerks of the senate and assembly." [185 N. Y. 108, 77 N. E. 994.] A motion for rehearing was made and denied. Based upon this part of the opinion, a supposed Federal question is alleged in the sixth assignment of error in this court, which is as follows:

"6. That the said court of appeals of the state of New York erred in holding and deciding that the motion for reargument and for a hearing on the validity and effect of chapter 240 of the Laws of 1906 should be denied; by reason of which denial the said court of appeals has, in effect, held:

[422] *"(a) that chapter 240 of the laws of 1906 should be construed to have a retroactive effect, and

"(b) that such construction would not be in violation of the 14th article of the Amendments to the Constitution of the United States, and

"(c) would not impose and exact a tax without due notice and without due process of law, and

"(d) that the state would not, by such act and such construction thereof, deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error, who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose."

We do not intend to intimate that, if the words of the opinion were capable of the meaning which is attributed to them in this assignment of error, there would have been shown any violation of the 14th Amendment. League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475. But we think, in view of the fact that when the copies of the journals were offered in evidence no objection had been made that the originals were not produced, the language of the court may quite as naturally be interpreted as a declination to pass on a question, not necessary to the decision, which had been set at rest for the future by legislation. The best that can be said for the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit.

It does not therefore appear that the judgment under review was based upon the decision of any Federal question. Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

The writ of error is dismissed.

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*SHAWNEE COMPRESS COMPANY, the Gulf Compress Company, T. F. Stubbs, et al., Appts., [423]

v.

NEIL P. ANDERSON, B. L. Anderson, and Morris E. Burney, Copartners as Neil P. Anderson & Company, and F. E. Anderson, M. D. Anderson, and W. L. Clayton, Copartners as Anderson, Clayton, & Company.

(See S. C. Reporter's ed. 423-435.)

Appeal — from territorial supreme court — scope of review.

1. In reviewing a decree of a territorial supreme court, which reversed the decree of the trial court in a suit to cancel a corporate lease, the Federal Supreme Court is confined, as was the court below, to determining whether there was some evidence supporting the findings of the trial court, and whether the facts found were adequate to sustain the legal conclusions.

NOTE.—As to monopolies generally—see notes to Fowle v. Park, 33 L. ed. U. S. 67, and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to contracts in partial restraint of trade, as affected by modern anti-trust acts

Monopoly — restraint of trade — lease of entire corporate property.

2. An Oklahoma compress company, though financially embarrassed, cannot lease its entire property and good will to a foreign corporation, with a covenant to lend its assistance to discourage competition against its tenant, and to refrain from engaging in the business of compressing cotton within 50 miles of any plant operated by the tenant, where such lease is executed in pursuance of a plan to assemble under one management or ownership the compression business in the cotton-producing states.

[No. 140.]

Argued March 2, 3, 1908. Decided April 13, 1908.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which reversed a decree of the District Court of Pottawatomie county, in that territory, in favor of defendants in a suit by minority stockholders to cancel a lease of the corporate property, and remanded the cause, with a direction to render judgment for the plaintiffs. Affirmed.

See same case below, 17 Okla. 231, 87 Pac. 315.

Statement by Mr. Justice **McKenna**:

This suit was brought in the district court of the county of Pottawatomie, territory of Oklahoma, by appellees as stockholders of the Shawnee Compress Company

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—see case note to Lanyon v. Garden City Sand Co. 9 L.R.A.(N.S.) 446.

As to the validity of a stipulation to discontinue or not to engage in a particular business, when not ancillary to a lawful contract—see case note to Clemmons v. Meadows, 6 L.R.A.(N.S.) 847.

Validity of agreement not to compete, ancillary to sale or lease of property, as affected by covenantee's purpose to procure a monopoly.

The variety of considerations which have governed the disposition, in the cases following, of the question under discussion, seems to preclude the statement of any general principle as deducible therefrom. While an attempt has been made herein to group the cases with reference to the rationale of decision, for the purpose of showing the extent to which the decision is based upon common-law principles, or the extent to which it is influenced by anti-monopoly statutes, it is not always possible, as appears from the comment in the principal case upon the decision of the court below, to determine the exact ground on which the judgment is based.

The test now generally applied is whether the restraint is such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not such as to interfere with the interests of the public. Among recent cases involving the validity of restrictions upon competition in connection with the sale of a business, in which this test is applied, may be cited Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770; Cottington v. Swan, 128 Wis. 321, 107 N. W. 336; My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

In Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31, it was held that an agreement accompanying the sale of the business of a corporation, that it and its stockholders would not again engage, during the next ten years in the territory, or immediate vicinity of the territory, in a business similar to that dealt in by the selling corporation, if tested by the rule that such a stipulation is valid if it goes no further than to support and protect the interest transferred by the contract of sale, was valid and obligatory, although it appeared that the purchaser had also acquired other plants and stocks to an extent that tended to create a power to monopolize the fish market.

In United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946, a lease of the plant of a company engaged in the manufacturer of bone tartar, containing a covenant on the part of the lessor not to engage in the manufacture of bone tartar during its continuance, for a rental large enough to cover not only the actual rental value of the land and buildings, but the profits derived from the business conducted on the premises, was held valid, although it appeared that it was the intention to remove the lessor's competition from the market, upon the ground that the stipulation in question was ineffectual to create a monopoly or even to confer a dominating control over the trade in bone tartar, that the restraint imposed was only commensurate with the fair protection of the business sold, and that the tendency of such a contract to create a monopoly was less harmful than a restriction of the right upon the transfer of a business, to enter into such a covenant as would adequately protect the purchaser, would be.

In Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723, where, simultaneously with the purchase of a business, the vendors of which bound themselves not to engage in the same business within a certain territory for a period of fifty years, the purchaser also acquired by purchase four other concerns engaged in the same line of business, each vendor entering into a similar contract not to engage in a competitive business, it was held that, although contracts to restrain and limit competition in the production of some commodity in the manufacture and sale of which the public have an interest are repugnant to public policy, a restraint or limit upon competition against appellants, to cancel a lease made by the Shawnee Compress Company to the Gulf Compress Company.

The original petition alleged that the compress companies were respectively corporations of Oklahoma and the state of Alabama; that the plaintiffs, appellees here, were minority stockholders of the Shawnee Company; that certain of the stockholders of the Shawnee Company, claiming to be its officers, "conceived the idea of leasing the entire property and business of said company, together with its good will and the right to the business thereof to said defendant, Gulf Compress Company, a foreign corporation;" [424] that subsequently the *same stockholders, claiming to be the directors of the corporation, in certain meetings and by certain resolutions, executed the purpose. These meetings were alleged to be invalid as not being in conformity with the by-laws, and that the proceedings therein were "wholly illegal and beyond the powers and authority of the said stockholders and directors of said corporation;" that the corporation was organized to construct and operate a cotton compress in the city of Shawnee, and that its officers and stockholders were not authorized to execute a lease for a period of years, vesting in another and foreign corporation the rights, duties, and business of the company, and that the lease was void as against the rights of plaintiffs, being minority stockholders of the company. A copy of the lease was attached to the petition.

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may result from contracts which the courts are bound to enforce; so that, in the absence of legislative prohibition, the courts would be obliged to recognize and enforce contracts for the purchase by an individual manufacturer of the business of his competitors, even to the last one, although such purchases tend to eliminate competition, and the last purchase would completely exclude it, at least for a time. In discussing the particular phase of the question which forms the subject of this note, the court said: "Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture? . . . The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work, a single workman in that industry. They restrain a comparatively small number of capitalists who had previously employed their capital in such manufacture, from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction, when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains. The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce."

In Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973, it was held that the issuance of an injunction against the violation, by a manufacturer who for mutual advantage unites with other manufacturers of the same product in a combination of stocks, machinery, accounts, and good will, and the formation of a corporation to operate the combined business, of his agreement not to re-engage individually in the business, cannot be prevented on the ground that the contract tends to create a monopoly.

While it is universally conceded that public interest demands that a seller shall be free to enter into such covenants as will adequately protect the purchaser, as well as that competition should continue, some difference of opinion appears to exist as to whether interference with the interests of the public begins at the point where protection of the purchaser ends.

In Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577 (writ of error dismissed in 187 U. S. 651, 47 L. ed. 349, 23 Sup. Ct. Rep. 841), it was held that where the seller of a business agreed not to re-engage therein during the period of twenty-five years, within a radius of 1,500 miles of the city of Chicago, and the evidence tended to show that the manufacture in question could only be carried on successfully within such radius, the agreement indicated clearly that the object of the whole scheme was to suppress competition and to create a monopoly, and was void as being in total or general restraint of trade.

In Keene Syndicate v. Wichita Gas, Electric Light & P. Co. 69 Kan. 284, 67 L.R.A. 61, 105 Am. St. Rep. 164, 76 Pac. 834, it was held that no action to recover rents could be maintained on a lease made by a corporation engaged in the business of generating and furnishing electricity for public and private use, to a rival corporation in the city, for a period of ten years, of machinery and appliances used in generating electricity, whereby the lessor obligated itself not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and not to dispose of any of the property, machinery, or appliances retained by it for producing or generating in said

The petition was amended, making the allegations somewhat fuller, and alleged that appellants Stubbs and Beatty, who assumed to act respectively as president and secretary of the company, and certain other stockholders who joined with them in the negotiation of the lease, were induced thereto by certain advantages personal to themselves, and not by the interest of the company. It was also alleged that the "exigencies of the business" of the company did not demand or justify the lease, and that its revenues for the season 1904–1905, over and above taxes and insurance, notwithstanding negligent and incompetent management, were $7,485.89; and, plaintiffs expressed the belief, could be made greater for the years covered by the lease. It was alleged that the Gulf Compress Company was in the business of leasing and operating competing compresses for the purpose of monopolizing, as far as possible, the business of compressing cotton in a large portion, if not all, the cotton-raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compresses were also secured for like purposes, and that the Gulf Company is, in its operation and method of conducting business, a trust, combine, and conspiracy, in restraint of trade *and commerce, [425] in violation of the Federal anti-trust law and the anti-trust law of the territory of Oklahoma, and that it is the design of the Gulf Compress Company to

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city electric light and power, such lease being in contravention of public policy.

In Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 41 L.R.A. 185, 63 Am. St. Rep. 736, 49 N. E. 1030, it was held that, where one engaged in the same business as another purchased that of the latter, with its good will, taking from the latter a stipulation that he would not, directly or indirectly, engage in the same business in the state, or in the United States, for the period of twenty-five years, such agreement, when analyzed, shows that its principal object was not simply to acquire the seller's business and its good will as an investment, but to purchase it out of business, that the buyer might have a more complete monopoly; and that therefore, on principles of public policy, such agreement would not be enforced, whether it was necessary or not to the reasonable enjoyment of the good will so purchased. This case emphasizes the point that, while agreements that impose only a partial restraint, made in connection with the purchase of the business, that are reasonably necessary to make available the good will purchased with the business, and are reasonable, may be enforced, such rule does not allow the enforcement of such agreements in general restraint of trade, although no more so than is necessary to afford protection to the purchaser, as in such case the interest of the public outweighs the interest of the purchaser.

An analogous question is presented in the case of Pacific Factor Co. v. Adler, 90 Cal. 110, 24 Am. St. Rep. 102, 27 Pac. 36, in which it was held that a contract creating an exclusive agency for the sale of grain bags or burlaps was void as against public policy, where shown to be a part of a scheme of the agent to establish a monopoly.

Passing to those cases in which the effect of some anti-monopoly statute seems to be a salient feature, it will be found that the purpose of the covenantee to procure a monopoly will invalidate an agreement otherwise lawful, only where the statute is construed as applicable to all contracts in aid of a monopoly, or where there is an unlawful combination of two or more persons, in furtherance of the purpose of which the contract was entered into. It is to be noted that under the foregoing statement there is a ground for distinction between cases in which such agreements are merely ancillary to a sale or lease, and the seller or lessor retains no interest in the business, and cases where such a stipulation forms a part of a sale or lease by which a combination of several component businesses is effected. Such distinction is analogous to that existing between an act lawful in itself, and the same act when done in futherance of an unlawful conspiracy, and is pointed out in Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31, in the following language: "There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management where each owner's interest is continued in the combination. To this latter class belongs the case of Merz Capsule Co. v. United States Capsule Co. (C. C.) 67 Fed. 414, Affirmed in 31 L.R.A. 415, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete."

And in the same case it was accordingly held that the validity of an agreement accompanying the sale of the business of a corporation, that it or its stockholders would not again engage in a similar business during the next ten years in the territory or immediate vicinity of the territory dealt in by it, was not affected by the Michigan anti-trust law enacting that "all contracts, . . . the purpose, object, or intent of which shall be . . . in any man-increase the charge of compressing cotton, and that it will be able to enforce such charges by reason of the fact that it will control all of the compresses in the territory.

There was a demurrer to the petition, which was overruled. An answer was then filed, which in detail asserted the validity of the proceedings preceding the execution of the lease; that the company was indebted in the sum of $17,250,—$6,000 to the Shawnee National Bank and $11,250 to the Webb Press Company, Limited, which was past due; that its creditors were pressing for payment, and that the lease was necessary in order to procure money by which to pay the Shawnee Bank and to secure the extension of time on the indebtedness due the Webb Press Company; and that, for these reasons, the negotiations for the lease were entered into and the lease finally made. And it is alleged that the consideration paid was fair and reasonable and for the best interest of the stockholders of the Shawnee Company; that defendants could procure said second mortgage money in no other way; and that the property of the Shawnee Company would have been sold at a great sacrifice unless the lease had been made.

It is alleged that appellees are firms of cotton buyers, and, in order to obtain an unfair advantage over other buyers, have conspired together for the purpose of forming a monopoly of all the compresses in the territory and destroying competition in com-

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ner to prevent or restrict free competition in the sale of any article or commodity, . . . shall be utterly illegal and void, . . . provided, however, that this section shall in no manner invalidate or affect contracts for what is known and recognized at common law and in equity as contracts for the good will of a trade or business," upon the ground that, since such statute is aimed at "trust combinations," the intent which makes a contract or combination unlawful thereunder is one in which both parties participate, and that the act is not intended to compromise a case where there is a sale and purchase of property, after which the seller has no interest in the property, and therefore no intent as to its further use. And, further, in holding that interstate commerce was not so directly affected by the contract above set forth as to bring it within the operation of the Federal anti-trust act, the court said: "Nor can this conclusion be affected by the fact that A. Booth & Company also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market."

In A. Booth & Co. v. Seibold, 37 Misc. 101, 74 N. Y. Supp. 776, in sustaining the validity of a contract whereby upon the sale of its business a corporation and its individual stockholders agreed not to re-engage in such business within certain territory for a limited time, it is said: "It does not appear that the attempted expansion of the plaintiff's business by purchasing and absorbing the stock in trade and good will of rival dealers was in any sense a combination to control the sale and enhance the prices of food fishes. It does not, therefore, fall within the prohibition of the anti-monopoly statutes; . . . nor is its validity affected, so far as concerns the parties to it, by the fact that the plaintiff has purchased the business of other dealers, and has made similar contracts with them."

But in Fisher v. Flickinger Wheel Co. 28 Ohio C. C. 501, in which the controversy was as to the title of the property covered by the contract of sale in question, a different effect was attributed to an anti-monopoly statute, it being held that the provision of the Ohio anti-trust act (Rev. Stat. 4427, 4428), that "any contract or agreement in violation of the provisions of this act shall be absolutely void, and not enforceable either in law or equity," is not restricted in its application to the mere agreement to form a trust, but is applicable to contracts made with the intent to carry out the illegal purpose defined by the statute, and that therefore a contract whereby a combination of manufacturers purchased all the machinery of one of its constituent members, which stipulated that such member should not compete in business for the period of five years in a territory lying between New York city and Denver, Colorado, was illegal and void, where the provisions of the contract, and the fact that such machinery was purchased without any plan for its location and use, and remained unused by the purchaser, pointed irresistibly to the conclusion that the main object of the purchase was the restriction of competition.

A case governed by peculiar considerations is Comer v. Burton-Lingo Co. 24 Tex. Civ. App. 251, 58 S. W. 969,—an action to restrain the seller of a business from re-engaging therein, and for damages,—in which it was held that, although a stipulation on the part of the seller not to re-enter such business in a certain city within ten years thereafter was not rendered invalid by the Texas statute prohibiting the union or association of the capital, skill, or acts of two or more persons, firms, or corporations for the purpose of creating or carrying out restrictions in trade or the free pursuit of business or to prevent competition, and declaring all contracts and agreements in violation thereof to be absolutely void and unenforceable, such a stipulation was not valid where it appeared that the purchasers of the business were the only other lumber dealers in the city, and had combined to buy the business for the purpose of preventing competition and controlling prices.

In the following cases, however, the complicity of the covenantor seems to have been pressing; and, in order to carry out the conspiracy, have, for more than six months, endeavored to obtain a majority of the stock of the Shawnee Company; and, knowing that Beatty and Stubbs were involved and in need of money, have, in all ways, oppressed said Beatty and Stubbs to compel them to sell their stock to appellants for an inadequate consideration, and conspired to compel the Shawnee Company, knowing it was involved and its demands pressing, to sell and convey its property to them for the inadequate consideration of $25,000. [426]*And it is alleged that the lease was made to defeat such conspiracy. Other plans of the appellees to harass the Shawnee Company are averred.

The case went to trial on the issues thus formed and resulted in a judgment for defendants (appellants here). The judgment recited that "the court having heard all the evidence offered . . . and being fully advised in the premises, finds for the defendants and against the plaintiffs that the allegations of the petition of plaintiffs are not supported by the law and the evidence."

A motion for a new trial was denied and the case was then taken to the supreme court of the territory, which court reversed the judgment of the court below, and the case was remanded to the district court, with instructions to that court to render judgment for plaintiffs in the case (appellees here) in accordance with the opinion of the supreme court, and the prayer of the amended petition.

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regarded as bringing the contract within the inhibition of the anti-trust statutes:

In Merz Capsule Co. v. United States Capsule Co. 67 Fed. 414 (Affirmed on other grounds in 31 L.R.A. 415, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787), the stipulation in question was incidental to a transaction whereby a corporation entered into a combination with other manufacturers, all of whom conveyed their entire property and business to a new corporation, for the purpose of controlling the price of the article manufactured by them; and it was held that, such contract falling within the Michigan anti-trust act of 1889, the corporation, upon deciding to withdraw, was entitled to an injunction to prevent the combination from taking possession of its property thereunder.

In McConnell v. Camors-McConnell Co. 81 C. C. A. 429, 152 Fed. 321, in which the violation of the stipulation against competition was sought to be enjoined, it was held that, where the contract of sale provided for the organization of a new corporation to monopolize the business, the contract was in violation of the Federal anti-trust act and was therefore void, the enforcement of the provisions of such act not being limited to direct proceedings by the state.

In American Strawboard Co. v. Peoria Strawboard Co. 65 Ill. App. 502, it was held that no recovery of rent could be had upon a lease containing a provision whereby the lessor agreed not to compete within a radius of 1,000 miles, upon the ground that the contract was void because entered into knowingly and purposely, as a part of an unlawful combination for the purpose of limiting the production of an article of merchandise and fixing the price thereof, in violation of the Illinois anti-trust act, the evidence showing that the scheme entered into, which resulted in the execution of various leases to a corporation known as the Independent Paper Company, which assigned it to the appellant, was a mere shift or device gotten up for the purpose of limiting the production of strawboard and fixing its price in violation of the laws of the state, and that the lease was not made in good faith with the intention that the plant pretended to be leased should be used, but that it was a mere form adopted to evade the law and to enable the lessor to receive a bonus for allowing its factory to remain idle.

In Clark v. Needham, 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027, it was held that a lease by a firm of all its machinery used in the manufacture of certain articles, with an agreement that they would not for five years manufacture or sell such articles except to a single third party, upon the execution of which lease the lessee leased back the machinery to the first lessor to use for any purpose except for the manufacture of such articles, constituted an illegal contract in restraint of trade, within the inhibition of the laws of the state and of the United States, where it was not limited as to territory, and the lessor had been engaged in carrying on such business in other states, upon the ground that the plain object of the agreement was substantially to give the lessee a monopoly of the business by closing such part of the lessor's business.

In connection with the foregoing cases, notice may also be taken of Detroit Salt Co. v. National Salt Co. 134 Mich. 103, 96 N. W. 1, in which an agreement by a manufacturer of salt to sell its entire output to another company, and containing provisions under which the purchaser might stop the manufacture on payment of certain amounts, was held illegal under a state statute declaring illegal all contracts, agreements, understandings, and combinations entered into or knowingly assented to, the purpose, object, or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production, or to enhance, control, or regulate the market price of any article, or in any manner to prevent or restrict free competition, where it was shown that the seller knew that the purchaser was attempting to get control of the market, and was seeking to make contracts with other manufacturers.

Mr. **B. B. Blakeney** argued the cause and filed a brief for appellants:

The primary purpose of this contract was the leasing to the Gulf Company of the compress plant at Shawnee. The restrictive clauses were merely ancillary. The restriction was not the main direct purpose, but a collateral agreement. Such restrictive provision has always been regarded as collateral to a contract of sale or leasing. A verbal agreement not to compete with the purchaser or lessee has uniformly been held not to vary the written contract of leasing or of sale, because collateral.

Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747.

This court has always held this character of contracts valid.

Prior to the Sherman act:

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

Under the Sherman act:

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

A condition in a contract of sale, restricting competition, is not affected by the Federal anti-trust law.

United States v. Joint Traffic Asso.; Northern Securities Co. v. United States; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.; and Cincinnati, P. B. S. & P. Packet Co. v. Bay,—supra.

The following is a correct *résumé* from the decisions:

The Federal and the state courts uniformly hold that a contract in partial restraint of trade is valid and will be enforced.

The Federal and a majority of the state courts hold that the restrictive contract is valid though it embraces the whole of the state where the property sold or leased is situated, and other states.

A few states, recognizing the boundaries of their state as an arbitrary limitation, hold contracts excluding competition within the whole of the state as invalid, but this rule, ignoring the wide area in which the good will of a business may extend, is rejected by this court.

Fowle v. Park, supra; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 68, 22 L. ed. 318; Cincinnati, P. B. S. & P. Packet Co. v. Bay, supra; A. Booth & Co. v. Davis, 127 Fed. 875, Affirmed in 65 C. C. A. 269, 131 Fed. 31; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048; Western Wooden-ware Asso. v. Starkey, 84 Mich. 76, 11 L. R.A. 503, 22 Am. St. Rep. 686, 47 N. W. 604.

If the terms of a contract in restraint of trade can be construed divisibly as to the limits, it may be valid as to the limits which are reasonable, although other limits imposed are excessive, unreasonable, and void.

9 Cyc. Law & Proc. p. 565; Rosenbaum v. United States Credit System Co. 65 N. J. L. 255, 53 L.R.A. 449, 48 Atl. 237; Fishell v. Gray, 60 N. J. L. 5, 37 Atl. 606; Western U. Teleg. Co. v. Burlington & S. W. R. Co. 3 McCrary, 130, 11 Fed. 1; Dean v. Emerson, 102 Mass. 480; Thomas v. Miles, 3 Ohio St. 274; Lange v. Werk, 2 Ohio St. 520; Arnot v. Pittston & E. Coal Co. 2 Hun, 591.

Not only could the whole provision be stricken out, if illegal. but the provision may be pruned of its illegal portions, and the remainder enforced.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Cincinnati. P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428. 26 Sup. Ct. Rep. 208; Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380; Peltz v. Eichele, 62 Mo. 171; Smith's Appeal. 113 Pa. 579, 6 Atl. 251; United States v. Bradley, 10 Pet. 343, 9 L. ed. 418; Wolsey v. Neeley, 62 Ill. App. 141; Trenton Potteries Co. v. Oliphant. 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612. 43 Atl. 723.

The lease is not *malum in se*, but invalid because it extended over too wide an area.

Black's Law Dict. *Malum in se*; United States v. Bradley, supra; United States v. Mora, 97 U. S. 413, 24 L. ed. 1013.

This is a California statute, and has been frequently construed by that court as itself dividing the contract, and making the same valid as to the county where the business is located.

City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Meyers v. Merillion, 118 Cal. 353, 50 Pac. 662; Merchants' Ad.-Sign Co. v. Sterling, 124 Cal. 429, 46 L.R.A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

South Dakota, with the same statute, has given it the same construction.

Prescott v. Bidwell, 18 S. D. 64, 99 N. W. 93.

To acquire the Shawnee compress to avoid competition is lawful.

A. Booth & Co. v. Davis, 127 Fed. 875; State v. Shippers Compress & Warehouse Co. 95 Tex. 603, 69 S. W. 58 (Tex. Civ. App.) 67 S. W. 1049; Trenton Potteries Co. v. Oliphant, supra; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Rafferty v. Buffalo City Gas Co. 37 App. Div. 618, 56 N. Y. Supp. 288; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973.

It is not material that the price of compressing was raised.

A. Booth & Co. v. Davis, supra.

Or that other parties were obligated by similar conditions.

A. Booth & Co. v. Seibold, 37 Misc. 101, 74 N. Y. Supp. 776.

Messrs. G. T. Fitzhugh and B. B. Blakeney also filed a brief for appellants:

An act is not necessarily invalid because in restraint of trade, when the restriction of trade is an ancillary or incidental result. To be condemned by the law, a contract must be an agreement between the parties to restrict trade; and such contract is invalid, whatever may be the result of its operation. If a purchaser buys one or more compresses, and operates them as his own property, competition is to that extent restricted, but being incidental, such contract is not invalid, and will not be held invalid, because the purchaser may have taken a contract from the seller obligating the seller not to carry on or resume such business.

Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 92, 46 L. ed. 1058, 1069, 22 Sup. Ct. Rep. 747; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 68, 22 L. ed. 315, 318; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; Beal v. Chase, 31 Mich. 490; Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; National Benefit Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 437, 47 N. W. 806; Whitney v. Slayton, 40 Me. 224; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Richards v. American Desk & Seating Co. 87 Wis. 503, 58 N. W. 787; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 37, 127 Fed. 875; Re Greene, 52 Fed. 104; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; S. Jarvis Adams Co. v. Knapp, 58 C. C. A. 1, 121 Fed. 39; Atlanta v. Chattanooga Foundry & Pipeworks, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; Carter v. Alling, 43 Fed. 208; Harrison v. Glucose Sugar Ref. Co. 58 L. R.A. 915, 53 C. C. A. 484, 116 Fed. 304; State v. Shippers Compress & Warehouse Co. 95 Tex. 603, 69 S. W. 58 (Tex. Civ. App.) 67 S. W. 1049.

Decisions sustaining contracts in restraint of trade which cover particular cities or towns or small localities are almost innumerable. Such contracts are usually made in connection with the sale of some business, industry, or practice.

Peltz v. Eichele, 62 Mo. 171; Washburn v. Dosch, 68 Wis. 436, 60 Am. Rep. 873, 32 N. W. 551; Ellis v. Jones, 56 Ga. 504; Grundy v. Edwards, 7 J. J. Marsh. 368, 23 Am. Dec. 409; Johnson v. Gwinn, 100 Ind. 466; Dean v. Emerson, 102 Mass. 480; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Eddy, Combinations, §§ 762, 789.

Under the Oklahoma statute, which was adopted from California, one who leases a compress and its good will may enter into a contract to refrain from carrying on a similar business within a specified county.

Brown v. Kling, 101 Cal. 295, 35 Pac. 995; Gregory v. Spieker, 110 Cal. 150, 52 Am. St. Rep. 70, 42 Pac. 576; Ragsdale v. Nagle, 106 Cal. 332, 39 Pac. 628; City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 Pac. 841; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581.

The contract of lease in controversy limits such competition to 50 miles. The evidence did not disclose whether a radius of 50 miles would have carried it without the boundaries of the county or not; but if 50 miles was an excessive restriction, the excess only was invalid, and the restriction might be enforced within the limits of the law.

If the Gulf Compress Company itself was a monopoly, the Shawnee Compress Company could not for that reason prevent the specific performance of a contract for sale or lease, and *a priori*, the minority stockholders could not interpose to prevent such performance.

Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Diamond Match Co. v.

Roeber, supra; Metcalf v. American School Furniture Co. 122 Fed. 120; Connolly v. Union Sewer Pipe Co. 184 U. S. 547, 46 L. ed. 685, 22 Sup. Ct. Rep. 431; Willoughby v. Chicago Junction & Union Stock Yards Co. 50 N. J. Eq. 656, 25 Atl. 277.

The appellees, plaintiffs in the courts below, having come into equity with unclean hands, are entitled to no relief.

Muskogee Commercial Club v. Missouri, K. & T. R. Co. 12 Inters. Com. Rep. 316; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; McVey v. Brendel, 144 Pa. 235, 13 L.R.A. 377, 27 Am. St. Rep. 625, 22 Atl. 912; Dickinson v. Consolidated Traction Co. 114 Fed. 240; Richardson v. Walton, 49 Fed. 888; Brutsche v. Bowers, 122 Iowa, 226, 97 N. W. 1076; California Redwood Co. v. Litle, 79 Fed. 857.

Messrs. **Andrew Wilson** and **James R. Keaton** argued the cause, and, with Messrs. John W. Shartel, Frank Wells, and Noel W. Barksdale, filed a brief for appellees:

The contract of lease from the Shawnee Compress Company to the Gulf Compress Company tended to create a combination unreasonably in restraint of trade, the prevention of competition, and the establishment of a monopoly, and therefore was against public policy.

Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 281, 116 Am. St. Rep. 901, 56 S. E. 264; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

It certainly cannot be judicially determined that any portion of the lease contract involved in the case at bar would unquestionably have been entered into regardless of the two provisions hereinbefore quoted, providing for such illegal restraint of trade and competition; hence the entire contract must fall.

Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Western Woodenware Asso. v. Starkey, 84 Mich. 76, 11 L.R.A. 503, 22 Am. St. Rep. 686, 47 N. W. 604; Saratoga County Bank v. King, 44 N. Y. 87; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193, 41 N. E. 1048; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Frost v. More, 40 Cal. 347.

A contract based upon several considerations, one of which is unlawful, is void.

Edwards County v. Jennings, 89 Tex. 618, 35 S. W. 1053; Gage v. Fisher, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809; Collins v. Merrell, 2 Met. (Ky.) 163; St. Louis, J. & C. R. Co. v. Mathers, 104 Ill. 257.

Even conceding that the purpose was only to shut out or restrict such competition as might, under the common law, be properly termed unreasonable or unnecessary, still a contract, one of the purposes of which is to restrict the same, is illegal under the Federal anti-trust act.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Western Wooden-ware Asso. v. Starkey, supra; Santa Clara Valley Mill. & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Houck v. Anheuser-Busch Brewing Asso. 88 Tex. 184, 30 S. W. 869; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155.

Mr. Justice **McKenna**, after making the foregoing statement, delivered the opinion of the court:

The supreme court of the territory, in its opinion, discussed only two of the questions urged upon its consideration; to wit: (1) the legal power of the Shawnee Compress Company to execute the lease; and (2) the purpose in its execution to secure a monopoly of the business of compressing cotton and to unlawfully restrict competition. Of the first the court said: "We find no express authority to lease set out in the articles of incorporation, but we are nevertheless of the opinion the weight of authority is that, when a strictly private corporation finds it cannot profitably continue operations, it may lawfully make a lease of its entire property for a term of years." [17 Okla. 237, 87 Pac. 316.]

*The court cited cases, and continued: "It [430] is only when such exigencies exist as necessitate or render appropriate such or similar action that the right can be exercised." And it was observed that while there was no special finding of fact "in that regard by the trial court, yet this feature must necessarily have been considered, in the light of the evidence introduced at the trial, and the judgment based thereon."

The court further said that it found "ample authority in the record for the action;" and, following the rule "often reiterated," the court further said: "We must hold that, where the record contains some evidence to support the finding of the trial court," the judgment will not be disturbed.

The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it, on account of the view we entertain of the second proposition.

In passing on the second proposition the supreme court decided adversely to the view taken by the trial court. The court therefore must either have considered that there was not some evidence supporting the conclusions of fact of the trial court, or must have deemed the principles of law which the trial court upheld were not sustained by its conclusion of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court below; and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings, and whether the facts found were adequate to sustain the legal conclusions. Southern Pine Lumber Co. v. Ward, 208 U. S. 126, ante, 420, 28 Sup. Ct. Rep. 239.

The court, in its opinion, gives a summary of the pleadings, and states the salient points of the lease to be that it conveys all of the property of the Shawnee Company to the Gulf Company, that the Shawnee Company covenants that it will not, "directly or indirectly, engage in the [431]compressing of cotton *within 50 miles of any plant operated by the" Gulf Company, and that the Shawnee Company "agrees and pledges" to the Gulf Company "its good will, moral and real support, and that it, individually and collectively, will render the . . . [Gulf Company] every assistance in discouraging unreasonable and unnecessary competition." And from the evidence the court deduces the following conclusions:

"It further appears from the evidence at the trial that C. C. Hanson is the president of both the Atlanta Compress Company and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated the lease in question. That the Atlanta Compress Company operates in the states of Alabama, Georgia, and Florida, and was organized and is owned and controlled solely by the carriers, for their benefit. That the board of directors and stockholders of said corporation are composed entirely of railroad officials. That the Atlanta Company controls the operation of twenty-five plants. That the Gulf Compress Company is a close corporation, chartered in Mobile, Alabama, and operating in the states of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory, and Oklahoma, and controlling the operation of twenty-seven compresses in those states, located at various points therein. That none of the Gulf Compress Company's plants and the Atlanta Compress Company's compresses are operated at the same points.

"It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was $25,000, but that it has, within the past year, been increased to $1,000,000, of which $600,000 is treasury stock. That its field of operation has been rapidly extended from Alabama to all the cotton-growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and, as testified to by its president, is 'prepared to buy or lease, whichever proposition suits us best.' It appears from the evidence that negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shawnee *plant[432] were in pursuance of an effort to avoid, 'directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition.'

"It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff. That tariffs for the hauling of cotton are established by the railroad as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district."

And the court says that from these facts, and others referred to supporting them, it cannot be doubted that the object of the Gulf Company and its allied corporation, the Atlanta Compress Company, "is to prevent competition in compression of cotton throughout the cotton-producing states." The court declared it to be its judgment that "not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade and against public policy."

This conclusion is the direct antithesis of that drawn by the trial court, and we are brought to the inquiry, Is it justified?

The evidence cannot be given in detail, and we may say at the outset that there is no question as to its weight,—we are not confronted with conflicting testimonies. This branch of the case is constituted of the lease, principally of the testimony of one witness, the president of the Gulf Company, and of facts which are not disputed. The other testimony, a great deal of which is documentary, is mostly directed to the financial condition of the Shawnee Company as the inducement of the lease and to the proceedings taken to authorize its execution. There is also testimony directed against the purpose and motives of the appellees and some tending to show that one of the officers and stockholders of the Shaw-

[433]nee Company *had been loaned money by the president of the Gulf Company, whereby control of the Shawnee Company might be obtained and the lease authorized. This, however, we may put out of view.

It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted for its assistance in discouraging competition against its tenant, and bound itself not to "directly or indirectly engage in the compressing of cotton within 50 miles of any plant operated by the tenant." So far it covenanted to aid in the restraint of trade. It went out of the field of competition; it covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the president of the Gulf Compress Company. In a letter dated April 18, 1905, addressed to it by the president of that company, among other inducements, the following was expressed: "Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition." And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated "forty odd compresses." Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned. Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that "we are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses [434]being constructed, *it was made less by the power that could be opposed to them. The Gulf Company was a close corporation, which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the supreme court of the territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress,—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

It does not appear whether the supreme court based its judgment upon the common law, the Sherman law, or the statutes of Oklahoma. The appellees insist that the law applicable to the case comes from all three sources. The Sherman law provides that "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia . . . is hereby declared illegal." [26 Stat. at L. 209, chap. 647, § 3, U. S. Comp. Stat. 1901, p. 3201.] And it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law. But it is contended that it was held in United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and in United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, that the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman act.

Counsel has discussed with an affluent citation of cases the principle which regulates such contracts, and insists that the lease by the Shawnee Company conforms to such principle. The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other *party requires, and it needs no[435] further explanation than is given in Gibbs v. Baltimore Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553. The supreme court of the territory recognized the principle, but said: "Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook and more onerous in its intent than is necessary to afford a fair protection to the lessee." And in this conclusion the statute of the territory may have had its influence. That statute makes void every contract by which anyone is restrained from exercising a lawful profession, trade, or business, except, however, that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof. Wilson's Rev. & Anno. Stat. §§ 819, 820. It is clear that the lease of the Shawnee Company to the

Gulf Company does not literally comply with this requirement. Whether it can be limited by construction, as it is contended by appellants it can be, we need not decide. As written, it was, no doubt, considered with other considerations by the court in concluding that "the real, the veritable, purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of organization and mode of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them is, beyond reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers [railroads] in their cotton tariffs. Within certain boundaries the haul must be one certain way, and when the Gulf Company seizes the strategic point, under its leases, competition within that district is annihilated."

Decree affirmed.

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[436]*EX PARTE: IN THE MATTER OF THE STATE OF NEBRASKA, Petitioner.

(See S. C. Reporter's ed. 436-447.)

Mandamus — to control judicial discretion.

1. Mandamus cannot be used as a substitute for an appeal or writ of error to correct the error, if any, committed by a Federal circuit court in denying a motion to remand, which presented for decision the question whether there was in the case a controversy wholly between citizens of different states, to the complete determination of which the state, though named as a party plaintiff, was not a necessary party.

Removal of causes — state as real party.

2. The mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of a Federal circuit court to which the cause has been removed from a state court, if it appears that the state has no real interest in the controversy.

[No. 15, Original.]

Argued March 17, 1908. Decided April 20, 1908.

PETITION for a writ of mandamus to compel the judges of the Circuit Court of the United States for the district of Nebraska to remand to the Supreme Court of that state a cause which the Circuit Court had refused to remand because of the opinion that a controversy is presented for decision wholly between citizens of different states, to the complete determination of which the state of Nebraska is not an indispensable party. Rule discharged and petition dismissed.

Statement by Mr. Chief Justice **Fuller**:

On June 15, 1907, the state of Nebraska, William T. Thompson, attorney general, Nebraska State Railway Commission, Hudson J. Winnett, J. A. Williams, and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska brought suit against the Chicago, Burlington, & Quincy Railway Company to enjoin that company from charging more for the transportation of freight and passengers within the state of Nebraska than the rates fixed for such transportation in certain acts of the legislature of the state of Nebraska, and also from disobeying the orders of the Nebraska State Railway Commission, and from concealing from that commission the condition of its business, and from making any unlawful discrimination, in violation of the state statute.

*June 22 the defendant company filed its [437] petition for the removal of the action to the circuit court of the United States. The petition for removal alleged:

"Your petitioner further avers that in the above-entitled suit there is a controversy which is wholly between citizens of different states, to wit: A controversy between your petitioner, Chicago, Burlington, & Quincy Railway Company, which your petitioner avers was, at the time of the commencement of this suit, ever since has been, and now is, a corporation created and existing under and by virtue of the laws of the state of Iowa; the said William T. Thompson, attorney general of the state of Nebraska, one of the plaintiffs, who your petitioner avers was, at the time of the commencement of this action, ever since has been, and still is, a citizen and resident of the state of Nebraska; the Nebraska State Railway Commission, a board organized under the laws of the state of Nebraska for the supervision of railways in said state, and the members composing the said board, whom your petitioner avers were, at the time of the commencement of this suit, ever since have been, and still are, citizens and residents of the state of Nebraska; the said Hudson J. Winnett, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been, and still is, a citizen and resident of the state of Nebraska; the said J. A. Williams, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your pe-

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NOTE.—As to mandamus to control inferior tribunal—see note to Re Morgan, 29 L. ed. U. S. 135.

titioner avers was, at the time of the commencement of this action, ever since has been, and still is, a citizen and resident of the state of Nebraska; and the said Henry T. Clarke, Jr., one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been, and still is, a citizen and resident of the state of Nebraska. And your petitioner avers that it was not, at the time of the commence-[438]ment of this suit, nor since has been, *and is not now, a resident or citizen of the state of Nebraska.

"Your petitioner further avers that the state of Nebraska, as a party plaintiff in the said suit, is not a proper or necessary party in the said suit; that the said state of Nebraska is not the real party in interest in the said suit; that the said state of Nebraska has no interest, beneficial or otherwise, in the said suit, and has been named as a party plaintiff simply for the purpose of depriving the circuit court of the United States of jurisdiction over this suit."

Bond was filed with the petition for removal and also the transcript of the record in the office of the clerk of the circuit court of the United States for the district of Nebraska on the 3d day of July, 1907.

Plaintiffs then, on July 12, filed a motion to remand the case to the supreme court of the state of Nebraska, on the ground that the circuit court of the United States did not have jurisdiction over the subject-matter of said action or of the parties thereto, and had no jurisdiction to hear or determine the cause. The motion to remand, having been argued and submitted to the court, was overruled for reasons set forth in an opinion.

Subsequently leave was granted to file a petition in this court for a writ of mandamus directing the remanding of the action to the supreme court of the state of Nebraska, and, being filed, a rule was entered thereon directing the district judges for the district of Nebraska, holding the circuit court of the United States in and for that district, to show cause why said petition for mandamus should not be granted.

The judges made due return to the rule, in which, after reciting the proceedings had in the circuit court, they stated that it became and was their duty as judges holding that court to hear the argument on the motion to remand, and consider and decide that motion, which, pursuant to said duty, the said judges heard and decided accordingly. They further showed that the motion to remand was denied by the judges [439]*holding the circuit court, in the exercise of the jurisdiction conferred upon them by law, and that their decision upon the motion was in the exercise of judicial judgment and discretion vested in them. The return, and as a part thereof, was accompanied by a complete transcript of the record of the cause in the circuit court.

Messrs. **William T. Thompson** and **William B. Rose** argued the cause and filed a brief for petitioner:

Where a circuit court of the United States has no jurisdiction over a cause removed by defendant from a state court, and refuses to remand it upon a proper motion, mandamus is plaintiff's remedy.

Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case.

Ex parte Bradley, 7 Wall. 377, 19 L. ed. 219.

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds.

Virginia v. Rives (Ex parte Virginia) 100 U. S. 316, 25 L. ed. 668.

On this motion to remand the case to the supreme court for want of jurisdiction of the Federal court, the sole test was a matter of law, depending alone on the petition filed in the state court. The sole ground of removal was diverse citizenship. No question of a severable controversy was presented. The petition disclosed on its face, as hereinafter shown, that a single injunction was sought in favor of the state of Nebraska, the only real plaintiff, against the one defendant, the Chicago, Burlington & Quincy Railroad Company. Ground of removal does not exist unless found in the petition in the state court.

Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Minnesota v. Northern Securities Co. 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598; Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama) 155 U. S. 487, 39 L. ed. 232, 15 Sup. Ct. Rep. 192; Tennessee v. Bank of Commerce, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

The petition shows on its face that the state is the only real party plaintiff, and not being a citizen within the removal acts of Congress (Upshur County v. Rich, 135 U. S. 470, 34 L. ed. 197, 10 Sup. Ct. Rep. 651; Postal Teleg. Cable Co. v. United States, supra), the circuit court of the United States acquired no jurisdiction by removal.

Want of jurisdiction from any cause, appearing on the face of the record, makes mandamus the proper remedy where the Federal court refuses to perform the duty to remand. Such cases are outside the discretion and jurisdiction of the court to which they are removed.

Virginia v. Rives, supra; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Ex parte Wisner, supra.

The 11th Amendment to the Constitution of the United States, passed in consequence of the decision in Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440, was intended to take away the judicial power of the courts of the United States over all controversies between states and individuals.

Rhode Island v. Massachusetts, 12 Pet. 731, 9 L. ed. 1263; Hollingsworth v. Virginia, 3 Dall. 381, 1 L. ed. 645.

The state could not have brought its suit originally in the United States circuit court.

Dey v. Chicago, M. & St. P. R. Co. 45 Fed. 82.

Messrs. **William D. McHugh** and **Maxwell Evarts** argued the cause and filed a brief for respondent:

The writ of mandamus will not be used to perform the office of an appeal or writ of error.

United States v. Lawrence, 3 Dall. 42, 1 L. ed. 502; Ex parte Bradley, 7 Wall. 364, 377, 19 L. ed. 214, 219; Ex parte Loring, 94 U. S. 418, 419, 24 L. ed. 165; Ex parte Hoard, 105 U. S. 578, 579, 26 L. ed. 1176, 1177; Re Rice, 155 U. S. 396, 403, 39 L. ed. 198, 201, 15 Sup. Ct. Rep. 149; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Re Pollitz, 206 U. S. 323, 330, 51 L. ed. 1081, 1083, 27 Sup. Ct. Rep. 729.

If petitioner is aggrieved by the decision of the circuit court, the proper remedy is by appeal after entry of final decree.

Re Pollitz, 206 U. S. 323, 333, 51 L. ed. 1081, 1084, 27 Sup. Ct. Rep. 729.

The presence on the record of the state of Nebraska as one of the parties plaintiff does not of itself necessarily defeat the jurisdiction of the Federal court.

Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593, 597; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; Missouri use of Public Schools v. Alt, 73 Fed. 302.

The converse is equally true. If a state is not a party of record, yet if it appears that the case is one wherein the state is a real party in interest, that fact will be recognized, and jurisdiction will not be determined merely by an inspection of the nominal parties to the cause.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The motion to remand presented for decision the question whether there was in the case a controversy wholly between citizens of different states, to the complete determination of which the state of Nebraska was not an indispensable party. If defendant's contention was correct, the action could have been originally brought in the Federal court, and its jurisdiction of the case was complete on removal. The circuit court *was called upon to determine that **[441]** question and to exercise judicial discretion in deciding it. This being so, its jurisdiction was complete; and if it erred in its conclusions the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error. The applicable principles have been laid down in innumerable cases. Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

It appeared in the case of Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729, that Pollitz had brought suit in the supreme court of New York against the Wabash Railroad Company and a number of defendants. Pollitz was a citizen of the state of New York; a number of the defendants were citizens of the state of New York; the Wabash Railroad Company was a corporation organized under the laws of states other than New York. The Wabash Railroad Company filed a petition to remove the case to the circuit court of the United States for the southern district of New York. The petition for removal alleged that there was, in the cause, a controversy wholly between citizens of the different states, to the determination of which controversy the defendants, citizens of the state of New York, were not indispensable or necessary parties. The cause was removed and Pollitz made a motion to remand, which was denied. Pollitz applied to this court for a writ of mandamus directing the remanding of the cause to the state court. The rule was entered, and a return was made to the effect that the order denying the motion to remand had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the circuit judge by law, and for the reasons expressed in the opinion filed with the order.

The rule was discharged and the petition dismissed, and the court said (330):

"The suit was commenced in the state court by a citizen and resident of the city, county, and state of New York against a corporation, a citizen of the state of Ohio, and other defendants, many of whom were [442]residents and citizens of the *state of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

"The defendant the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the suit into the United States circuit court for the southern district of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the circuit court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although, in its nature, a judicial act, and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so, and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221. And so where the court assumes to exercise jurisdiction on removal when, on the face of the record, absolutely no jurisdiction has attached. Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

*" 'In Re Hohorst, supra, the bill was filed [443] in the circuit court of the United States for the southern district of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the circuit court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded.' Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208.

"In Ex parte Wisner, Wisner, a citizen of the state of Michigan, commenced an action at law in the circuit court for the city of St. Louis, state of Missouri, against Beardsley, a citizen of the state of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the state court into the circuit court of the United States for the eastern district of Missouri, on the ground of diversity of citizenship, with the proper bond, and an order of removal was made by the state court, and the transcript of record was filed in the circuit court. Wisner (who had had no choice but to sue in the state court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the circuit court, and that, as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the circuit court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. The motion to remand was denied, *and Wisner applied to this court for a [444] writ of mandamus, which was subsequently awarded.

"In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the circuit court against the railroad company as sole defendant.

"If the ruling of the circuit court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 582, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389."

If this case is one wherein there was a controversy wholly between citizens of different states, to the complete determination of which other parties to the record were not indispensable or necessary, then, the removal being properly sought on that ground, the Federal court had jurisdiction. If the state of Nebraska was not an indispensable party by reason of its interest in the controversy, its presence on the record as a plaintiff would not defeat the jurisdiction of the Federal court. And to the circuit court was committed the decision of those questions in the first instance, the correctness of which cannot be examined upon this application.

We must add that the mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of the Federal court when it appears that the state has no real interest in the controversy. And in the present case the circuit court was not bound to adjudicate the question merely by an inspection of the nominal parties to the record, for the mere presence of the state of Nebraska as a party plaintiff was not of itself sufficient necessarily to defeat the jurisdiction of the Federal court. It became, and was, the duty of the circuit court to determine the question whether the state of Nebraska was an actual party plaintiff in the present suit, and to determine that question by consideration of the nature [445] *of the case as presented by the whole record, and not "by a reference to the nominal parties to the record."

This the circuit court did, and, from an inspection of the entire record, for the reasons stated in the opinion filed, the court held that, although the state of Nebraska was a nominal party plaintiff on the record, yet it had no real substantial legal interest in the controversy. The complaint alleged that the Nebraska State Railway Commission was charged with the duty to regulate proper and lawful intrastate rates upon the railroad lines in the state of Nebraska, and to enforce thereon all lawful intrastate rates and charges for the transportation of passengers and freight, and to prevent discrimination in such intrastate freight and passenger rates and charges; and alleged the duty of the attorney general to bring all suits necessary for that purpose; the suit had for its object and purpose merely the securing of an injunction against the defendant company, to restrain that company from charging for the transportation of freight and passengers within the state of Nebraska more than the rates fixed by the state authority for that purpose, and from disobeying orders of said Nebraska State Railway Commission, and from concealing from said commission the true condition of its business, and from making any unlawful discrimination in issuing intrastate passes, mileage tickets, and transportation within the state of Nebraska.

The question whether the state of Nebraska is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record. If the nature of the case is such that the state of Nebraska is the real party plaintiff, the Federal court will so decide for all purposes of jurisdiction, even though the state were not named as a party plaintiff. If the nature of the case is such that the state is not a real party plaintiff, the Federal court will so decide for the purposes of jurisdiction, even though the state is named nominally as a party plaintiff.

The question whether such a case as this is one in which *the state is the real party [446] in interest and the real party plaintiff was determined by this court in Missouri K. & T. R. Co. v. Missouri R. & Warehouse Comrs. 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18, where the only question presented was whether, in a suit brought to enjoin a railroad company from charging greater rates within the state of Missouri than those fixed by state authority, the state of Missouri was the real party plaintiff. The state was not joined as a party plaintiff, but the question had to be determined, not by a view of the nominal parties to the record, but from the consideration of the nature of the case as shown by the whole record. The defendant company presented to the state court a petition for removal, which was denied. The supreme court of the state held that it was proper to go behind the face of the record and inquire who was the real party plaintiff; and, after making such examination, decided that the state was the real party plaintiff, and that the Federal court had no jurisdiction on the removal. The case was brought to this court for a review of the decision of the supreme court of Missouri, and this court, recognizing the rule that a mere inspecition of the parties named as the plaintiffs was not conclusive, examined the record and the nature of the case, and, in an opinion rendered by Mr. Justice Brewer, held that the nature of the case was such that the state of Missouri was not a real party in interest and not a real party plaintiff.

The court analyzed the nature of the proceeding, showed that there was nothing in such an action which affected the state as such, and that the relief sought did not inure to the state alone, and that a decree in favor of the plaintiff would not effectively operate in favor of the state.

The circuit court might clearly have been correct in its decision that the present case was one in which the state of Nebraska was not the real party plaintiff, but that decision could not be reviewed by mandamus.

The circuit court was called upon on this record to decide whether the state of Nebraska had any real or legal interest [447] *in the controversy alleged to have been wholly between citizens of different states; and it was a decision which the court had a right to make, involving no abuse of judicial discretion. A premature review cannot be obtained by a writ of mandamus.

Without expressing any opinion as to whether the state was a necessary party to the relief asked, which involved the removability of the case, this court bases its judgment on the mandamus entirely upon the ground that, as the circuit court had jurisdiction to pass upon the question of the removability of the case, and as its order overruling the motion to remand was subject to be reviewed by a higher court after the case had been disposed of by final judgment, the remedy was by appeal, and not by mandamus.

Rule discharged; petition dismissed.

UNITED STATES, Appt.,
v.
CHANDLER-DUNBAR WATER POWER COMPANY.

(See S. C. Reporter's ed. 447–453.)

Limitation of actions — suit to quiet title — invalid patent.

1. A patent from the United States, invalid when made, after five years without attack, must be deemed to have the same effect as against the United States in a suit to remove a cloud on title as though it were valid when issued, in view of the act of March 3, 1891 (26 Stat. at L. 1099, chap. 561), § 8, although this section in form only bars suits to annul the patent.

Waters — relative rights between state and United States — islands.

2. Small rocky islands, without apparent value, situated in the St. Mary's river, were not excepted from the transfer to the state by the act of June 15, 1836 (5 Stat. at L. 49, 50, chap. 99), admitting Michigan to the Union, of the bed of the stream surrounding them, because of the provisions of § 4 of that act, that no right was conferred upon the state "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said state," and of the act of June 23, 1836 (5 Stat. at L. 59, 60, chap. 121), that the state should "never interfere with the primary disposal of the soil within the same by the United States."

Waters — title to bed of stream — islands.

3. A patent from the United States, describing the land granted as bounded by the St. Mary's river, carries with it the title to small, unsurveyed islands on the American side of the international boundary line, where, under the laws of the state, a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread.

[No. 599.]

Argued April 6, 7, 8, 1908. Decided April 20, 1908.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Michigan, Northern Division, dismissing a bill to remove a cloud on title. Affirmed.

See same case below, 81 C. C. A. 221, 152 Fed. 25.

The facts are stated in the opinion.

Attorney General **Bonaparte**, Solicitor General **Hoyt**, and Mr. **Duane E. Fox** argued the cause and filed a brief for appellant:

The law of Michigan, so far as the Great Lakes are concerned, is in full harmony with the American doctrine of public waters.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 435, 436, 36 L. ed. 1018, 1036, 1037,

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NOTE.—As to title to waters as between state and United States—see note to Farm Invest. Co. v. Carpenter, 50 L.R.A. 747.

As to title to islands—see note to Holman v. Hodges, 58 L.R.A. 673.

Government grant bounded by water as carrying title to islands therein.

In Steinbuehel v. Lane, 59 Kan. 7, 51 Pac. 886, it is said that it is impossible to lay down a definite rule which will determine every case involving a question as to what passes by the grant of land bordering on a water course. Whether islands are intended to be reserved, or to pass, must be determined from their situation and extent and the action of the Land Department.

In states where the title of a riparian owner extends to the center of the stream, an unsurveyed island in a river will pass under a governmental grant of land on the bank. Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530 (Affirming 65 Neb. 137, 90 N. W. 966).

So, also, in Chandos v. Mack, 77 Wis.

13 Sup. Ct. Rep. 110; La Plaisance Bay Harbor Co. v. Monroe, Walk. Ch. (Mich.) 168; Sterling v. Jackson, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; People v. Silberwood, 110 Mich. 107, 32 L.R.A. 694, 67 N. W. 1087; Sherwood v. State Land Office Comrs. 113 Mich. 227, 71 N. W. 532; People v. Warner, 116 Mich. 228, 74 N. W. 705; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 87 N. W. 117.

The pre-eminent interest of the public in those waters, for the purposes of navigation and other purposes, is superior to that of individuals owning the lands bordering thereon; and private ownership of the bed of the waters is absolutely inconsistent with the public interest.

Illinois C. R. Co. v. Illinois, 146 U. S. 460, 36 L. ed. 1045, 13 Sup. Ct. Rep. 110.

This ruling is in accordance with the common law of England governing tide waters.

Martin v. Waddell, 16 Pet. 418, 10 L. ed. 1015; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9.

Both the Great Lakes and their connecting waters are within the class of tidal waters as dealt with by the common law.

United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109; The Genesee Chief v. Fitzhugh, 12 How. 457, 13 L. ed. 1064; United States v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; Kingman v. Sparrow, 12 Barb. 201; Hensler v. Hartman, 16 Abb. N. C. 176, note; State v. Lake St. Clair Fishing & Shooting Club, supra.

Even if the present decisions of the state of Michigan were not in harmony with the decision in the Illinois Central Case, they would not be controlling upon the Federal judiciary in a matter involving the rights of the government, which arose before the existence of the state, and did then, and do still, involve the international obligations of the appellant.

573, 10 L.R.A. 207, 20 Am. St. Rep. 139, 46 N. W. 803, it was held that a small unsurveyed island in a navigable stream will pass to the government grantee of the lands on his side of the thread of the stream to which he takes, when there is no reservation in the grant. See also, to the same effect, Franzini v. Layland, 120 Wis. 72, 97 N. W. 499; Sliter v. Carpenter, 123 Wis. 578, 102 N. W. 27.

But in Packer v. Bird, 71 Cal. 134, 11 Pac. 873, it was held that a patent from the United States for land bounded on a river which is actually navigable extends no farther than the edge of the stream, and does not include an island separated from the upland by a slough forming part of such river, although the slough is not ordinarily navigable, or not navigable at all.

A government grant of land on the Mississippi river will carry title to the center of the stream, unless the intention not to do so plainly appears, and will include an island separated from the mainland by a slough filled with water a portion of the year, although the island is not surveyed and platted, or otherwise marked on the surveyor's map. Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

A patent of government subdivisions along the bank of a river conveys the title to all islands lying between the meander line and the middle thread of the stream, unless such islands have been previously surveyed by government subdivisions, or are expressly reserved. Butler v. Grand Rapids & I. R. Co. 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569.

And in Goff v. Cougle, 118 Mich. 307, 42 L.R.A. 161, 76 N. W. 489 it was held that a conveyance of land bounded by a river would extend the title of the grantee to the middle of the main channel, so as to include islands lying between it and the shore, in the absence of anything to show that the government reserved title to the islands when it conveyed the shore.

It has also been held that a government patent of land adjoining a meandered lake will be deemed to include an unsurveyed island between the shore and the center of the lake, not reserved in the conveyance. Church v. Case, 122 Mich. 554, 81 N. W. 334; Webber v. Axtell, 94 Minn. 375, 6 L. R.A.(N.S.) 194, 102 N. W. 915.

But in Bigelow v. Hoover, 85 Iowa. 161, 39 Am. St. Rep. 296, 52 N. W. 124, it was held that the patentee of land near an island in a lake, which was not surveyed or recognized by the government, the place where it was situated being marked "bayou," had no title to the island.

The passing of title to an unsurveyed island under a government grant bounded by a river will not be affected by the fact that the survey showed that a meander line was run along the river, where such line was run for the purpose of ascertaining the quantity of land, and is not marked as a boundary line. Houck v. Yates, 82 Ill. 179; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917.

However, the fact that the island has not been surveyed is not conclusive of an intention on the part of the government to pass title thereto as appurtenant to a grant of the upland.

Thus, in Harding v. Minneapolis Northern R. Co. 28 C. C. A. 419, 55 U. S. App. 257, 84 Fed. 287, it was held that the omission by the government, from a survey, of an island contiguous to the eastern shore of a river, did not show an intention on the part of the government to relinquish its claim thereto, where the Indian title to the lands on the western side of the river had not been acquired, and an extension of the survey to the island would have divided it into four sections, two of which would have been on the western side of the river, and a

Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227; Martin v. Waddell, 16 Pet. 417, 10 L. ed. 1015; Scranton v. Wheeler. 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 811; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

There is a difference between the land in the bed of the inland rivers of a state and that in the bed of rivers on its boundary,—especially where the boundary is an international boundary.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 703, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770.

The powers affecting the internal affairs of the states, not granted to the United States by the Constitution, or prohibited by it to the states, are reserved to the states respectively; and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States.

Kansas v. Colorado, 206 U. S. 90, 51 L. ed. 971, 27 Sup. Ct. Rep. 655.

The international character of the waters of the Great Lakes was one of the elements considered by this court in deciding that such lakes are high seas.

United States v. Rodgers, 150 U. S. 266, 37 L. ed. 1077, 14 Sup. Ct. Rep. 109.

Inasmuch as questions of boundary are political ones, in which all courts, both Federal and state, are bound to follow the measures adopted by the government, it follows that, as to all incidental questions pertaining to such boundaries, all courts are likewise bound to follow the principles so established.

Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Lattimer v. Poteet, 14 Pet. 14, 10 L. ed. 333; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 770.

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survey of it was made four years later on the extinguishment of the Indian title, and the claims of the patentee under such survey were acquiesced in for thirty-six years by the lot owners on the eastern side of the river.

And in Steinbuchel v. Lane, 59 Kan. 7. 51 Pac. 886, it is held that a patent for lands bordering on a stream, both banks of which were meandered by the government, without any reference to a large island therein composed of primitive soil, includes no part of the island opposite such land as an appurtenance thereof, whether the stream be navigable or not, where it separates at the head of the island into two distinct channels, constituting a well-defined stream on either side, and it is not necessary to include any part of the island to make up the quantity of land included in the patent; but, at most, the boundary of the land granted extends only to the middle of the thread of the channel between it and the island.

In Shoemaker v. Hatch, 13 Nev. 261, it was held that an unsurveyed island of considerable size in a river is no part of the land surveyed on the side opposite one channel, where the two branches of the river are both well-defined channels and there is no disparity in size, although in low water the one channel carries all the running water, and at other times more than the other channel, because it is shorter and has more fall.

Where the government surveys the land on each side of a river, and an island in the stream, separately, and grants the main shores and the island to different parties, the title to the island cannot be claimed by the grantees of the mainland. Stolp v. Hoyt, 44 Ill. 219; Wiggenhorn v. Kountz, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603.

But if the government surveyors have, in good faith and exercising their best judgment, surveyed a strip of land as part of the mainland and the land has been sold. a subsequent patent of the land as an island will be a nullity. St. Paul. S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 31. 49 N. W. 303.

In Kaskaskia v. McClure. 167 Ill. 23. 47 N. E. 72, it was held that an act of Congress fixing the boundary of an old French grant as bordering on a navigable river, and confirming the grant, will be construed according to the rule of the common law, which extends the title of such grants to the center of the stream, including all islands lying between the mainland and such center of the stream, even though the French law in force in the territory when the original grant was made would exclude islands formed in the river from such grant.

A patent confirmatory of a Mexican grant, excepting, reserving, and excluding from the land that portion thereof covered by the navigable waters of a designated bay, must be construed as excepting an island lying within the exterior boundaries of the bay, as well as land covered by the waters thereof, where such a bay was marked "excepted" on the map accompanying the patent, and the land surveyed, after the boundaries thereof were given by courses and distances, was also designated as being certain numbered lots and plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the bay as marked upon the map. De Guyer v. Banning, 91 Cal. 400, 27 Pac. 761, Overruling on this point 25 Pac. 252.

In M'Mullen v. M'Culloch, 2 Bail. L. 346, it was held that a grant to a navigation improvement company of all lands within 2 miles of a river, which had not been granted to other persons, includes islands situated in the bed of the river.

Former construction by the government is entitled to respect.

New York Indians v. United States, 170 U. S. 1, 30, 42 L. ed. 927, 937, 18 Sup. Ct. Rep. 531; Edwards v. Darby, 12 Wheat. 210, 6 L. ed. 604; United States v. State Bank, 6 Pet. 39, 8 L. ed. 311; United States v. Pugh, 99 U. S. 265, 25 L. ed. 322; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; United States v. Union P. R. Co. 37 Fed. 556.

Messrs. **Arch. B. Eldredge** and **J. H. Goff** argued the cause, and, with Mr. Moses Hooper, filed a brief for appellee:

Unsurveyed islands between the bank and the middle thread of the river, not omitted from survey by fraud or mistake, pass with the mainland to the riparian patentee.

United States v. Stinson, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426; Whitaker v. McBride, 197 U. S. 510, 514, 49 L. ed. 857, 861, 25 Sup. Ct. Rep. 530; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 90, 95, 40 L. ed. 85, 86, 88, 15 Sup. Ct. Rep. 991, 85 Mich. 255, 24 Am. St. Rep. 84, 48 N. W. 569; Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139, 46 N. W. 803; Granger v. Avery, 64 Me. 292; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Church v. Case, 122 Mich. 554, 81 N. W. 334; McCullough v. Wall, 4 Rich. L. 82, 53 Am. Dec. 715; Gould, Waters, § 77; St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 33, 49 N. W. 303; Morgan v. Reading, 3 Smedes & M. 366; Houck v. Yates, 82 Ill. 179; Franzini v. Layland, 120 Wis. 72, 97 N. W. 499; Webber v. Axtell, 94 Minn. 375, 6 L.R.A.(N.S.) 194, 102 N. W. 915.

The logical, underlying reason of this rule is that the title to unsurveyed islands goes with, and is part of, the subaqueous lands,—that the United States treats them as part of such subaqueous lands, and relinquishes to the state all proprietary interest therein, and the state in turn relinquishes them to the riparian.

Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 88, 40 L. ed. 85, 86, 15 Sup. Ct. Rep. 991; Franzini v. Layland, 120 Wis. 81, 97 N. W. 499; Webber v. Axtell and McCullough v. Wall, supra; Hopkins Academy v. Dickinson, 9 Cush. 545; Deerfield v. Arms, 17 Pick. 41, 28 Am. Dec. 276.

The proprietary right to the bed of the stream being either in the riparian or in the state, this court considers the question of ownership by the riparian a question for each state to pass upon through its legislature or its court of final resort.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 271, 272, 35 L. ed. 1004, 1010, 12 Sup. Ct. Rep. 173; Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224, 228; Packer v. Bird, 137 U. S. 661, 669, 670, 34 L. ed. 819, 820, 821, 11 Sup. Ct. Rep. 210; St. Louis v. Rutz, 138 U. S. 226, 242, 34 L. ed. 941, 947, 11 Sup. Ct. Rep. 337; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 435, 36 L. ed. 1018, 1036, 13 Sup. Ct. Rep. 110; Shively v. Bowlby, 152 U. S. 1, 45, 46, 38 L. ed. 331, 347, 348, 14 Sup. Ct. Rep. 548.

In Michigan, the riparian, under patent of the United States, owns the bed of the river to the middle thread thereof.

Ryan v. Brown, 18 Mich. 208, 100 Am. Dec. 154; Bay City Gaslight Co. v. Industrial Works, 28 Mich. 182; Atty. Gen. ex rel. Muskegon Booming Co. v. Evart Booming Co. 34 Mich. 463; Backus v. Detroit, 49 Mich. 110, 43 Am. Rep. 447, 13 N. W. 380; Turner v. Holland, 65 Mich. 453, 33 N. W. 283; Grand Rapids v. Powers, 89 Mich. 94, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; People v. Silberwood, 110 Mich. 106, 32 L.R.A. 694, 67 N. W. 1087; Brown v. Parker, 127 Mich. 392, 86 N. W. 989; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Kemp v. Stradley, 134 Mich. 676, 97 N. W. 41.

There are no two opinions respecting the common-law rule of ownership by a riparian of subaqueous land on non-tidal rivers.

Kinkead v. Turgeon, 74 Neb. 580, 1 L.R.A.(N.S.) 762, 7 L.R.A.(N.S.) 316, 121 Am. St. Rep. 740, 104 N. W. 1061, 109 N. W. 744.

The same rule applies to interstate rivers.

Berry v. Snyder, 3 Bush, 283, 96 Am. Dec. 219; Miller v. Hepburn, 8 Bush, 326; Stanberry v. Mallory, 101 Ky. 52, 72 Am. St. Rep. 389, 39 S. W. 495; Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485; Jones v. Soulard, 24 How. 41, 16 L. ed. 604; St. Louis v. Myers, 113 U. S. 566, 567, 28 L. ed. 1131, 1132, 5 Sup. Ct. Rep. 640; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Morgan v. Reading, 3 Smedes & M. 369; Franzini v. Layland; Middleton v. Pritchard; and Houck v. Yates,—supra; Braxon v. Bressler, 64 Ill. 488; Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91; Lavalle v. Strobel, 89 Ill. 370; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; Brooklyn v. Smith, 104 Ill. 438, 44 Am. Rep. 90; School Trustees v. Schroll, 120 Ill. 518, 60 Am. Rep. 575, 12 N. E. 243; People ex rel. Highway Comrs. v. Madison County, 125 Ill. 9, 17 N. E. 147;

Chicago v. Van Ingen, 152 Ill. 624, 43 Am. St. Rep. 285, 38 N. E. 894; Kaskaskia v. McClure, 167 Ill. 23, 47 N. E. 72; The Magnolia v. Marshall, 39 Miss. 109; Young v. Harrison, 6 Ga. 130; Jones v. Water Lot Co. 18 Ga. 539; Moses v. Eagle & P. Mfg. Co. 62 Ga. 455; Cook v. Winter, 68 Ga. 259.

Interstate rivers are international rivers.

Nebraska v. Iowa, 143 U. S. 359, 361, 36 L. ed. 186, 187, 12 Sup. Ct. Rep. 396; Indiana v. Kentucky, 136 U. S. 479, 506, 34 L. ed. 329, 331, 10 Sup. Ct. Rep. 1051; Handly v. Anthony, 5 Wheat. 374, 379, 5 L. ed. 113, 114; Rhode Island v. Massachusetts, 12 Pet. 657, 720, 9 L. ed. 1233, 1258; Alabama v. Georgia, 23 How. 505, 512, 513, 514, 16 L. ed. 556, 559, 560; 8 Ops. Atty. Gen. 177.

The same rule applies to international rivers.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Rice v. Ruddiman, 10 Mich. 141; Clark v. Campau, 19 Mich. 325; Backus v. Detroit, 49 Mich. 115, 43 Am. Rep. 447, 13 N. W. 380; Hall v. Alford, 114 Mich. 167, 38 L.R.A. 205, 72 N. W. 137; Water Comrs. v. Detroit, 117 Mich. 462, 76 N. W. 70; Ryan v. Brown, 18 Mich. 207, 100 Am. Dec. 154; Scranton v. Wheeler, 113 Mich. 567, 67 Am. St. Rep. 484, 71 N. W. 1091, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Sherwood v. State Land Office Comrs. 113 Mich. 228, 71 N. W. 532; Kemp v. Stradley, supra; Granger v. Avery, 64 Me. 295.

Except in case of omission by accident or mistake, the United States has no authority to make surveys, subsequent to patent, of any land between the meandered line and the middle thread of the stream.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 289, 19 L. ed. 74, 78; Hardin v. Jordan, 140 U. S. 371, 383, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 412, 413, 35 L. ed. 442, 444, 445, 11 Sup. Ct. Rep. 819, 840; Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878; Lindsey v. Hawes, 2 Black, 554, 560, 561, 17 L. ed. 265, 268; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Webber v. Pere Marquette Boom Co. 62 Mich. 635, 30 N. W. 469; Shufeldt v. Spaulding, 37 Wis. 662; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 587, 87 N. W. 117; Stoner v. Rice, 121 Ind. 56, 6 L.R.A. 387, 22 N. E. 968; McCormick v. Huse, 78 Ill. 373; St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 34, 49 N. W. 303; Webber v. Axtell, 94 Minn. 375, 6 L.R.A.(N.S.) 194, 102 N. W. 915.

The size of the river has no logical bearing upon the question.

Jones v. Soulard, 24 How. 41, 16 L. ed. 604; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; Franzini v. Layland, 120 Wis. 72, 97 N. W. 499; Morgan v. Reading, 3 Smedes & M. 366.

The meander line is, by presumption of law, imported into every patent of public lands bordering on a water course.

Cragin v. Powell, supra; United States v. Texas, 162 U. S. 1, 5, 40 L. ed. 867, 16 Sup. Ct. Rep. 725; Jefferis v. East Omaha Land Co. 134 U. S. 178, 194, 195, 33 L. ed. 872, 878, 10 Sup. Ct. Rep. 518; Shufeldt v. Spaulding, 37 Wis. 668; Whitney v. Detroit Lumber Co. 78 Wis. 246, 47 N. W. 425; Hardin v. Jordan, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808, 838.

But the meander line is held not to limit the grant. It only determines area.

Hardin v. Jordan, supra; Whitaker v. McBride, 197 U. S. 510, 512, 49 L. ed. 857, 860, 25 Sup. Ct. Rep. 530; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; St. Louis Public Schools v. Risley, 10 Wall. 91, 110, 19 L. ed. 850, 856; Yates v. Milwaukee, 10 Wall. 497, 504, 19 L. ed. 984; Bates v. Illinois C. R. Co. 1 Black, 204, 17 L. ed. 158; Grand Rapids v. Powers, 89 Mich. 102, 14 L.R.A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; Ryan v. Brown, 18 Mich. 208, 100 Am. Dec. 154.

Parties purchasing property shown by the United States surveys and plats to be riparian property should not be excluded from the water front.

St. Paul & P. R. Co. v. Schurmeir, supra; Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 319, 26 L. ed. 546, 548; Bates v. Illinois C. R. Co. supra; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265; St. Clair v. Lovingston, 23 Wall. 46, 63, 23 L. ed. 59, 62; Brown v. Huger, 21 How. 305, 16 L. ed. 125; Hardin v. Jordan, supra; Mitchell v. Smale, 140 U. S. 406, 412–414, 35 L. ed. 442, 444, 445, 11 Sup. Ct. Rep. 819, 840; Jefferis v. East Omaha Land Co. 134 U. S. 178, 195, 196, 197, 33 L. ed. 872, 878, 879, 10 Sup. Ct. Rep. 518; Cragin v. Powell, supra; Boorman v. Sunnuchs, 42 Wis. 233; Wright v. Day, 33 Wis. 264; Watson v. Peters, 26 Mich. 517; Richardson v. Prentiss, 48 Mich. 91, 11 N. W. 819; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 236, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; Horne v. Smith, 159 U. S. 40, 46, 40 L. ed. 68, 70, 15 Sup. Ct. Rep. 988; Pere Marquette Boom Co. v. Adams, 44 Mich.

403, 6 N. W. 857; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950.

Where lands are bounded by streams, and monuments on the banks are stated to be corners, the true corner is held to be the point in the middle thread of the stream opposite the given monument.

Luce v. Carley, 24 Wend. 453, 35 Am. Dec. 637; Seneca Nation v. Knight, 23 N. Y. 498; St. Clair v. Lovingston, 23 Wall. 46, 63–65, 23 L. ed. 59, 62, 63; Cold Spring Iron Works v. Tolland, 9 Cush. 495; Newton v. Eddy, 23 Vt. 319; McCullock v. Aten, 2 Ohio, 307; Handly v. Anthony, 5 Wheat. 375, 380, 5 L. ed. 113, 114; Buck v. Squiers, 22 Vt. 494.

The United States, or an individual, being the owner of the mainland and also of adjacent islands, may separate the ownership of the islands from that of the mainlands. In such case, there is created a new thread of the stream between the mainland and the islands, and the owner of the island becomes the owner of the subaqueous land on each side of the island to the middle thread of each stream.

Whitaker v. McBride, 197 U. S. 510, 514, 49 L. ed. 857, 861, 25 Sup. Ct. Rep. 530; West v. Fox River Paper Co. 82 Wis. 655, 52 N. W. 803; Stolp v. Hoyt, 44 Ill. 223; Warren v. Westbrook Mfg. Co. 86 Me. 36, 26 L.R.A. 284, 29 Atl. 927; Wiggenhorn v. Kountz, 23 Neb. 696, 8 Am. St. Rep. 150, 37 N. W. 603.

Cases holding that the property right in the subaqueous lands is in the riparian hold, substantially without exception, that such property right of the riparian is subordinate to all rights of the state and of the United States for public uses.

Scranton v. Wheeler, 113 Mich. 565, 67 Am. St. Rep. 484, 71 N. W. 1091, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Franzini v. Layland, 120 Wis. 81, 97 N. W. 499; Willow River Club v. Wade, 100 Wis. 117, 42 L.R.A. 305, 76 N. W. 273.

If public policy requires that the property right of the subaqueous lands shall remain in the state of Michigan, and the unsurveyed islands are part thereof, and subject to the same policy, then the property right in islands No. 1 and No. 2 is in the state of Michigan, and not in the United States.

Packer v. Bird, 137 U. S. 661, 666, 667, 672, 34 L. ed. 819, 820, 822, 11 Sup. Ct. Rep. 210; Sherwood v. State Land Office Comrs. 113 Mich. 228, 71 N. W. 532; People v. Warner, 116 Mich. 232, 74 N. W. 705; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 87 N. W. 117.

This court has determinedly sustained rules of property once established by the state courts. Where property has been acquired or contracts made in view of, and on faith in, a settled rule established by the state courts, the Federal courts will not depart from such established rule on account of subsequent varying state decisions.

Hardin v. Jordan, 140 U. S. 371, 384, 389, 397, 35 L. ed. 428, 434, 436, 438, 11 Sup. Ct. Rep. 808, 838; Morgan v. Curtenius, 20 How. 1, 15 L. ed. 823; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Marshall County v. Schenck, 5 Wall. 772, 785, 18 L. ed. 556, 560.

There can be no doubt that, at that time, the settled doctrine in Michigan was that the riparian owner on the small inland lakes and on the rivers of Michigan owned to the middle thread of the lake or stream. Such doctrine plainly appears in the decisions rendered before the issue of the patent, all but one of which was rendered before the application of Chandler to locate.

Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Rice v. Ruddiman, 10 Mich. 125; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Clark v. Campau, 19 Mich. 325; Watson v. Peters, 26 Mich. 508; Bay City Gaslight Co. v. Industrial Works, 28 Mich. 182; Atty. Gen. ex rel. Muskegon Boom. Co. v. Evart Boom. Co. 34 Mich. 462; Backus v. Detroit, 49 Mich. 114, 43 Am. Rep. 447, 13 N. W. 380.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought by the United States to remove a cloud from its alleged title to two islands, numbered 1 and 2, in the Sault Ste. Marie, between Lake Huron and Lake Superior. The islands are in the rapids of the river or strait, on the American side of the Canada boundary line, and near to a strip of shore lying between the rapids and the United States ship canal referred to in United States v. Michigan, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742. The defendant claims this strip and the islands under a patent from the United States, dated December 15, 1883, describing the land as bounded by the river St. Mary on the east, north, and west. The United States says that the patent was void because the land had been reserved for public purposes; and that, even if it was valid, the islands did not pass. The defendant replies that the land was not reserved, and also sets up the statute of limitations. Act of March 3, 1891, chap. 561, § 8. 26 Stat. at L. 1099. The circuit court dismissed the bill, and its decree was affirmed by the circuit court of appeals. 81 C. C. A. 221, 152 Fed. 25.

There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion [450] that now the patent must be assumed *to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,"—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co. 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States, was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599. 17 L. ed. 261.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605, 17 L. ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. P. R. Co. 165 U. S. 463, 476, 41 L. ed. 789, 795, 17 Sup. Ct. Rep. 368.

We waste no time upon suggestions of bad faith on the one side or the other, as there is no sufficient warrant for them, and as they were touched rather than pressed at the argument. The only other question is whether the United States has title to the islands, notwithstanding its [451] patent and notwithstanding *the incorporation of Michigan as a state. The bill admits and alleges that the bed of the river, or strait, surrounding the islands, passed to Michigan when Michigan became a state (Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548), subject to the same public trusts and limitations as lands under tide waters on the borders of the sea (Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110). But it sets up that the islands remained the property of the United States, and it argues that, in such circumstances, the islands did not pass by the patent of the neighboring land.

The act offering Michigan admission to the Union provided that no right was conferred upon the state "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said state." Act of June 15, 1836, chap. 99, § 4. 5 Stat. at L. 49, 50. And again, by a condition, that the state should "never interfere with the primary disposal of the soil within the same by the United States." Act of June 23, 1836, chap. 121. Fifth. 5 Stat. at L. 59, 60. The islands are little more than rocks, rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the state of the bed of the streams surrounding them. If they did not, then, whether the title remains in the state or passed to the defendant with the land conveyed by the patent, the bill must fail.

The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the state, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. This view is well established. Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 93, 94, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685. The right of the state to grant lands covered by tide waters or navigable lakes, and the [452] qualifications, as *stated in Shively v. Bowlby, 152 U. S. 1, 47, 38 L. ed. 331, 348, 14 Sup. Ct. Rep. 548, 565, are that the state may use or dispose of any portion of the same "when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce." But it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie. See Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 271, 272, 35 L. ed. 1004, 1010, 12 Sup. Ct. Rep. 173. Therefore, if, by the law of Michigan, the bed of the river or strait would pass to a grantee of the upland, we may assume that it passed to the defendant, and we may assume further that the islands also passed. If, as we think, they belonged to the state, they passed along with the bed of the river. If they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass. Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 91, 92, 40 L. ed. 85, 15 Sup. Ct. Rep. 991. Of course other nice questions are suggested and might be asked; for instance, how it would be if the title to the bed of the stream was in the state and did not pass with the upland, and the islands remained to the United States. It still would be a reasonable proposition that the islands followed the upland. But, in the view that we have taken, that may be left in doubt.

The question, then, is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are public waters. The Genesee Chief v. Fitzhugh, 12 How. 443, 457, 13 L. ed. 1058, 1064. But, whatever may be the law as to lands under the great lakes (People v. Silberwood, 110 Mich. 103, 32 L.R.A. 694, 67 N. W. 1087), we believe that the law still is as it was declared to be in Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 94, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991, 993, that "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread [453] thereof," and that this *applies to the Sault Ste. Marie, whatever it be called. The fact that it is a boundary has not been held to make a difference. The riparian proprietors upon it own to the center. Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Scranton v. Wheeler, 113 Mich. 565, 567, 67 Am. St. Rep. 484, 71 N. W. 1091, s. c. 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Kemp v. Stradley, 134 Mich. 676, 97 N. W. 41. See also Scranton v. Wheeler, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803, 812; Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Water Comrs. v. Detroit, 117 Mich. 458, 462, 76 N. W. 70. We see no plausible ground for the claim of the United States.

Decree affirmed.

Mr. Justice **Harlan** dissents.

LIU HOP FONG, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 453–463.)

Appeal — in Chinese exclusion cases — hearing de novo.

1. A hearing *de novo* before the district judge is contemplated by the provision of the act of September 13, 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312), § 13, giving a Chinese person convicted before a United States commissioner of being unlawfully within the United States the right to appeal to the judge of the Federal district court for the district.

Appeal — in Chinese exclusion cases — record — deportation.

2. The deportation of a Chinaman lawfully admitted to the United States upon a student's certificate, complying with the treaty with China of December 8, 1894 (28 Stat. at L. 1210), art. 3, cannot be ordered by a Federal district court upon the transcript of the proceedings before the commissioner, which presents merely such student's certificate and a statement that witnesses were examined, without any findings, or the giving of any testimony, although additional separate findings of the commissioner were afterwards filed, where this was done without the order of the court, and there was no consent to a hearing upon such additional findings.

[No. 181.]

Argued March 18, 1908. Decided April 20, 1908.

IN ERROR to the District Court of the United States for the District of Nebraska to review an order for the deportation of a Chinaman found to be unlawfully within the United States. Reversed and remanded with directions to discharge the plaintiff in error from custody without prejudice to further proceedings.

The facts are stated in the opinion.

Mr. **Frank L. McCoy** argued the cause, and, with Messrs. **John L. Webster** and **Robert H. Olmsted**, filed a brief for plaintiff in error.

Assistant Attorney General **Cooley** argued the cause and filed a brief for defendant in error.

Mr. Justice **Day** delivered the opinion of the court:

The plaintiff in error, Liu Hop Fong, on November 23, 1904, was arrested upon the sworn complaint of the United States district attorney, and brought before a United States commissioner at Omaha, Nebraska, charged with being unlawfully within the United States of America, living and residing at Omaha, Nebraska, and there pursuing the occupation of a common laborer, contrary to the laws of the United States. The complaint prayed that he might be arrested and dealt with according to law. Upon a plea of not guilty, on December 29, 1904, a hearing was had before the commissioner. The bill of exceptions shows that the commissioner on December 29, 1904, made an order finding the defendant guilty, and ordered his deportation from the United States to the Empire of China; that an appeal was taken to the district court of the United States for the district of Nebraska; that the case was heard upon the 13th day of April, 1905, being one of the days of the November term of the district court; that the case was tried and submitted to the judge without any new evidence upon the complaint, upon the transcript of the proceedings made by the United States commissioner from whose order the case was ap- [457] pealed, and the additional separate *findings made by the commissioner and the original student's certificate of the defendant and the translation thereof, with all indorsements and certificates thereon under which the defendant was admitted into and entered the United States. The commissioner's transcript shows:

On November 23, 1904, the defendant was brought before the commissioner, entered a plea of not guilty, and the hearing was continued to December 29, 1904, when witnesses were examined for the United States and for the defendant. Their names are given, but their testimony is not set out. On the same day (December 29, 1904) defendant was adjudged guilty and ordered to be deported, and on that day defendant appealed to the district court and gave bond for his appearance in that court. This transcript was duly certified and indorsed, filed January 9, 1905, by "R. C. Hoyt, Clerk," and the commissioner filed additional and separate findings, bearing date December 30, 1904, as follows:

"That the said Liu Hop is a Chinese manual laborer, and was born in and is a subject to the (Emperor) of China; that he was found within the limits of the United States, to wit, in the city of Omaha, Douglas county, state of Nebraska, in the district of Nebraska, on the 23d day of November, A. D., 1904, and that when he was so found as aforesaid, the said Liu Hop was in possession of a certain certificate, proper in form, No. 179, registered in book 3, folio 164, issued by the colonial secretary of Macau province, by authority of H. E. Governor of said province, and dated the 17th day of May, 1899, which said certificate, among other things, recites as follows:

"'By order of H. E. the Governor, I grant this passport to a Chinaman, Liu Hop, bachelor, natural, and residing in Macau, student of Chinese literature for over four years, being his professor Liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm *"Lun-Sing-Chong,"—Rockspring, Wyo.,[458] —San Francisco, California.'

"That I find from the evidence adduced upon the hearing herein that the said Liu Hop landed in the city of San Francisco on or about July 3, 1899, and shortly thereafter and during said year of 1899 came to the city of Omaha, state and district of Nebraska, where he has ever since resided and still resides.

"I further find that during the time of his residence in said city he has at all times been a common laborer, and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday school teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language; and that the said Liu Hop has at no time been a student within the meaning of the act of Congress approved May 5, 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319], and acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America.

"To all of which foregoing order and findings of the United States commissioner, the said Lui Hop excepts and prays an appeal, and bail is fixed in the sum of $500; his certificate pending an appeal to remain in the custody of the said United States commissioner."

These findings are indorsed as follows: "Filed Jan. 9, 1905. R. C. Hoyt, Clerk."

The certificate upon which the plaintiff in error was admitted to this country is as follows:

(Endorsements—Translation.)
Government of Macau Province.
Colonial Secretary of Macau Province.
No. 179.
Registered in Book 3, folio 164.
Mario Pires Nonteiro Bandeira de Lima,
Colonial Secretary of Macau Province,
His Majesty the King, etc., etc.

[459] *By order of H. E. the Governor, I grant this passport to a Chinaman, Liu-Hop, bachelor, natural and resident in Marcau, student of Chinese literature for over four years, being his professor Liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm 'Lun-Sing-Chong,'—Rockspring, Wyo.—San Francisco, Cal.

Signals:

Age	20 years.
Height	1 m. 590 ms.
Face	Long.
Hair	Black.
Eyebrows	do.
Eyes	Dark chestnut.
Nose	Flat.
Mouth	Big.

Color of the Asiatic race.

Cost of passport, $3.50.

Guaranteed.

Fulfilling the obligation to have this passport viséd by the respective diplomatic or consular agent residing in this city, I beg to request the administrative authorities, and all those to whom it may concern, not to put any objection to the bearer.

Valuable for 30 days to leave this city.

Given at Macao on the 17th day of May, 1899.

By authority of H. E. the Governor.
The Colonial Secretary,
(Signed) Mario B. De Lima.
Bearer's signature
(S'd) Liu Hop.
Translated by A. M. Roza Peruia, Jr.

Visé U. S. Consulate General, Hongkong, May 31, 1899.

R. Wildman, Consul Gen.

The bill of exceptions further shows that the evidence taken before the commissioner was not reduced to writing or preserved, or in any manner taken to the district court, and no further or other evidence was submitted by either of the parties. After argument of counsel the judge filed an opinion [460] and *ordered the defendant to be deported, to which the defendant excepted.

The opinion of the learned district judge, a copy of which is given in the record, shows that the order of deportation was made because, in his opinion, the facts as found by the commissioner indicate that Liu Hop Fong did not come to the United States to study the English language and the English sciences as a student, and that such contention was a mere device to gain entrance into this country, and not in good faith to pursue studies as a student, and his real intent was to labor only; "and I am of the opinion," says the learned judge, "that his entry under the certificate mentioned was a fraud upon the United States, and such certificate does not afford him protection." He thereupon affirmed the finding and judgment of the commissioner. Subsequently, and after the adjournment of the term at which this order was made, a petition was filed for a new trial upon the record and affidavits submitted on behalf of Liu Hop Fong, and, while the judge recognized that he had no further power over the proceedings after the adjournment of the court for the term, upon investigation adhered to his former opinion as to the order of deportation.

We need not be concerned with these proceedings after the term, for clearly the judge's authority over the case had ended. The question is here upon the record made in the original proceeding before him. Was the judge warranted in making the order of deportation? By the 3d article of the treaty with China of December 8, 1894 (28 Stat. at L. 1210), it is provided:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular *representative of the [461] United States in the country or port whence they depart."

By § 13 of the act of 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312), it is provided:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

By § 3 of the act of May 5, 1892 (27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1319), it is provided:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

Section 13 of the act of 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312) also provides that any Chinese person convicted before the commissioner of the United States court may, within ten days of such conviction, appeal to the judge of the district court for the district.

In this case the Chinaman did prosecute his appeal from the commissioner to the district judge. The statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed or as to what testimony shall be given. In our view, giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported. It is a serious thing to arrest a Chinaman who, as in this case, has been in this country a number of years, lawfully admitted upon a certificate complying with the treaty, and order his deportation without giving him a full oppor-[462]tunity *to assert his rights before a competent court. There being no provision of the statute that the hearing shall be upon a transcript of the proceedings before the commissioner, we think, when a party demands it, Congress intends he shall have the right to a hearing and judicial determination before the district judge.

In the case of Ah How v. United States, 193 U. S. 65, 48 L. ed. 619, 24 Sup. Ct. Rep. 357, it was assumed that the judge who tried the case upon appeal did so solely upon the commissioner's report, and heard no witnesses. In Tom Hong v. United States, 193 U. S. 517, 48 L. ed. 772, 24 Sup. Ct. Rep. 517, the commissioner made a finding, which was made part of the record by order of the district court. In the present case the record shows that there was before the district court the transcript of the proceedings hereinbefore set out as having taken place before the commissioner on December 29, 1904; and then, without the order of the court, an additional and separate finding of the commissioner appears to have been filed. We are not aware of any statute that gives the commissioner a right to make up and file such additional finding; he had made and filed a certified transcript in the case, and there ended his authority in the matter. There was no order, as in the Tom Hong Case, making the commissioner's findings part of the record. There was no consent to a hearing of the case upon such additional findings, and the case presented to the district judge embraced the student's certificate hereinbefore referred to, and a statement that witnesses were examined, without any findings of facts or the giving of any testimony. On this state of the record we are of the opinion that the court had no authority to order the deportation of the Chinaman.

The treaty with China provides that officials, teachers, students, etc., shall have the privilege of coming to and residing in the United States (article 3, treaty of December, 1894, above referred to), and further provides:

"To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they *last resided, viséd by the dip-[463]lomatic or consular representative of the United States in the country or port whence they depart."

When this young man entered a port of the United States in July, 1899, he presented such a certificate, duly issued and viséd by the consular representative of the United States. Upon application for admission this certificate is prima facie evidence of the facts set forth therein. 22 Stat. at L. 58, § 6, chap. 126, U. S. Comp. Stat. 1901, p. 1307; 33 Stat. at L. 428, chap. 1630. This certificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of a judicial determination, yet, being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate. In this record we can find no competent testimony which would overcome such legal effect of the certificate, and the plaintiff in error was therefore wrongfully ordered to be deported.

The judgment of the District Court is reversed, and the cause remanded to that court with directions to discharge the plaintiff in error from custody without prejudice to further proceedings.

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[464]*J. G. BOGARD, J. H. Simpson, H. Y. Hoover, et al., Appts.,
v.
F. H. SWEET, J. L. Sweet, Leon S. Herd, et al.

(See S. C. Reporter's ed. 464–467.)

Cloud on title — recorded deed — cancelation.

A cloud on the title of the owner of land in Greer county, Oklahoma, under patent from the United States, created by the record of a deed previously executed by him while he was claiming ownership under a Texas patent, in pursuance of an arrangement whereby the grantees were to sell the land and to collect certain notes for the purchase price of property which the grantor had already sold, and to turn over two thirds of the proceeds to the grantor, retaining one third for their commissions, will be removed and the deed canceled, where the project was abandoned and the deed was returned to the grantor, together with the notes.

[No. 156.]

Submitted March 6, 1908. Decided April 27, 1908.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Greer County, in that territory, removing a cloud on title created by the record of a deed, and canceling such deed. Affirmed.

See same case below, 17 Okla. 40, 87 Pac. 669.

The facts are stated in the opinion.

Messrs. **John W. Shartel, James R. Keaton**, and **Frank Wells** submitted the cause for appellants:

The mere failure of the consideration named in a deed cannot be shown for the purpose of defeating the conveyance.

Jones, Real Prop. in Conveyancing, §§ 300–302; 3 Washb. Real Prop. 614; 6 Am. & Eng. Enc. Law, 2d ed. p. 761; McCalla v. Bane, 45 Fed. 828; Ohmer v. Boyer, 89 Ala. 273, 7 So. 663; Coles v. Soulsby, 21 Cal. 47; Hartman v. Reed, 50 Cal. 485; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; Feeney v. Howard, 79 Cal. 525, 4 L.R.A. 826, 12 Am. St. Rep. 162, 21 Pac. 984; Downing v. Rademacher (Cal.) 62 Pac. 1055; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Bever v. North, 107 Ind. 544, 8 N. E. 578; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; Bobb v. Bobb, 89 Mo. 411, 4 S. W. 512; M'Crea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Vail v. McMillan, 17 Ohio St. 623; Finlayson v. Finlayson, 17 Or. 347, 3 L.R.A. 801, 11 Am. St. Rep. 836, 21 Pac. 57; Hannan v. Oxley, 23 Wis. 519; Calkins v. Calkins, 220 Ill. 111, 77 N. E. 103; Brand v. Power, 110 Ga. 522, 36 S. E. 53; Brown v. Brown, 44 S. C. 378, 22 S. E. 412.

Mr. **Charles M. Thacker** submitted the cause for appellees:

The rule that excludes evidence of failure of consideration is not applicable here.

Renshaw v. First Nat. Bank (Tenn. Ch. App.) 63 S. W. 195; Ewing v. Wilson, 132 Ind. 223, 19 L.R.A. 767, 31 N. E. 64; Groesbeck v. Seeley, 13 Mich. 329; Lyford v. Thurston, 16 N. H. 399; Hebbard v. Haughian, 70 N. Y. 54; Eckler v. Alden, 125 Mich. 215, 84 N. W. 141; Beaumont Car Works v. Beaumont Improv. Co. 4 Tex. Civ. App. 257, 23 S. W. 274; Wigmore, Ev. § 2437; Ames, Cases on Trusts, 1st ed. pp. 291, 295–330; Horner v. Chicago, M. & St. P. R. Co. 38 Wis. 165; Andrews v. Andrews, 12 Ind. 348; Ewing v. Justice, 132 Ind. 600, 31 N. E. 68; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Kerr v. Calvit, 1 Walk. (Mass.) 115, 12 Am. Dec. 537.

As between the parties and those claiming under them, a deed cannot be impeached on the sole ground of a want of consideration. But an executory agreement or an imperfect conveyance, without a valid or meritorious consideration, will not be enforced in equity against the promisor or grantor, or his personal representative or subsequent voluntary grantees; and, *a fortiori*, it will not be enforced against subsequent grantees for a valuable consideration.

13 Cyc. Law & Proc. pp. 534, 535; Burton v. Leroy, 5 Sawy. 510, Fed. Cas. No. 2,217.

While want of consideration, inadequacy of consideration, or failure of consideration, in case of perfect and absolute deed reciting a consideration and conveying the property, when standing alone, according to many authorities, is not ground for setting aside the deed, either of these facts may be governed by circumstances which justify setting it aside.

6 Cyc. Law & Proc. p. 286; McClelland v. McClelland, 176 Ill. 83, 51 N. E. 559; Bevins v. Keen, 23 Ky. L. Rep. 757, 64 S. W. 428; Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Lockwood v. Lockwood, 124 Mich. 627, 83 N. W. 613; Pironi v. Corrigan, 47 N. J. Eq. 135, 20 Atl. 218; Hollingshead v.

McKenzie, 8 Ga. 457; Dickerson v. Dickerson, 24 Neb. 530, 8 Am. St. Rep. 213, 39 N. W. 429; Vincent v. Walker, 93 Ala. 165, 9 So. 382; Steele v. Richardson, 24 Ark. 365; Jackson ex dem. Houseman v. Sebring, 16 Johns. 515, 8 Am. Dec. 357; Southern Life Ins. & T. Co. v. Cole, 4 Fla. 359; Fowlkes v. Lea, 84 Miss. 509, 68 L.R.A. 925, 36 So. 1036.

Mr. Justice **Harlan** delivered the opinion of the court:

There can be no doubt upon this record, confused though it be, as to the real nature of the present case.

The substantial facts are these: In December, 1890, one Sweet, claiming to be owner of certain town lots covered by a patent to him from the state of Texas, of date December 10th, 1885, conveyed the same by deed (his wife uniting with him) to J. G. Bogard and other named persons. The lots were in the town of Mangum, which was in what is now Greer county, Oklahoma. The deed, which was recorded, was with warranty and absolute upon its face. On the same day, at the same time, a written agreement was entered into between, substantially, the same parties. That agreement referred in terms to the deed, and bound the grantees therein to sell the lots, collect the proceeds of sale,' and, out of the gross receipts in cash received and collected on such sales, as soon as collected, pay over two thirds to Sweet and his wife. The [465] agreement *recites that Sweet had transferred to the other parties a large number of promissory notes which Sweet had taken for purchase money due on certain town lots previously sold by him. Bogard and his associates by the agreement bound themselves to use due diligence to collect the notes, handing over to Sweet two thirds of the amount collected on them.

The parties with whom Sweet made this arrangement were members of the Mangum Star Printing & Publishing Association, a partnership located at Mangum. The arrangement, evidenced by the deed and the agreement, had for its object the building up of that town, the parties, as stated, with whom Sweet contracted, receiving, as compensation for their services, one third on the sales of lots, and a like proportion of the proceeds of any notes collected by them. There was no other consideration for the arrangement. The absolute title to the lots was put in Bogard and his associates for purposes of convenience; namely, that they might the more easily effect sales of the property. The situation was accurately described by the supreme court of the territory of Oklahoma when it said: "The record discloses that, at a date when Greer county was claimed to be a part of and under the jurisdiction of the state of Texas, H. C. Sweet purchased the land in controversy from that state, and, while claiming the same under such title, platted it into town lots, which became, and were, at the time of the action, a part of the townsite of the city of Mangum. H. C. Sweet, desiring to aid in the upbuilding of a newspaper and the town generally, entered into a contract with the defendants in error, and others, to allow the plaintiffs in error to sell his townsite property, and to collect certain notes which he then had, for property by him theretofore sold, the understanding and agreement being that, in order to facilitate the business, the plaintiffs in error were to form a corporation for the purpose of running the newspaper and selling the real estate, it being agreed that the corporation should sell the property, and collect the notes, and pay to Sweet two thirds of the amount of the sales, and retain one third thereof as their *commission. As a matter [466] of convenience, in the carrying out of the contract, a deed was made by Sweet and wife to all of the property. Afterwards an attempt was made to form the corporation. There being no law in Texas under which such a corporation could be formed, that portion of the scheme failed; and, as shown by the record, the project was dropped by almost all, if not entirely all, of the parties connected therewith, and the deed, although recorded, was returned to Sweet, together with the notes." [17 Okla. 41, 87 Pac. 669.]

As already indicated, at the time the above arrangement was made it was supposed by some that Greer county was part of the state of Texas. For many years, indeed, from the time of its admission into the Union, Texas asserted that Greer county was within its recognized limits. But subsequently, in a suit brought in this court by the United States against the state, it was adjudged that Greer county constituted no part of the state of Texas, but was under the exclusive jurisdiction of the United States. United States v. Texas (1895) 162 U. S. 1, 90, 40 L. ed. 867, 902, 16 Sup. Ct. Rep. 725.

At a later date, January 18th, 1897 (29 Stat. at L. 490, chap. 62, U. S. Comp. Stat. 1901, p. 1621), Congress passed an act whereby grants of lands in Greer county could be obtained under the homestead law of the United States, as modified by that act. Under that legislation Sweet, on October 13th, 1898, obtained a patent from the United States and holds title under it.

The original scheme for the upbuilding of Mangum, as outlined in the deed and agreement of 1890, failed and was wholly aban-

doned by the parties to those instruments, and the present suit was brought by Sweet and wife for the cancelation of the deed made to Bogard, and for a decree removing the cloud created by it upon the title to the property in question. The plaintiffs having died, after the institution of the suit, there was a revivor of the suit in the name of their children and heirs. Notwithstanding some of the parties to the original scheme defended the suit, a decree was rendered in accordance with the prayer of the
[467] plaintiffs, and that decree was affirmed *by the supreme court of the territory of Oklahoma. 17 Okla. 40, 87 Pac. 669.

Neither argument nor citation of authorities is necessary to establish the correctness of the decree below, and it is affirmed.

FREDERICK LANG, Plff. in Err.,
v.
STATE OF NEW JERSEY.

(See S. C. Reporter's ed. 467–472.)

Constitutional law — equal protection of the laws — discrimination.

A person indicted for a crime committed after the grand jury was impaneled is not denied the equal protection of the laws because he is precluded from raising the objection that two of the grand jurors were over the age fixed by New Jersey Laws 1876, p. 360, under which objections on that ground must be made before the jury is sworn, where the object sought to be attained by the statute, according to the view adopted by the state court, was to make the grand jury a more efficient instrument of justice, and not to benefit any particular defendant or class of defendants.

[No. 649.]

Argued April 6, 1908. Decided April 27, 1908.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of the state, which had, in turn, affirmed a conviction of murder in the Court of Oyer and Terminer of Middlesex County. Affirmed.

See same case below (N. J. L.) 68 Atl. 210.

The facts are stated in the opinion.

Mr. Alan H. Strong argued the cause and filed a brief for plaintiff in error:

To challenge a grand juror for any ground of disqualification is the right, at common law, of anyone who is under prosecution for any crime whatsoever.

2 Hawk. P. C. chap. 25, § 16; 1 Bishop, Crim. Proc. 3d ed. § 676; 4 Crim. L. Mag. 171.

If any one of the grand jury who find an indictment is disqualified, he vitiates the whole, though never so many unexceptionable persons join with him in finding it.

2 Hawk. P. C. chap. 25, § 28; 1 Bishop, Crim. Proc. 3d ed. §§ 749, 3884, 1 Chitty, Crim. Law, 307; State v. Rockafellow, 6 N. J. L. 332.

And for that cause a conviction upon such an indictment (if objection was duly taken) will be reversed on error.

State v. Hoffman, 71 N. J. L. 285, 58 Atl. 1012; Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1.

Equal protection of the laws requires that no person shall be indicted without having had an opportunity to challenge members of the grand jury who are disqualified.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 447, 48 L. ed. 1062, 1065, 24 Sup. Ct. Rep. 703; 1 Bishop, Crim. Proc. 3d ed. §§ 877–879; United States v. Gale, 109 U. S. 65, 67, 27 L. ed. 857, 858, 3 Sup. Ct. Rep. 1; Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687; Castleberry v. State, 69 Ark. 346, 86 Am. St. Rep. 197, 63 S. W. 670; New Jersey v. Corrigan, 139 Fed. 768.

The law as expounded by the court of errors and appeals vests in the prosecuting authorities the arbitrary power to bring the charge before a grand jury impaneled before or one impaneled after the offense; thus at their pleasure depriving or not depriving a defendant of his challenges. It is contrary to the 14th Amendment that a person should hold any of his rights at the mere will of another.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The slightest infringement of the rights of a defendant (whether resulting from race discrimination or otherwise) in the drawing of a grand or petit jury will work a reversal of the conviction, if objection is seasonably made.

Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; Crowley v. United States, 194 U. S. 461, 474, 48 L. ed. 1075, 1081, 24 Sup. Ct. Rep. 731.

It is the duty of courts to be watchful of the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524.

Mr. **George Berdine** argued the cause and filed a brief for defendant in error:

The statute of the state of New Jersey prescribing the qualifications of grand jurors, and the manner in which the challenge for any disqualification must be made, does not deprive the defendant of any fundamental or all-important right.

Gibbs v. State, 45 N. J. L. 382, 46 Am. Rep. 782; State v. Hoffman, 71 N. J. L. 285, 58 Atl. 1012; State v. Lang (N. J. L.) 68 Atl. 210.

The right to principal challenge is not a fundamental and all-important right.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Profat, Jury Trial, § 106; 12 Enc. Pl. & Pr. p. 475; 1 Bishop, Crim. Proc. 941; Howard v. Kentucky, 200 U. S. 173, 50 L. ed. 425, 26 Sup. Ct. Rep. 189.

The statute is based on municipal consideration alone.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; McQuillen v. State, 8 Smedes & M. 587; Cain v. State, 86 Miss. 505, 38 So. 227; Rawlins v. Georgia, 201 U. S. 640, 50 L. ed. 900, 26 Sup. Ct. Rep. 560.

If there be a class favored by the statute, as claimed by plaintiff in error, it is not an arbitrary class.

Bachtel v. Wilson, 204 U. S. 41, 51 L. ed. 359, 27 Sup. Ct. Rep. 243; Missouri v. Lewis (Bowman v. Lewis) supra; Brown v. New Jersey, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; West v. Louisiana, 194 U. S. 263, 48 L. ed. 969, 24 Sup. Ct. Rep. 650.

In Howard v. Kentucky, 200 U. S. 175, 50 L. ed. 426, 26 Sup. Ct. Rep. 189, it was held that the statute of Kentucky which forbade reversal of a trial judge's ruling upon the competency of a juror was constitutional.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error was convicted in the court of oyer and terminer of Middlesex county, New Jersey, of the crime of murder. His conviction was successively affirmed by the supreme court of the state and the court of errors and appeals. 68 Atl. 210. He attacks the judgment on the ground that he has been deprived of the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States, in that his motion to quash the indictment was denied, a plea in abatement overruled, and that he was required to answer the indictment.

The crime for which plaintiff in error was indicted was committed after the grand jury was impaneled, and two of its members were over the age of sixty-five years. The object of his motion and plea was to avail himself of the limitation of age of grand jurors prescribed by the statutes of the state, and avoid that part of the section which provides that the exception on that ground must be taken before the jury is sworn.†

[**470**] *This provision, plaintiff in error contends, as applied by the courts of the state, separates criminal defendants into classes; to wit, those who are accused before the finding of the indictment, and those who are accused afterwards; giving to the first a privilege of challenge which is denied to the second. And it is contended that there is no substantial reason for the classification, and therefore, the provision of the 14th Amendment which secures to all persons the equal protection of the laws is violated.

The court of errors and appeals met this contention by denying that the statute made the classification asserted. The court observed that the contention rested "fundamentally upon the proposition that the right to have a grand juror discharged upon the statutory grounds stated in § 6 of the jury act is for the benefit or protection of a particular class of persons," whom, the court said, "to avoid constant paraphase," it would "call putative criminals." And "putative criminals," the court defined to be all who actually committed crime before the grand jury had been sworn, or who were charged or suspected, or, being wholly innocent, were ignorant of the fact that they were suspected, as well as those who were charged with the crime during the sitting of the grand jury. But to none of these, the court said, was the protection of the statute addressed; that its purpose was the "furtherance of the due and efficient administration of justice for the protection of those against whom crimes might be committed, as well as those who might be charged with the commission of such crimes." The object sought to be attained, it was further said, by the disabilities expressed in the statute, "was to secure an [471] efficient and representative *body of citizens to take part in the due administration of the law for the benefit of all who were entitled to its protection, and not specially or even primarily for the benefit of those who were charged with its violation."

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†That every person summoned as a grand juror in any court of this state, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this state, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person who is not so qualified shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this state, or if any person shall be summoned as a petit juror at any stated term of any court of this state, who has served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law, or on his own oath of affirmation in support thereof; provided, that no exception to any such juror on account of his citizenship or age, or any other legal disability, shall be allowed after he has been sworn or affirmed [Laws 1876, p. 360.]

This we accept as the proper construction of the statute, and see no unconstitutional discrimination in it. It is to the effect that certain qualifications have been deemed advisable in order to make the grand jury a more efficient instrument of justice,—qualifications which have no relation to any particular defendant or class of defendants. And the practical is regarded. Objection may be taken before a jury is sworn, but not afterwards; and the statute uses for its purpose the prosecutor of pleas, those who stand accused of crime, and even, the court says, an *amicus curiæ*. A grand jury thus secured will have all the statutory qualifications in most cases for all defendants; and, besides, the discrimination is very unsubstantial, as was pointed out in Gibbs v. State, 45 N. J. L. 382, 46 Am. Rep. 782.

Counsel has not been able to point out what prejudice results to defendants from the enforcement of the statute. He urges a verbal discrimination, and invokes the 14th Amendment against it. The statute, he in effect says, fixes the limit of service at twenty-one and sixty-five years, and confesses the latter is "somewhat early," but seeks to sustain his contention as follows: "And though it may not be possible in any case to show that the fact of the juror being above the lawful age has worked injustice to the defendant, he is not required to show it. It is enough that a statute has been transgressed which was enacted, in some measure, at least, for his benefit. The due observance of that statute is part of the protection of the laws, to which, equally with all others in like circumstances, he is entitled under the guaranty of the 14th Amendment."

But this proceeds upon a misconception of the purpose of the statute, as was pointed out by the court of errors and appeals, and of the power of the state.

[472] *Let it be granted, in deference to the argument of counsel, that the statute makes two classes,—those who are accused of crime and those that may be accused,—there is certainly no discrimination within the classes, and the only question can be whether, in view of the purpose of the statute, is the classification justified? In other words, whether the persons constituting the classes are in different relations to the purpose of the law. That they are, we think, is obvious; and, as we have said, the law neither offers nor withholds substantial rights. It constitutes one of its instrumentalities of persons having certain qualifications which cannot affect essentially the charge against, or the defense of, any defendant. It is the conception of the state that a grand jury so constituted would be more efficient in the administration of justice than one not so constituted, but that there would be counteracting disadvantages if the right of challenge should be extended beyond the date of the empanelment of the jury. We think it is competent for the state to have so provided.

It will be observed that the provision of the statute is that no exception to a juror "on account of his citizenship or age *or any other legal disability* [italics ours] shall be allowed after he has been sworn." It is hence contended that "the principle of the decision" under review is not limited to the "statutory disqualifications." The court said, however: "Whether the words of the statute, 'any other disability,' include the common-law grounds of prejudice, malice, and the like, and, if so, what would be the rights and remedies of an indicted person who had had no opportunity to challenge a given juror upon these personal grounds, is not involved in the facts of the present case, or in the line of reasoning upon which, in our judgment, its decision should be placed." In connection with this comment see Lee v. New Jersey, 207 U. S. 67, ante, 106, 28 Sup. Ct. Rep. 22.

Judgment affirmed.

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*CENTRAL RAILROAD COMPANY OF [473]
NEW JERSEY, Plff. in Err.,
v.
MAYOR AND ALDERMEN OF JERSEY CITY and Robert Davis, Collector thereof.

(See S. C. Reporter's ed. 473–480.)

States — compacts as to boundary waters — taxation of bed.

Lands lying between the middle of New York bay and the low-water line on the New Jersey shore are taxable by New Jersey, notwithstanding the provisions of a compact between the states, fixing the boundary line as the middle of New York bay, approved by Congress by act of June 28, 1834 (4 Stat.

at L. 708, chap. 126), by which New York is given "exclusive jurisdiction of and over all the waters of the bay of New York," and "of and over the land covered by the said waters to the low-water mark" on the New Jersey side, subject to the exclusive right of property in New Jersey "in and to the land under water lying west of the middle of the bay," and to her exclusive jurisdiction over wharves, docks, and improvements made, or to be made, on her shore, and to her exclusive right to regulate the fisheries on the west of the middle of said waters.

[No. 203.]

Argued April 15, 16, 1908. Decided April 27, 1908.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that state, sustaining, on certiorari, taxes levied upon lands lying between the middle of New York bay and the low-water mark on the New Jersey shore. Affirmed.

See same case below, 72 N. J. L. 311, 61 Atl. 1118.

The facts are stated in the opinion.

Messrs. **Frank Bergen** and **William D. Edwards** argued the cause and with Mr. George Holmes filed a brief for plaintiff in error:

The compact, or some part of it, has occasionally been considered in litigation pending in the courts of New York and New Jersey and in the Federal courts.

State v. Babcock, 30 N. J. L. 29; People v. Central R. Co. 42 N. Y. 283; Kiernan v. The Norma, 32 Fed. 411; Hall v. Devoe Mfg. Co. 14 Fed. 183; McCarthy v. The Sarah E. Kennedy, 25 Fed. 569; Ferguson v. Ross, 126 N. Y. 462, 27 N. E. 954.

The power to levy taxes can be exercised only by a government having jurisdiction over the property assessed. Exclusive jurisdiction for all purposes of government may not be necessary; but it cannot be maintained that a qualified power to regulate fisheries in the waters covering the property of the plaintiff in error (which is all the jurisdiction that New Jersey has over it) involves the power to tax it.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. ed. 513, 518, 23 Sup. Ct. Rep. 463; M'Culloch v. Maryland, 4 Wheat. 316, 429, 4 L. ed. 579, 607; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Opinion of Justices, 1 Met. 580; United States v. Ames, 1 Woodb. & M. 80, Fed. Cas. No. 14,441; Mitchell v. Tibbetts, 17 Pick. 298; United States v. Rice, 4 Wheat. 246, 4 L. ed. 562.

The expression "exclusive legislation" has been held to be synonymous with "exclusive jurisdiction."

United States v. Cornell, 2 Mason, 64, 91, Fed. Cas. Nos. 14,867, 14,868; Com. v. Clary, 8 Mass. 72; Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98.

The boundary between the colonies and subsequent states was the easterly shore of New Jersey; and New York asserted, and in fact exercised, jurisdiction to the New Jersey shore during that period, and rightfully so.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; Handly v. Anthony, 5 Wheat. 374, 5 L. ed. 113; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 609, 613, 43 L. ed. 823, 829, 830, 19 Sup. Ct. Rep. 553.

Mr. **Warren Dixon** argued the cause and filed a brief for defendant in error:

It is the settled law of the state of New Jersey that lands under water within the state limits originally belonged to the state, and that title by holders other than the state is acquired from the state. The title to lands under water within the present limits of the state was vested in the King of Great Britain at and before the Revolution of 1776, and became vested, by the law of nations and by the right of conquest, in the people of the then colony and now state of New Jersey by the War of Independence.

Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Stevens v. Paterson & N. R. Co. 34 N. J. L. 540, 3 Am. Rep. 265; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

Where an arm of the sea or river is the boundary between two nations or states, if the original right of jurisdiction is in neither, in the absence of any convention respecting it, each holds to the middle of the stream.

Angell, Tide-Waters, p. 7; Vattel, Nations, bk. 1, chap. 22, § 266; Martens, Nations, bk. 4, chap. 3–5.

Lands under water formerly belonging to the state, and granted by the state to property owners, are subject to taxation.

State, Morris Canal & Bkg. Co., Prosecutor, v. Haight, 35 N. J. L. 178; State, Coles, Prosecutor, v. Platt, 24 N. J. L. 108; State, Bentley, Prosecutor, v. Sippel, 25 N. J. L. 530; State, New York, L. E. & W. R. Co., Prosecutor, v. Yard, 43 N. J. L. 121; State, Colket, Prosecutor, v. Rightmire, 46 N. J. L. 341.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error prosecuted to review a judgment sustaining taxes levied by Jersey City upon lands of the plaintiff in error, lying between the middle of New York bay and its low-water line on the New Jersey shore. It is argued that this land, although it belonged to New Jersey until conveyed, is not within its jurisdiction, and cannot be taxed under the authority of that state. The supreme court upheld the tax (70 N. J. L. 81, 56 Atl. 239), and its judgment was affirmed by the court of errors and appeals, for the reasons given by the supreme court. 72 N. J. L. [477]311. 61 Atl. 1118. *The plaintiff in error contended that, as New Jersey had not the right to tax, the attempt was to deprive the prosecutor of its property contrary to the 14th Amendment, and brought the case here.

The decision depends upon the construction of an agreement made between New Jersey and New York for the purpose of settling the territorial limits and jurisdiction of the two states, which previously had been the subject of dispute. This agreement was made by commissioners appointed for the purpose, was confirmed by New York on February 5, 1834 (Laws of 1834, chap. 8, p. 8), and by New Jersey on February 26, 1834 (Laws of 1834, p. 118), and was approved by Congress by act of June 28, 1834, chap. 126, 4 Stat. at L. 708. By article 1, the boundary line between the two states from a point above the land in dispute is to be the middle of the Hudson river, of the bay of New York, of the water between Staten island and New Jersey, etc., "except as hereinafter otherwise particularly mentioned." By article 2, New York retains its present jurisdiction over Bedloe's and Ellis islands, and exclusive jurisdiction over certain other islands in the waters mentioned. By article 3, New York is to have "exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of the Hudson river lying west of Manhattan island and to the south" of the above-mentioned point, "and of and over the land covered by the said waters to the low-water mark on the westerly or New Jersey side thereof, subject to the following rights of property and jurisdiction of the state of New Jersey, that is to say: 1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey." 2. New Jersey is to have exclusive jurisdiction over wharves, docks, and improvements made or to be made on its shore, and over vessels aground or fastened there, subject to the quarantine and passenger laws of New York. 3. New Jersey is to have the exclusive right of *regulat- [478] ing the fisheries on the west of the middle of said waters, providing that navigation be not obstructed or hindered.

The other articles need but brief mention. Article 4 gives New York "exclusive jurisdiction" over the waters of Kill van Kull "in respect to such quarantine laws and laws relating to passengers as etc., and for executing the same," and over certain other waters. Article 5 gives New Jersey exclusive jurisdiction over certain other waters, subject to New York's exclusive property and exclusive jurisdiction over wharves, docks, and improvements within certain limits, and exclusive right of regulating the fisheries on its side, as above in the case of New Jersey. Articles 6 and 7 provide for the service of criminal and civil process of each state on the waters within the exclusive jurisdiction of the other. Article 8 and last calls for the confirmation of the agreement by the two states and approval by the Congress of the United States.

Thus, the land which has been taxed is on the New Jersey side of the boundary line, but under the "exclusive jurisdiction" of New York, subject to the exclusive right of property in New Jersey, and the limited jurisdiction and authority conferred by the paragraphs summed up. The question is, Which of these provisions governs the right to tax? It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied, but is contradicted, by the suggestion that the agreement simply gives the ownership of the land under water on the New Jersey side to that state as a private owner of land lying within the state of New York. On the contrary, the provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim, which, for all that appears, may have been inconsistent with titles already accrued, and which would lose significance the *moment that New Jersey sold the land. [479] We repeat that boundary means sovereignty, since, in modern times, sovereignty is mainly territorial, unless a different meaning clearly appears.

It is said that a different meaning does appear in the article (3) that gives New York exclusive jurisdiction over this land as well as the water above it. But we agree with the state courts that have been called on to construe that part of the agreement, that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of article 1. This is the view of the New York as well as of the New Jersey court of errors and appeals, and it would be a strange result if this court should be driven to a different conclusion from that reached by both the parties concerned. Ferguson v. Ross, 126 N. Y. 459, 463, 27 N. E. 954; People v. Central R. Co. 42 N. Y. 283. This opinion is confirmed by the judgment delivered by one of the commissioners in State v. Babcock, 30 N. J. L. 29. Again, as was pointed out by the state court, the often-expressed purpose of the appointment of the commissioner and of the agreement to settle the territorial limits and jurisdiction must mean, by territorial limits, sovereignty, and by jurisdiction something less. It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedloe's and Ellis islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and would seem on its face simply to be intended to preserve the *status quo ante*, whatever it may be.

Throughout nearly all the articles of the agreement, other than those in controversy, the word "jurisdiction" obviously is used in a more limited sense. The word has occurred in other cases where a river was a boundary, and in the Virginia compact was held to mean, primarily at least, *jurisdictio*,—authority to apply the law to the acts of men. Wedding v. Meyler, 192 U. S. 573, 584, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322. Whether, in the case at bar, some power of police regulation also was conferred upon New York, as held in Ferguson v. Ross, need not be decided now. [480] That New Jersey *retained the sovereignty, however, seems to be assumed in article 3 (2), giving her exclusive jurisdiction over wharves, docks, and improvements, made and "to be made," on the shore. This does not grant the right to make such improvements, but assumes it to exist. But the right would need the permission of New York, except on the hypothesis that New Jersey had sovereign power over the place.

The conclusion reached has the very powerful sanction of the conduct of the parties and of the existing condition of things. See Moore v. McGuire, 205 U. S. 214, 220, 51 L. ed. 776, 777, 27 Sup. Ct. Rep. 483. The decisions of the courts have been referred to. It was admitted at the bar that the record of transfers of such lands was kept in New Jersey, not in New York. New York never has attempted to tax the land, while New Jersey has levied more or less similar taxes for many years without dispute. See, *e. g.*, State, Coles, Prosecutor, v. Platt, 24 N. J. L. 108, 120; State, Bentley, Prosecutor, v. Sippel, 25 N. J. L. 530; State, Morris Canal & Bkg. Co., Prosecutor, v. Haight, 35 N. J. L. 178, s. c. 36 N. J. L. 471. New Jersey, not New York, regulates the improvements on the shore. Act of March 18, 1851, P. L. 1851, p. 335; Rev. 1877, p. 1240; act of April 11, 1864, P. L. 1864, p. 681; March 31, 1869, P. L. 1869, p. 1017; 3 Gen. Stat. 2784, 2786; New York, L. E. & W. R. Co. v. Hughes, 46 N. J. L. 67. Without going into all the details that have been mentioned in the careful and satisfactory discussion of the question in the state courts, we are of opinion that the land in question is subject to the sovereignty of the state of New Jersey, and that the exclusive jurisdiction given to the state of New York does not exclude the right of the sovereign power to tax.

Judgment affirmed.

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*DANIEL B. SCULLY and Maurice H. Scully, Appts., [481]
v.
ARTHUR C. BIRD.

(See S. C. Reporter's ed. 481–490.)

Appeal — from circuit court — certificate as to jurisdiction.

1. The ground of the action of a Federal circuit court in dismissing a bill, as recited in the certificate presenting a question of jurisdiction, will be accepted by the Supreme Court on appeal, where a different course requires an assumption of inconsistency between the lower court's opinion and order of dismissal and such certificate.

Appeal — from circuit court — when jurisdiction in issue.

2. Whether the bill presents a case for equitable relief or not does not involve a question of the jurisdiction of a Federal circuit court as a Federal court, so as to sustain a direct appeal to the Supreme Court.

Dismissal — for want of jurisdiction — suit against state.

3. A Federal circuit court should not dismiss on its own motion, for want of jurisdiction, a suit against the dairy and food

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NOTE.—As to suits against state—see notes to Beers v. Arkansas, 15 L. ed. U. S. 991, and Hans v. Louisiana, 33 L. ed. U. S. 842.

Suits against state officers as suits against state—see case notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727, and Ex parte Young, 13 L.R.A.(N.S.) 932.

commissioner of a state, on the ground that such suit is one against the state, but such question should be raised by demurrer or other pleading.

State — immunity from suit — suit against officer.

4. A suit against the dairy and food commissioner of a state to restrain certain action taken under cover of his office, but alleged to be in violation of the state laws, which injuriously affects the reputation and sale of certain products manufactured by complainants, is not a suit against the state, forbidden by the 11th Amendment to the Federal Constitution.

[No. 353.]

Submitted April 20, 1908. Decided May 4, 1908.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan to review a decree dismissing, for want of jurisdiction, the bill in a suit to restrain certain action by the dairy and food commissioner of the state. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **Edward T. Fenwick** submitted the cause for appellants:

The prohibition of the 11th Amendment does not apply where a suit is brought against defendants who, claiming to act as officers of the state, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff.

1 Bates, Fed. Eq. Proc. 1901, ed. § 560, subdiv. 4; Reagan v. Farmers' Loan & T. Co. 154 U. S. 388, 38 L. ed. 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The prohibition of the 11th Amendment does not apply where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In this class of cases the defendant is not sued as, or because he is, the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority in law was sufficient to protect him.

Cunningham v. Macon & B. R. Co. 109 U. S. 451, 27 L. ed. 994, 3 Sup. Ct. Rep. 292, 609.

The state is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for a defendant who seeks to substitute the state in his place, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act.

Bates, Fed. Eq. Proc. 1901 ed. § 560, subdiv. 8; Poindexter v. Greenhow, 114 U. S. 288, 29 L. ed. 192, 5 Sup. Ct. Rep. 903, 962.

Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense.

Bates, Fed. Eq. Proc. 1901 ed. § 560, subdiv. 9; Reagan v. Farmers' Loan & T. Co. 154 U. S. 391, 38 L. ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The suit at bar might have been maintained in the state courts of Michigan against said defendant, Arthur C. Bird.

Pratt Food Co. v. Bird, 148 Mich. 633, 118 Am. St. Rep. 601, 112 N. W. 701.

The state can waive its right to immunity from suit in a Federal court.

Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878.

Any pleading to the merits, or in any informal manner attacking plaintiff's case, is a general appearance, and waives such immunity.

2 Enc. Pl. & Pr. p. 363.

The obtaining of an extension of time to plead is a general appearance.

2 Enc. Pl. & Pr. p. 639.

The suit at bar should not have been dismissed under § 5 of the act of 1875.

Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; Williams v. Nottawa, 104 U. S. 212, 26 L. ed. 720; Mattocks v. Baker, 2 Fed. 457.

The question whether the suit at bar is, in legal effect, a suit against the state, is one on the merits of the case; and it was error for the trial court to hold that it was a question of jurisdiction, and to dismiss the bill on that account for want of jurisdiction.

Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

Mr. **John E. Bird** submitted the cause for appellee. Mr. George S. Law was on the brief:

A decree denying the temporary injunction and dismissing the bill of complaint was the only decree that could be rendered by the circuit court.

Arbuckle v. Blackburn, 113 Fed. 616, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Pittsburgh, C. C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914.

Where parties have an ample remedy by proceedings in the state courts, and the

Federal court clearly has no jurisdiction of most matters complained of, and as to others the jurisdiction is extremely doubtful, the Federal court will refuse to assume jurisdiction.

Freeney v. First Nat. Bank, 3 McCrary, 622, 16 Fed. 433.

This court will not reverse the decision of the lower court merely because the reason given for the conclusion was not the correct reason.

Pennsylvania R. Co. v. Wabash R. Co. 157 U. S. 225, 39 L. ed. 682, 15 Sup. Ct. Rep. 576; Moffat v. Smith, 41 C. C. A. 671, 101 Fed. 771; 3 Cyc. Law & Proc. p. 221.

The court may, at any stage of the proceedings, and upon its own motion, dismiss the case.

11 Cyc. Law & Proc. p. 701; Heriot v. Davis, 2 Woodb. & M. 229, Fed. Cas. No. 6,404.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an appeal directly from the circuit court from a decree dismissing the bill of appellants for want of jurisdiction.

The bill sought an injunction against certain acts of the appellee, who is the dairy and food commissioner of the state of Michigan, and who, it is alleged, under cover of his office, is injuriously affecting the reputation and sale of certain products manufactured by appellants. The acts complained of will be detailed more fully hereafter. It is enough to say preliminarily that appellants alleged in their bill that their business is the manufacturing, refining, and selling various food products, and more particularly manufacturing, blending, and selling of syrups used for food products; that their principal place of business is in Chicago, and that their business is "commonly recognized and known as an honorable and legitimate commercial industry, and a legal and necessary adjunct to organized society;" and that they have large quantities of their products in Michigan, "which, prior to the acts complained of, found a ready sale in that state, which sales resulted in fair and continuous profit" to them.

The court dismissed the bill, and recites in its certificate that the decree "was made and entered by the court on its own motion and without notice to any of the parties to [484] this suit or *their attorneys, except that the question of jurisdiction was argued on the motion for a preliminary injunction, it appearing to the court from the face of the bill that this suit is, in effect, a suit against the state of Michigan within the meaning of the 11th Amendment to the Constitution of the United States, and that, therefore, this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of a Federal court."

The court expressed its reason for its action in an opinion as follows:

"Upon examination of the authorities cited upon the arguments had in this cause upon the matters above related, it is clear that the case of Arbuckle v. Blackburn, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616, is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. It is argued in behalf of complainants that the case at bar is differentiated from that decision of the court of appeals in the case just cited. It is not perceived that there is any substantial difference in the facts of the two cases which would exclude the application of Arbuckle v. Blackburn. That case is conclusive that this court has no jurisdiction to entertain a suit of this nature, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso*, is one for a dismissal of the bill for want of jurisdiction."

Arbuckle v. Blackburn was appealed to this court, but the appeal was dismissed, on the ground that the jurisdiction of the circuit court was "'dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different states,' and the decree of the circuit court of appeals was final." The questions passed on by the latter court were not considered or decided. 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

The attorney general of the state, who appears as counsel for the appellee, does not contend that this is a suit against the state. He says: "Counsel for defendant did not claim in the circuit court, and do not now claim, that this proceeding is a suit against the state. It is our contention that, under the decision of the circuit court of appeals [485] in the case of Arbuckle v. Blackburn, supra, a Federal court of equity has no jurisdiction of the subject-matter of the bill of complaint; *viz.*, that it has no jurisdiction to restrain the dairy and food commissioner of a state from issuing bulletins or circulars claiming that an article of food is in violation of the criminal laws of a state."

And it is urged that such was the reason given by the court in its opinion and order dismissing the bill, and that, as the decision of the court was right, it should not be reversed because the reason given for it in the certificate was not the correct reason. But we cannot assume that there is inconsistency between the opinion and order of the court and its certificate. We, therefore, accept the latter as expressing the ground of the court's action. We would have no jurisdiction on this appeal unless the jurisdiction of the circuit court was in question as a Federal court; and whether the bill presented a case for equitable relief does not present a question of the jurisdiction of the court as a court of the United States. Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Illinois C. R. Co. v. Adams, 180 U. S. 28, 35, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251. Indeed, it is urged by appellants that whether a suit is one against a state is not a question of jurisdiction, but a question on the merits; and Illinois C. R. Co. v. Adams, supra, is cited.

That suit was brought by the railroad company against Adams, who was a revenue agent of the state of Mississippi, and the railroad commission of the state, to enjoin the latter from certifying an assessment for taxes on a railroad in which the Illinois Central had an interest, and to enjoin the revenue agent from beginning any suit, or advising any of the municipalities along the line of the road to bring suit, for the recovery of such taxes. The bill was dismissed for want of jurisdiction and the case was appealed to this court. One of the grounds for the dismissal was, as certified, "that there was no jurisdiction in this matter, because the bill was a suit against the state of Mississippi, and in violation of the 11th Amendment to the Constitution of the United States." We said, by Mr. Justice [486] *Brown, that such a question is "one which we think belongs to the merits rather than to the jurisdiction." And further: "If it were a suit directly against the state by name, it would be so palpably in violation of that Amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the state, but against Adams individually; and, if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the state that he is exempt from prosecution, on account of the matters set up in the particular bill, is more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in Osborn v. Bank of United States, 9 Wheat. 738, 858, 6 L. ed. 204, 232, wherein he makes the following observation: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'" Again: "But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. . . . But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law." Cases were cited, and it was further observed that in Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, the question whether the officers proceeded against "were representatives of the state was disposed of upon answers filed."

The suit at bar has not the "palpable" evidence of being a suit against the state by being against the state by name. Do the allegations of the bill make it such?

*The suit is brought against appellee, de- [487] scribed as a citizen of Michigan, by appellants, described as citizens of Illinois. It is true it is alleged that appellee is the state dairy and food commissioner of Michigan, and that, by an act of the general assembly of the state, passed the 2d of June, 1893, the office of dairy and food commissioner was created, and that it was by such act and amendatory acts made the duty of appellee as commissioner "to attend to the enforcement of all the laws of the state of Michigan against the unlawful labeling, fraud, adulteration, or impurity of foods sold, offered for sale, exposed for sale, or had in possession with intent to sell in the state of Michigan;" and that it is the duty of the commissioner is clearly set forth in the acts.

It is alleged that it is his duty to prosecute violators of the act. That it came to the notice of the appellants that the appellee questioned the legality of some of the food products manufactured by them and sold in Michigan, and that they represented, through their attorney, that they were manufacturers of certain brands of maple and cane syrups which they were desirous of having properly labeled; that appellee refused to accept the statement of the attorney as being made in good faith, and stated that none of the syrups manufactured by appellants contained any maple syrup whatever, but were mixtures of inferior syrups containing substances which produced "imitation maple flavors," and accused appellants of not being desirous of "obtaining a wise and just interpretation of the food laws of the state of Michigan," and refused to give appellants' attorney "any information as to how a brand of maple syrup and cane syrup should be properly and legally labeled under said food laws," and refused to consider how such syrups should be labeled, and insisted that he would only permit appellants' syrups "to be sold simply as 'syrup,' without any qualifying words whatever to inform purchasers of the same of the nature of such syrups." The bill sets forth efforts made by appellants to have the question of the legal labeling of their products decided by the assistant attorney general of the state, [488]*and asked the latter officer to bring a test case in the courts of Michigan or "arbitrate the question at issue." To which the assistant attorney general replied "that they did not arbitrate matters in Michigan, but that they were 'fighters.'"

It is alleged that appellants were advised by their attorney that the proper course for them to pursue would be to label their "Westmoreland" and "Triumph" brands of syrups as nearly as possible in accordance with the laws of Michigan, and in compliance with that opinion they devised labels which described the "Westmoreland" as a brand of pure maple syrup and pure rock-candy syrup, and the "Triumph" as a "delicious brand" of the same syrups. And it is alleged that both brands are composed of maple syrup and cane syrup, "and no other ingredients whatever," and that rock-candy syrup is the purest kind of cane syrup, and is the only cane syrup used by appellants.

It is alleged that appellants have shipped into the state of Michigan said brands of syrups labeled and branded as aforesaid, and that shortly after such shipment the appellee "assumed a hostile attitude towards all of said syrups, and contended and persists in contending that the labeling upon said syrups does not comply with the laws of the state, and that he and his inspectors "at once commenced a systematic crusade" against the sale of the syrups; and appellants are informed that appellee contends that "the word 'maple syrup' should not appear on any of the said labels in any manner or form whatever, even though said syrups actually contained a representative proportion of pure maple syrup." The bill contains the following paragraph:

"Your orators further represent that they are informed and believe that the said crusade, waged against their said brands of syrup by the said Arthur C. Bird and his inspectors is not in good faith, but that the same is actuated by malice and ill will on the part of said Arthur C. Bird towards your orators, growing out of the conference between your orators' said attorney and the said Arthur C. Bird, hereinbefore [489]referred to, *and that the activity of said Arthur C. Bird to prevent the sale of said brands of syrups is caused by the malicious desire on the part of Arthur C. Bird to ruin your orator's business in the state of Michigan."

It is further alleged that "the crusade against said brands of syrups" is conducted by appellee and his food inspectors, acting under his direction, by visiting all grocers, merchants, and dealers in the syrups, and informing them that by selling said syrups they would subject themselves to criminal prosecution. And that it has been the custom and practice of appellees since the shipment of the syrups to the state to write numerous letters to dealers in the state, warning them that the syrups were illegally labeled, and directing them to return all such syrups to appellants, and directing such dealers to make prompt reply "as to what course they had pursued in relation to said syrups," and what action they had taken to return the same.

It is also alleged that the food inspectors, under the direction of appellee, forcibly removed appellants' brands of syrups from the shelves of dealers, against the consent of said dealers. And "that in no case, so far as your orators are informed and believe, was any sample taken of such syrups so taken from the shelves as aforesaid, nor were the said syrups sealed as required by the statutes of the state of Michigan, nor were any prosecutions ever commenced against said grocers or dealers, although ample time has elapsed since the acts complained of as aforesaid."

The bill sets forth the efforts of appellants to have appellee commence prosecution against their agents and jobbers and against grocers and dealers handling their syrups, so that they might have an opportunity of defending the legality of their syrups "in the proper courts of the state of Michigan, and in a proper manner." These efforts, it is alleged, have failed; and it is further alleged that, in all the acts and doings of the appellee, complained of, he was and is acting as a private citizen of the state, but "under cover of his said office of dairy and food commissioner." That his powers and duties as such officer [490]*are clearly defined in the statutes to which reference is made.

The intimidating effect of the acts of appellee upon the dealers in the syrups is set out, and the detriment resulting therefrom to appellants detailed.

It is manifest from this summary of the allegations of the bill that this is not a suit against the state. Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701. It is not a suit, as was Arbuckle v. Blackburn, supra, to restrain a criminal prosecution. Indeed, the bill alleges that a criminal prosecution was invited by appellants and refused by appellee, and refused, it is alleged, to serve the purpose of what the bill denominates a "crusade" against the syrups of appellants, and in dereliction of duties enjoined by the statutes of the state.

Decree reversed and the case remanded for further proceedings.

Mr. Justice **Harlan** concurs in the decree.

IN THE MATTER OF ALBERT N. MOORE, an Infant, by Next Friend, Petitioner.

(See S. C. Reporter's ed. 490-513.)

Removal of causes — consent to Federal jurisdiction.

1. Plaintiff must be deemed to have consented to accept the jurisdiction of a Federal circuit court over a suit removed from a state court on defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the Federal court. signed a stipulation giving time to the defendant to answer, and entered with the defendant into successive stipulations for continuances.

Infants — selection of tribunal by next friend.

2. A next friend may select the tribunal in which a suit brought on behalf of an infant shall be prosecuted.

Removal of causes — nonresidence of both parties — consent.

3. Consent of both parties waives all objections to the jurisdiction of a Federal circuit court to which has been removed from a state court, for diverse citizenship, a suit which, by reason of the nonresidence of both parties, could not, in view of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, have been brought in that particular Federal circuit court in the first instance.

[No. 17, Original.]

Argued and submitted March 9, 1908. Decided April 20, 1908.

PETITION for a writ of mandamus to compel the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to remand a case to the state court from which it had been removed. Denied.

Statement by Mr. Justice **Brewer**:

This is an application by petitioner for a writ of mandamus to compel the circuit court of the United States for the eastern division of the eastern judicial district of Missouri to remand the case of this petitioner v. The Louisville & Nashville Railroad Company to the state court from whence it came.

The facts are these: On November 16, 1906, Albert Newton Moore, an infant, over the age of fourteen years, presented his petition to the circuit court of the city of St. Louis, Missouri, stating that he desired to institute a suit in that court against the Louisville & Nashville Railroad Company, and praying for the appointment of a next friend; whereupon George Safford, of St. Louis, was duly appointed such next friend. Thereupon a petition was filed in said state court in the name of Moore, by his next friend, against the Louisville & Nashville Railroad Company, to recover damages for personal injuries. After service of summons, but before answer was due, the railroad company filed its application for removal to the circuit court of the United States for the eastern division of the eastern judicial district of Missouri. This application for removal was based on the ground of diverse citizenship, and alleged that the plaintiff Moore was a citizen and resident of the state of Illinois; that Safford, the next friend, was a resident and citizen of the state of Missouri, and the defendant, a corporation created and existing under the laws of the state of Kentucky, and a citizen and resident of that state. The petition and bond were in due form, and the case was transferred to the United States circuit court. Thereafter, and on March 22, 1907, the plaintiff filed in that court an amended petition. On March 25, by stipulation of the parties, the defendant was given time to plead to the plaintiff's amended petition. Three or four times thereafter stipulations *for continuances [492] were entered into by the counsel for both sides. At the September term, 1907, a motion to remand, made by the plaintiff, was overruled, and a subsequent application to reconsider this ruling was also overruled. Thereupon this application for mandamus was presented.

Messrs. **Shepard Barclay** and **Thomas T. Fauntleroy** submitted the cause for petitioner:

Although an action may be within the original jurisdiction of a court, yet if the cause is brought within its purview by invoking its derivative or appellate jurisdiction in some unauthorized manner, the original jurisdiction cannot avert the consequences of such deficiency of procedure; nor can consent in such case confer jurisdiction over the cause.

State v. Potter, 16 Kan. 80; Robinson v.

NOTE.—As to control of guardian *ad litem* or next friend over action—see note to Eidam v. Finnegan, 16 L.R.A. 507.

Walker, 45 Mo. 120; Moulder v. Anderson, 63 Mo. App. 39; Latham v. Edgerton, 9 Cow. 229.

This court, in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the Federal courts, would, on its own motion, take the objection of the want of jurisdiction in the circuit court,—especially as regards citizenship.

Hilton v. Dickinson, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424; Morgan v. Gay, 19 Wall. 81, 22 L. ed. 100; Cameron v. Hodges, 127 U. S. 325, 32 L. ed. 133, 8 Sup. Ct. Rep. 1154.

Every form of collusive jurisdiction, or that acquired by mere consent, is beyond the pale of Federal cognizance.

Turnbull v. Ross, 72 C. C. A. 609, 141 Fed. 649.

Where a Federal court is without jurisdiction on removal, it is not conferred by the acts of the plaintiff in participating in the steps taken in the suit after removal.

Crane Co. v. Guanica Centrale, 132 Fed. 713. To the same effect are Cella v. Brown, 75 C. C. A. 608, 144 Fed. 742, and Mitchell Engineering & Machinery Co. v. Worthington, 140 Fed. 947.

The waiver theory must depend solely upon the application of original jurisdiction in the Federal circuit court to proceedings instituted therein by removal process. And if the original jurisdiction of the court is to be invoked to sustain such proceedings, the pleadings in the Federal court must affirmatively show the requisite diverse citizenship, without resorting to facts alleged in the removal petition.

Stevens v. Nichols, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; Mattingly v. Northwestern Virginia R. Co. 158 U. S. 53, 39 L. ed. 894, 15 Sup. Ct. Rep. 725; Graves v. Corbin, 132 U. S. 585, 33 L. ed. 467, 10 Sup. Ct. Rep. 196; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727; Craswell v. Belanger, 6 C. C. A. 1, 15 U. S. App. 104, 56 Fed. 529; MacNaughton v. South Pacific Coast R. Co. 10 Sawy. 111, 19 Fed. 881; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Kellam v. Keith, 144 U. S. 568, 36 L. ed. 544, 12 Sup. Ct. Rep. 922; Powers v. Chesapeake & O. R. Co. 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; Kinney v. Columbia Sav. & L. Asso. 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

No amount of moves, by either or both parties in the Federal court, could cure fatal blemishes flaunted openly in the removal petition.

Baxter S. & S. Const. Co. v. Hammond Mfg. Co. 154 Fed. 992; Yellow Aster Min. & Mill. Co. v. Crane Co. 80 C. C. A. 566, 150 Fed. 580; Goldberg B. & Co. Co. v. German Ins. Co. 152 Fed. 834; Ex parte Wisner, supra.

Since the Federal court cannot take jurisdiction of a cause by the mere consent of parties, the right to have the cause remanded for want of jurisdiction cannot be waived by lapse of time or by any proceedings taken in the cause in the Federal court.

Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 2; Frisbie v. Chesapeake & O. R. Co. 57 Fed. 1; Southworth v. Reid, 36 Fed. 451; Bronson v. St. Croix Lumber Co. 35 Fed. 634; Indiana v. Tolleston Club, 53 Fed. 18; Wabash R. Co. v. Barbour, 19 C. C. A. 546, 43 U. S. App. 102, 73 Fed. 513; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; Ayers v. Watson, 113 U. S. 598, 28 L. ed. 1094, 5 Sup. Ct. Rep. 641; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 690, 38 L. ed. 317, 14 Sup. Ct. Rep. 533; 18 Enc. Pl. & Pr. p. 369; Crane Co. v. Guanica Centrale, supra; Olds Wagon Works v. Benedict, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1; Parkinson v. Barr, 105 Fed. 81.

Until a next friend is appointed by the court in which the suit is intended to be brought, or by a judge or clerk thereof, an infant cannot become subject to the jurisdiction of a court.

Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 So. 98.

The appearance of an infant by a next friend or guardian *ad litem* is not, of itself, sufficient to bring the person of the infant within the jurisdiction of a court. Even a judgment founded on such an appearance has been held void; and other rulings in many ways assert the force of the proposition last stated.

10 Enc. Pl. & Pr. p. 613; Nagel v. Schilling, 14 Mo. App. 576; Ingersoll v. Mangan, 84 N. Y. 622; Carver v. Carver, 64 Ind. 194; Martin v. Starr, 7 Ind. 224; Gray v. Palmer, 9 Cal. 616; Frazier v. Pankey, 1 Swan, 75; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Bonnell v. Holt, 89 Ill. 72; Dickison v. Dickison, 124 Ill. 483, 16 N. E. 861; Fitch v. Cornell, 1 Sawy. 157, Fed. Cas. No. 4,834; Greenman v. Harvey, 53 Ill. 386; Hendricks v. McLean, 18 Mo. 32; Gibson v. Chouteau, 39 Mo. 537; Shaw v. Gregoire, 41 Mo. 407; Kansas City, St. J. & C. B.

R. Co. v. Campbell, 62 Mo. 585; Campbell v. Laclede Gaslight Co. 84 Mo. 352; Fischer v. Siekmann, 125 Mo. 165, 28 S. W. 435; Bogart v. Bogart, 138 Mo. 419, 40 S. W. 91; Wright v. Hink, 193 Mo. 130, 91 S. W. 933; McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902.

The citizenship of a next friend, such as the Missouri statutes prescribe and habilitate, can neither create nor defeat Federal jurisdiction. He is not a party to the action, within the purview of the Federal law concerning diverse citizenship.

Williams v. Ritchey, 3 Dill. 406, Fed. Cas. No. 17,734; Blumenthal v. Craig, 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320; Crandall v. Slaid, 11 Met. 288; Voss v. Neineber, 68 Fed. 947; Morgan v. Potter, 157 U. S. 195, 39 L. ed. 670, 15 Sup. Ct. Rep. 590; Brown v. Hull, 16 Vt. 673; Sinclair v. Sinclair, 13 Mees. & W. 640; Jones v. Kansas City, Ft. S. & M. R. Co. 178 Mo. 542, 101 Am. St. Rep. 434, 77 S. W. 890; Bryant v. Livermore, 20 Minn. 343, Gil. 271; Duffy v. Pinard, 41 Vt. 297; Mason v. McCormick, 75 N. C. 263.

His position is rather that of an attorney, with strictly limited powers.

Anonymous, 2 Hill, 417; Tate v. Mott, 96 N. C. 22, 2 S. E. 176.

A guardian *ad litem* or next friend cannot, by admissions or stipulations, surrender the rights of the infant.

Kingsbury v. Buckner, 134 U. S. 680, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638.

A next friend appointed by a state court could not institute an action for the minor in a Federal court, and thereby bring his infant charge into the latter court, without an appointment by the Federal court, if the original jurisdiction of the latter is to be invoked. The authority of such a representative of a minor is limited to the field or domain in which he is expressly authorized to serve or act.

Morgan v. Potter, 157 U. S. 197, 39 L. ed. 671, 15 Sup. Ct. Rep. 590.

A judgment or decree based on a jurisdiction obtained over an infant by appearance of his guardian *ad litem* is void.

O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840; New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580; Hatch v. Ferguson, 57 Fed. 966; Ingersoll v. Mangan, 84 N. Y. 622; Kingsbury v. Kingsbury, Fed. Cas. No. 7,817, and note, 3 Biss. 60.

An infant's personal acceptance of service is void to confer jurisdiction over him.

Bass v. Bass, 78 N. C. 374; Whitesides v. Barber, 24 S. C. 373.

His appearance by attorney gives no jurisdiction.

Bailey v. McGinniss, 57 Mo. 362; Copeland v. Yoakum, 38 Mo. 349.

When a next friend or guardian has been duly appointed by the proper court, such representative of an infant may appropriately take such steps as the court sanctions, in speeding the cause and in fairly executing his trust.

Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121.

But within the range of such duties and powers does not fall the right to make an essential appearance for the infant in another court, otherwise without jurisdiction, and thereby to waive (as is claimed) the right to trial and other proceedings in the court which appointed him.

Verrier v. Verrier, 7 Phila. 618.

A guardian *ad litem* has no power to choose a tribunal to try the infant's cause, and hence cannot consent to submit it for decision by a referee or a master, or to arbitrators.

Jenkins v. Freyer, 4 Paige, 47; Gamache v. Prevost, 71 Mo. 84; Hannum v. Wallace, 9 Humph. 129; Fisher v. Stilson, 9 Abb. Pr. 33; Frazier v. Pankey, 1 Swan, 75; O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 842; New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580.

To enable a statute guardian to bind his ward by a proceeding in a court of justice, some statute authority must be found for his act.

Mathewson v. Sprague, 1 Curt. 457, Fed. Cas. No. 9,278.

A next friend or guardian *ad litem* may not waive or admit away any substantial right of the infant he represents.

Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638.

Mr. **Harold R. Small** argued the cause, and, with Messrs. P. Taylor Bryan and Harvey L. Christie, filed a brief for respondent.

Adults can waive the benefit of the venue clause; and when they do, jurisdiction attaches.

Gracie v. Palmer, 8 Wheat. 699, 5 L. ed. 719; Toland v. Sprague, 12 Pet. 300, 327, 9 L. ed. 1093, 1104; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; First Nat. Bank v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37; McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; Martin v. Baltimore & O. R. Co.

(Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Merchants Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285; Corwin Mfg. Co. v. Henrici Washer Co. 151 Fed. 938; Louisville & N. R. Co. v. Fisher, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68; Shanberg v. Fidelity & C. Co. 158 Fed. 1; McPhee & McG. Co. v. Union P. R. Co. 158 Fed. 5; Logan v. Postal Teleg. & Cable Co. 157 Fed. 570; Re Metropolitan Railway Receivership (Re Reisenberg) 208 U. S. 90, ante, 403, 28 Sup. Ct. Rep. 219; 4 Fed. Stat. Anno. p. 317; Thayer, Jurisdiction of Fed. Courts, p. 26, § 36; Rose, Fed. Proc. "Venue," § 401f, p. 503; Desty, Fed. Proc. § 26, p. 154; 17 Am. & Eng. Enc. Law, 2d ed. p. 1064; Brown, Jurisdiction, § 49; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

A next friend may waive.

Raming v. Metropolitan Street R. Co. 157 Mo. 514, 50 S. W. 791, 57 S. W. 268; Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.

The next friend is the party whose residence under the venue clause is to be considered.

Mexican C. R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Raming v. Metropolitan Street R. Co. supra.

Mr. Justice **Brewer** delivered the opinion of the court:

It was held in Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, that—

"Under §§ 1, 2, 3. of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), as amended by the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), corrected by the act of August 13, 1888 (25 Stat. at. L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), an action commenced in a state court, by a citizen of another state, against a nonresident defendant, who is a citizen of a state other than that of the plaintiff, cannot be removed by the defendant into the circuit court of the United States."

On the authority of this case it is contended by petitioner that as in this action none of the parties were citizens of the state of Missouri, it could not be removed [496] by the defendant *into the circuit court of the United States, and that, upon the failure of the United States circuit court to remand the case to the state court in which it was originally brought, mandamus from this court is an appropriate remedy. But in that case the plaintiff never consented to accept the jurisdiction of the United States court, while in this case it is contended that both parties did so consent, and that therefore the decision in that case is not controlling.

This brings up two questions: First, whether both parties did consent to accept the jurisdiction of the United States court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States court.

That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the state to the United States court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that court.

That a next friend may select the tribunal in which the suit shall be brought is clear. While he may do nothing prejudicial to the substantial rights of the minor, yet the mere selection of one out of many tribunals having jurisdiction cannot be considered as an act to the latter's prejudice. Certainly the election to accept the jurisdiction of a court of the United States is not an act prejudicial to substantial rights. In Kingsbury v. *Buckner, 134 U. S. 650, 33 [497] L. ed. 1047, 10 Sup. Ct. Rep. 638, where the next friend consented that a case on a writ of error might be heard in some other grand division of the supreme court of Illinois than the one in which it was decided, and at a term of that court earlier than such writ of error could ordinarily be heard, and also waived the execution of an appeal bond by the opposite party, it was held that the infant was bound by such action, the court saying (p. 680):

"Now it is contended that the supreme court of the state, sitting in the central grand division, could not, except by consent, entertain jurisdiction of those appeals, and that the next friend and guardian *ad litem* was incapable, in law, of giving such consent. It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming or appointed to represent him. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved."

Again, in Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121, where the question was whether the infant was bound by a consent decree, it was said (462):

"That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said: 'Although the court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet, when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit.'

. . . .

"In Walsh v. Walsh, 116 Mass. 377, 17 [498] Am. Rep. 162, a decree had *been entered as follows: 'And the plaintiff and the defendants, . . . Thomas Keyes, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree: And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William, it is thereupon ordered and adjudged and decreed,' etc.

"On a bill of review, filed by the minors, this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said:

"'An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. Tillotson v. Hargrave, 3 Madd. Ch. 494; Levy v. Levy, 3 Madd. Ch. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. Lippiat v. Holley, 1 Beav. 423; Brooke v. Mostyn, 33 Beav. 457; and 2 De G. J. & S. 373.

"'If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. Wall v. Bushby, 1 Bro. Ch. 484; 1 Dan. Ch. Pl. & Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal, or review. Webb v. Webb, 3 Swanst. 658; Harrison v. Rumsey, 2 Ves. Sr. 488; Bradish v. Gee, Ambl. 229, s. c. 1 Ld. Kenyon, 73; Downing v. Cage, 1 Eq. Cas. Abr. 165; Toder v. Sansam, 1 Bro. P. C. 2d ed. 468; French v. Shotwell, 5 Johns. Ch. 555.'"

This also seems to be the settled law of Missouri. Raming v. *Metropolitan Street [499] R. Co. 157 Mo. 477, 50 S. W. 791, 57 S. W. 268. In that case it was held that the next friend was the party to make application and affidavit for a change of venue from one state court to another, and the court said (p. 514):

"Section 2261, Revised Statutes 1889, requires the application and affidavit to be made by the party, and it has been held that this means the party in his own person, and not by agent or attorney. Squires v. Chillicothe, 89 Mo. 226, 1 S. W. 23 . . . . But it has never been decided in case of an infant suing by his next friend that the application cannot be made by the next friend.

"A next friend is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, but an infant cannot appoint an agent and empower him to do an act which, in contemplation of law, he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied.

. . . .

"It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him. The next friend derives his authority from the court which appoints him; and, as he is appointed to institute and conduct the suit, it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. If this statute is to be considered so strictly as to deny the next friend the authority to make an application for a change of venue, then we necessarily deny to infants, who are unable to act for themselves, the equal protection with other litigants that the statute was designed to afford. Not only would this be rank injustice to a class for whose interests the law has always been watchful, but it would raise a serious question as to the validity of the statute itself. . . . It is intended here to say that, in the suit of an infant by his next friend, the next friend is the proper person to make the application for a change of venue."

[500] *Turning now to the other question, the Constitution, art. 3, § 2, provides that the judicial power of the United States shall extend to controversies "between citizens of different states." Section 11 of the judiciary act of 1789 (1 Stat. at L. 78, chap. 20) granted to the circuit courts original cognizance "of all suits of a civil nature at common law or in equity, where . . . the suit is between a citizen of the state where the suit is brought and a citizen of another state," and added: "And no civil suit shall be brought before either of said courts [circuit or district] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Section 12 provided "that if a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought, against a citizen of another state," a removal might be had of the case to the next circuit court to be held in the district where the suit is pending. The 1st section of the act of August 13, 1888, supra, like the judiciary act, invested the circuit courts of the United States with original cognizance of suits in which there is a controversy between citizens of different states, provided that no civil suit should be brought before either of said courts (circuit or district) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, and closed with [contained] these words: "But, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The second sentence of § 2 [of the act of 1875 as amended by this act of 1888] prescribed, in respect to removals, that "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that [501] state." It will thus be *seen that by both the act of 1789 and that of 1888 there is a general grant to circuit courts of jurisdiction over controversies between citizens of different states, and in each of them there is a limitation as to the district in which the action must be brought. In the light of this similarity between these two acts must the second question be considered.

The contention is that, as this action could not have been originally brought in the circuit court of the eastern district of Missouri by reason of the last provision quoted from § 1, it cannot, under § 2, be removed to that court, as the authorized removal is only of those cases of which, by the prior section, original jurisdiction is given to the United states circuit courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought.

It may be well to examine the authorities touching this matter. In Gracie v. Palmer, 8 Wheat. 699, 5 L. ed. 719, the court, by Mr. Chief Justice Marshall, held that—

"The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance."

In Toland v. Sprague, 12 Pet. 300, 330, 9 L. ed. 1093, 1105, Mr. Justice Barbour thus stated the rule:

"Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive. . . . *Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. [502] 666; and Barry v. Foyles, 1 Pet. 311, 7 L. ed. 157."

In Ex parte Schollenberger, 96 U. S. 369, 378, 24 L. ed. 853, 855, Mr. Chief Justice Waite said:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

In First Nat. Bank v. Morgan, 132 U. S. 141, 145, 33 L. ed. 282, 284, 10 Sup. Ct. Rep. 37, 38, Mr. Justice Harlan thus referred to a kindred question:

"This exemption of national banking associations from suits in state courts established elsewhere than in the county or city in which such associations were located was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. . . . If it [the exemption] had been claimed by the defendant when appearing in the superior court of Cleveland county, it must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the supreme court of the state, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. . . . We are of opinion that its exemption from suits in other courts of the same state was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress."

In McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485, 486, Mr. Chief Justice Fuller, quoting the provisions of § 1 of the act of 1888, said:

"The jurisdiction common to all the cir-[503]cuit courts of the United *States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause [the last clause in the section] relates to the district in which a suit may be originally brought."

In St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 131, 35 L. ed. 659, 661, 11 Sup. Ct. Rep. 982, 983, it was said:

"Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different states, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive; and he does waive it by pleading to the merits.

. . . . . .

"Without multiplying authorities on this question, it is obvious that the party who, in the first instance, appears and pleads to the merits, waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit had been brought in the wrong district. First Nat. Bank v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36."

In Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 453, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935, 938, a case arising after the act of 1888, and in which the defendant promptly raised the question of jurisdiction, Mr. Justice Gray referred to this matter in these words:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York, by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in the wrong district. Gracie v. Palmer, 8 *Wheat. 699, 5 L. ed. 719; St. [504] Louis & S. F. R. Co. v. McBride, supra, and cases cited."

See also Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

In Central Trust Co. v. McGeorge, 151 U. S. 129, 132, 38 L. ed. 98, 99, 14 Sup. Ct. Rep. 286, 287, an action after the act of 1888 was in force, and in which neither party was a citizen of the state or resided in the district in which the action was brought, Mr. Justice Shiras used this language:

"Undoubtedly, if the defendant company, which was sued in another district than that in which it had its domicil, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court [in dismissing the complaint] would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits."

In Martin v. Baltimore & O. R. Co. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533, where objection was made to a removal on the ground that the removal petition was filed too late, Mr. Justice Gray, on page 688, observed:

"The time of filing a petition for the removal of a case from a state court into the circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district, a noncompliance with which is waived by a defendant who does not seasonably object that [505]the suit is brought in the *wrong district. Gracie v. Palmer, supra; Taylor v. Longworth, 14 Pet. 172, 174, 10 L. ed. 405, 406; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286."

In Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 208, 39 L. ed. 672, 675, 15 Sup. Ct. Rep. 563, 565, Mr. Chief Justice Fuller, after stating that the action could not have been originally brought in the circuit court of the United States, because both parties were, in the eyes of the law, citizens of the same state, added:

"It is true that, by the 1st section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant and may be waived by him. St. Louis & S. F. R. Co. v. McBride, supra. Section 2, however, refers to the first part of § 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485."

In Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 219, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272, 273, Mr. Justice Gray thus stated the law:

"Diversity of citizenship is a condition of jurisdiction; and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance, without taking the objection."

In Ex parte Wisner, 203 U. S. 461, 51 L. ed. 268, 27 Sup. Ct. Rep. 153, Mr. Chief Justice Fuller, referring *to St. Louis & S. [506] F. R. Co. v. McBride, supra, said:

"As the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect."

Several other cases in this court, as well as many in the circuit courts and circuit courts of appeal, might be noticed, in which a similar ruling as to the effect of a waiver was announced. It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in Kinney v. Columbia Sav. & L. Asso. 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30, a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal court, and if, when the defendant is brought into a Federal court by the service of original process, he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a circuit court or one subsequently removed from a state court; and, if any objection arises to the particular court which does not run to the circuit courts as a class, that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in *that court, and he is, [507] equally with the defendant, precluded from making objection to its jurisdiction.

Special reliance is placed by petitioner upon this statement in the Wisner Case (p. 460):

"But it is contended that Beardsley was

entitled to remove the case to the circuit court, and as, by his petition for removal, he waived the objection so far as he was personally concerned, that he was not sued in his district, hence, that the circuit court obtained jurisdiction over the suit. This does not follow, inasmuch as, in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the circuit courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

It is said that here is a distinct declaration that "jurisdiction of the suit could not have obtained, even with the consent of both parties." There was no pretense of any consent on the part of the plaintiff in that case, and therefore this statement was unnecessary. In order, however, to prevent future misconception we add that nothing in the opinion in the Wisner Case is to be regarded as changing the rule as to the effect of a waiver in respect to a particular court.

It may not be amiss to note that in several of the circuit courts and courts of appeal the Wisner Case has been considered, and in all held that no change was intended by it. Corwin Mfg. Co. v. Henrici Washer Co. opinion by Lowell, circuit judge, 151 Fed. 938; Louisville & N. R. Co. v. Fisher, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68, circuit court of appeals (sixth circuit), opinion by Lurton, circuit judge; Shanberg v. Fidelity & C. Co. [158 Fed. 1] circuit court of appeals (eighth circuit), opinion by Riner, district judge; McPhee & McG. Co. v. Union P. R. Co. [158 Fed. 5] circuit court of appeals (eighth circuit), opinion by Sanborn, circuit judge.

We might also refer to the several textbooks in which is affirmed the general doctrine of the effect of the waiver of an [508] *objection to a particular court in which the suit has been brought or to which it has been removed. We have made these many quotations and references, not simply to establish the doctrine itself, but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule; for if, in a case between citizens of different states, of which the circuit courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.

The jurisdiction of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri was settled by the proceedings had by the two parties, and the application for a writ of mandamus is denied.

The CHIEF JUSTICE, dissenting:

The right of action was not vested in the next friend, and the citizenship of the infant controls. The case is one, therefore, in which the plaintiff was a citizen and resident of the state of Illinois, and the defendant a corporation created and existing under the laws of the state of Kentucky, and a citizen and resident of that state. The action was brought in the circuit court of the city of St. Louis, Missouri, of which state neither of the parties was a citizen. The fact that the next friend, who also acted as attorney at law for the minor, was a citizen of Missouri, is immaterial.

The question is whether, where neither of the parties is a citizen of the state in which the action is brought, the jurisdiction *of the circuit court can be maintained [509] if both parties consent to it. Jurisdiction of the circuit courts depends upon some act of Congress (Stevenson v. Fain, 195 U. S. 165, 167, 49 L. ed. 142, 143, 25 Sup. Ct. Rep. 6; Turner v. Bank of North America, 4 Dall. 8, 10, 1 L. ed. 718, 719; M'Intire v. Wood, 7 Cranch. 504, 506, 3 L. ed. 420, 421): and I quote at length from the opinion of Mr. Justice Gray in Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935, because he therein examines the statutory provisions bearing on the question before us, saying:

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different states,' Congress, by the judiciary act of September 24, 1789, chap. 20, § 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, 'between a citizen of the state where the suit is brought and a citizen of another state,' and provided that 'no civil suit shall be brought' 'against an inhabitant of the United States,' 'in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. at L. 78, 79.

"The word 'inhabitant,' in that act, was apparently used, not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state, like the districts of Maine and Massachusetts in the state of Massachusetts, and the districts of Virginia and Kentucky in the state of Virginia, established by § 2 of the same act. 1 Stat. at L. 73, chap. 20. It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought was not sufficient to support the jurisdiction, because, in the common use of words, a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the state, which was the fact on which the jurisdiction depended under the provisions of the Constitution and of the judiciary act. . . .

"By the act of May 4, 1858, chap. 27, § 1, [510] it was enacted that, *in a state containing more than one district, actions not local should 'be brought in the district in which the defendant resides,' or, 'if there be two or more defendants residing in different districts in the same state,' then in either district. 11 Stat. at L. 272, U. S. Comp. Stat. 1901, p. 587. The whole purport and effect of that act was not to enlarge, but to restrict and distribute, jurisdiction. It applied only to a state containing two or more districts; and directed suits against citizens of such a state to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the state of which they were citizens, but simply prescribed in which district of that state they might be sued.

"These provisions of the acts of 1789 and 1858 were substantially re-enacted in §§ 739 and 740 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 587).

"The act of March 3, 1875, chap. 137, § 1, after giving the circuit courts jurisdiction of suits 'in which there shall be a controversy between citizens of different states,' and enlarging their jurisdiction in other respects, substantially re-enacted the corresponding provision of the act of 1789 by providing that no civil suit should be brought 'against any person,' 'in any other district than that whereof he is an inhabitant or in which he shall be found' at the time of service, with certain exceptions not affecting the matter now under consideration. 18 Stat. at L. 470, U. S. Comp. Stat. 1901, p. 508.

"The act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant,' but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L. 552, chap. 373; 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit *to be brought in any other [511] district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but, where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.' McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485. And the general object of this act, as appears upon its face, and has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. Smith v. Lyon, 133 U. S. 315, 320, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; Re Pennsylvania Co. 137 U. S. 451, 454, 34 L. ed. 741, 11 Sup. Ct. Rep. 143; Fisk v. Henarie, 142 U. S. 459, 467, 35 L. ed. 1080, 1082, 12 Sup. Ct. Rep. 207.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant;' and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

Treating the clause that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" as by way of proviso, that proviso must be regarded as excluding from the enacting clause "some possible [512] ground of misinterpretation of it, as *extending to cases not intended by the legislature to be brought within its purview." Minis v. United States, 15 Pet. 445, 10 L. ed. 799; Austin v. United States, 155 U. S. 431, 39 L. ed. 211, 15 Sup. Ct. Rep. 167.

Jurisdiction of the subject-matter is given only by law, and cannot be conferred by consent, and, therefore, the objection that a court is not given such jurisdiction by law, if well founded, cannot, of course, be waived by the parties.

In my judgment, § 1, in cases where litigants are citizens of different states, confers jurisdiction only on the circuit court of the district of the plaintiff's residence and the circuit court of the district of the defendant's residence. And it is not conferred on the circuit court of the district of neither of them, and cannot be even by consent. If this were not so, as Mr. Justice Harlan said in Börs v. Preston, 111 U. S. 255, 28 L. ed. 420, 4 Sup. Ct. Rep. 407: "It would be in the power of the parties, by negligence or design, to invest those courts with a jurisdiction expressly denied to them;" or where it may also be said, such jurisdiction was not expressly conferred. This view was expressed in Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; and although it is true that the proposition need not have been there announced, because in that case it was correctly decided that there was not a consent to the jurisdiction by both parties, yet the rule was so laid down, and the result of the opinion in this case is to disapprove of and overrule Ex parte Wisner, so far as that proposition is concerned. And as I adhere to that view I dissent.

But it should be added that this case was brought in a state court, and removed by the defendant into the Federal court under the 2d section of the act of August 13, 1888, which provided "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state." And it is settled that, in order to make a suit removable under this part of the act, it must be one [513] *which the plaintiff could have brought originally in the United States circuit court. The right of removal given to the nonresident defendant or defendants by the 2d clause of § 2, removing the cause from the state court to the United States circuit court, is subject to the limitations of that clause that it must be a suit within the jurisdiction of such circuit court, and that it must be removed to the proper district, and therefore the act does not authorize him or them to remove it to the United States circuit court held in a district wherein that court was not given jurisdiction of the suit removed, or to any other judicial district in which the suit is not pending, as provided in § 3. Plaintiff brought his suit in a district wherein the defendant could not be sued in the Federal court within the meaning of the act. Hill v. Woodland Amusement Co. 158 Fed. 530.

The proper district within the meaning of the 2d clause of the 2d section means either of the districts made "proper districts" by the 1st section of the act; and when the 3d section requires the petition to be "for the removal of such suit into a circuit court to be held in the district where such suit is pending," it must have been contemplated that the suit would be pending in a "proper district." It is plain that the entire act is not to be construed as giving jurisdiction by reason of citizenship to a circuit court held in a state of which neither party is a citizen, but, on the contrary, that it restricts the jurisdiction to the district in which one of the parties resides, within the state of which he is a citizen.

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*COMMONWEALTH OF VIRGINIA, Complainant, [514]
v.
STATE OF WEST VIRGINIA, Dft.

(See S. C. Reporter's ed. 514-537.)

Reference — in suit between states.

Reference to a special master decreed in a suit begun by an original bill in equity, filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state.

[No. 4, Original.]

Argued April 9, 10, 1908. Decided May 4, 1908.

ORIGINAL BILL in equity filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. Reference to special master decreed.

See same case on demurrer, 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 732.

Mr. **William A. Anderson** argued the cause and filed a brief for complainant.

Mr. **Randolph Harrison** also argued the cause for complainant.

Messrs. **John C. Spooner** and **John G. Carlisle** argued the cause, and, with Messrs. C. W. May, Charles E. Hogg, W. Mollohan, George W. McClintic, and W. G. Matthews, filed a brief for defendant.

Mr. **Holmes Conrad** argued the cause and filed a brief as *amicus curiæ*.

Mr. Chief Justice **Fuller** announced the following order:

This cause having been heard upon the [535] pleadings and accompanying *exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the commonwealth of Virginia on the 1st day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law, and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and value† of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the commonwealth of Virginia within the territory now constituting the state of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the state of West Virginia, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the state of Virginia.

6. All moneys paid into the treasury of the commonwealth from the counties included within the state of West Virginia during the period prior to the admission of the latter state into the Union.

7. The amount and value of all money, property, stocks, and credits which West Virginia received from the commonwealth of Virginia, not embraced in any of the preceding items, and *not including any property, [536] stocks, or credits which were obtained or acquired by the commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the commonwealth of Virginia and the state of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make, or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents, and public records of either state, relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which, in the judgment of the master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two states since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

*The master is authorized and empowered, [537] subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

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†[Modified on June 1, 1908, by substituting "assessed valuation" for "value."—Ed.]

The complainant shall cause the sum of $5,000 to be deposited with the marshal of this court to the credit of this cause, and such further sums as, from time to time, may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters, and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may, in his judgment, be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts, and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the attorneys general of the respective states.

The master will make his report with all convenient speed, and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest, of the costs of this suit, and all further directions until after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[539]*UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, Plaintiff in Error, v. HARRY SPINKS. [No. 445.]

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 29 Ky. L. Rep. 960, 13 L.R.A. (N.S.) 1053, 96 S. W. 889.

Messrs. Wm. Marshall Bullitt, Charles E. Patterson, and John G. Carlisle for plaintiff in error.

Messrs. J. H. Hazelrigg and L. J. Crawford for defendant in error.

March 2, 1908. Dismissed for the want of jurisdiction.

NORTHWESTERN ELEVATED RAILROAD COMPANY, Plaintiff in Error, v. PEABODY COAL COMPANY et al. [No. 560.]

In Error to the Supreme Court of the State of Illinois.

See same case below, 230 Ill. 214, 82 N. E. 573.

Mr. Clarence A. Knight for plaintiff in error.

Mr. Horace Kent Tenney for defendants in error.

March 2, 1908. Dismissed for the want of jurisdiction.

JOHN BOYD, Plaintiff in Error, v. STATE OF TEXAS. [No. 151.]

In Error to the Court of Criminal Appeals of the State of Texas.

See same case below (Tex. Crim. App.) 96 S. W. 1079.

Mr. H. M. Garwood for plaintiff in error.

Mr. Robert V. Davidson for defendant in error.

March 9, 1908. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Gibson v. Mississippi, 162 U. S. 565, 590, 40 L. ed. 1075, 1081, 16 Sup. Ct. Rep. 904; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87.

*RODERICK LEAN MANUFACTURING COMPANY,[54 Plaintiff in Error, v. REINHART KUELLING. [No. 554.]

In Error to the Supreme Court of the State of New York.

Mr. Sardius D. Bentley for plaintiff in error.

Mr. Eugene Van Voorhis for defendant in error.

March 16, 1908. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; Fisk v. Henarie, 142 U. S. 459, 35 L. ed. 1080, 12 Sup. Ct. Rep. 207; McDonnell v. Jordan, 178 U. S. 229, 44 L. ed. 1048, 20 Sup. Ct. Rep. 886; Pennsylvania Co. v. Bender, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591; Re Pennsylvania Co. 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 870, 18 Sup. Ct. Rep. 435.

RICHARD H. FIELD et ux., Plaintiffs in Error, v. BARBER ASPHALT PAVING COMPANY et al. [No. 165.]

In Error to the Kansas City Court of Appeals of the State of Missouri.

Mr. Richard H. Field for plaintiffs in error.

Mr. W. C. Scarritt for defendants in error.

March 16, 1908. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Cockran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

OSBERN H. WILSON, Plaintiff in Error, v. ERIE RAILROAD COMPANY et al. [No. 247.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. Charles Koonce, Jr., and E. H. Moore for plaintiff in error.

Mr. William E. Cushing for defendants in error.

March 23, 1908. Dismissed for the want of jurisdiction.

[541]*EX PARTE: IN THE MATTER OF MICHAEL CRARCHILO, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Messrs. James K. Jones and William J. Stone for petitioner.

April 6, 1908. Denied.

EX PARTE: IN THE MATTER OF MICHAEL CRARCHILO, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Prohibition.

Messrs. James K. Jones and William J. Stone for petitioner.

April 6, 1908. Denied.

EX PARTE: IN THE MATTER OF SMOKELESS FUEL COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Messrs. Alexander H. Sands, Wm. L. Royall, and Geo. Bryan for petitioner.

April 13, 1908. Denied.

THOMAS M. FIELDS, Appellant, v. CHARLES E. HADDOX, Warden, etc. [No. 563.]

Appeal from the District Court of the United States for the Northern District of West Virginia.

Messrs. Frank J. Hogan, Henry E. Davis, and John C. Gittings for appellant.

The Attorney General and the Solicitor General for appellee.

April 13, 1908. *Per Curiam:* Final order affirmed with costs. Fields v. United States, 205 U. S. 292, 51 L. ed. 807, 27 Sup. Ct. Rep. 543, denying appeal from 27 App. D. C. 433; Re Eckart, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263.

CHARLES W. HUNTER et al., Petitioners, v. REBECCA A. JOHNSON et al. [No. 199.]

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 77 C. C. A. 359, 147 Fed. 133.

Messrs. L. P. Berry, James K. Jones, and A. B. Shafer for petitioners.

No appearance for respondents.

*April 20, 1908. Decree of United States[542] Circuit Court of Appeals reversed with costs, and decree of Circuit Court of the United States for the Eastern District of Arkansas affirmed with costs, and cause remanded to that court. Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261.

SAVINGS DEPOSIT BANK & TRUST COMPANY OF ELYRIA, OHIO, Appellant, v. NATHAN LOESER, Trustee of the Estate of Cassie L. Chadwick, Bankrupt. [No. 171.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 78 C. C. A. 597, 148 Fed. 975.

Messrs. W. W. Boynton and John C. Hale for appellant.

Messrs. Frederick L. Taft, Charles P. Hine, Amos Burt Thompson, Nathan Loeser, and C. K. Arten for appellee.

April 27, 1908. *Per Curiam:* Appeal dismissed for the want of jurisdiction. Chapman v. Bowen, 207 U. S. 89, ante, 116, 28 Sup. Ct. Rep. 32; and see First Nat. Bank v. Klug, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; General Order in Bankruptcy, 35.

JAMES S. YEATES, Appellant, v. GEORGE B. ROBERSON, Sheriff, etc. [No 680.]

Appeal from the District Court of the United States for the Southern District of Georgia.

Mr. John Randolph Cooper for appellant.

Mr. John C. Hart for appellee.

May 4, 1908. Final order affirmed.

CHARLES C. MAY, Petitioner, v. UNITED STATES. [No. 571.]

Petition for a Writ of Certiorari to *the[543] United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 157 Fed. 1.

Messrs. C. S. Voorhees and Reese H. Voorhees for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Sanford for respondent.

March 2, 1908. Denied.

WALLACE P. COOK et al., Petitioners, v. TIMOTHY FOLEY et al. [No. 590.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 81 C. C. A. 237, 152 Fed. 41.

Mr. George P. Wilson for petitioners.

Mr. Harris Richardson for respondents.

March 2, 1908. Denied.

MRS. ANNIE E. PENMAN, Petitioner, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY. [No. 598.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Frederic D. McKenney and A. J. Truitt for petitioner.

Mr. W. K. Jennings for respondent.

March 2, 1908. Granted.

J. H. FRIDAY et al., Petitioners, v. HALL & KAUL COMPANY. [No. 600.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Richard A. Ford for the petitioners.

March 2, 1908. Granted.

W. D. MUNSON, Petitioner, v. STANDARD MARINE INSURANCE COMPANY (LIMITED). [No. 601.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 156 Fed. 44.

Messrs. Eugene P. Carver and G. Philip Wardner for petitioner.

[544] Messrs. James Emerson *Carpenter, Samuel Park, and James K. Symmers for respondent.

March 2, 1908. Denied.

FRANKLIN H. SEELEY, Petitioner, v. BLANCHE LOWE SEELEY. [No. 612.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 30 App. D. C. 191.

Messrs. Barry Mohun and H. Prescott Gatley for petitioner.

No opposition.

March 2, 1908. Denied.

EMILIE SAXLEHNER, Petitioner, v. EDWARD WAGNER et al. [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Arthur V. Briesen, Antonio Knauth, and Frank F. Reed for petitioner.

Mr. Walter F. Murray for respondents.

March 2, 1908. Denied.

March 23, 1908. Order set aside, and writ granted.

COLORADO & NORTHWESTERN RAILROAD COMPANY, Petitioner, v. UNITED STATES. [No. 634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 15 L.R.A.(N.S.) 167, 157 Fed. 321.

Messrs. E. E. Whitted and John L. Thomas for petitioner.

No opposition.

March 2, 1908. Denied.

GEORGE C. LOCKLIN et al., Petitioners, v. GEORGE H. BUCK. [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 159 Fed. 434.

Messrs. Otto Raymond Barnett, Ernest Wilkinson, and Samuel T. Fisher for petitioners.

Mr. Wm. P. Martin for respondent.

March 2, 1908. Denied.

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*RICKEY LAND & CATTLE COMPANY, Petitioner, v. MILLER & LUX [No. 646]; and RICKEY LAND & CATTLE COMPANY, Petitioner, v. HENRY WOOD et al. [No. 653]. [545]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Frederic D. McKenney for petitioner.

Mr. W. B. Treadwell for Miller & Lux.

No counsel for Wood et al.

March 9, 1908. Granted.

HARPER M. ORAHOOD, Petitioner, v. ARTHUR M. EPPSTEIN, Trustee. [No. 519.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 156 Fed. 42.

Mr. Harvey Riddell for petitioner.

Messrs. Simon Wolf and Myer Cohen for respondent.

March 9, 1908. Denied.

Central Coal & Coke Company, Petitioner, v. Doc W. Sutton. [No. 613.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Holmes Conrad for petitioner.

Mr. N. W. Finley for respondent.

March 9, 1908. Denied.

Henson Collier, Petitioner, v. Missouri, Kansas, & Texas Railway Company. [No. 645.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 157 Fed. 347.

Mr. William Warner for petitioner.

Mr. Geo. P. B. Jackson for respondent.

March 9, 1908. Denied.

Scruggs, Vandervoort, & Barney Dry Goods Company, Petitioner, v. United States. [No. 636.]

[546] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 156 Fed. 940.

Mr. Everit Brown for petitioner.

The Attorney General and the Solicitor General for respondent.

March 16, 1908. Denied.

Edgar E. Heavenrich, Trustee, etc., Petitioner, v. Carrie W. Haley. [No. 659.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 158 Fed. 74.

Mr. Bernard B. Selling for petitioner.

Mr. Alex. J. Groesbeck for respondent.

March 23, 1908. Denied.

J. Willcox Brown et al., Petitioners, v. Willmore Coal Company. [No. 656.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 82 C. C. A. 295, 153 Fed. 143.

Mr. John G. Carlisle for petitioners.

Messrs. John G. Johnson and W. H. Ruppel for respondent.

April 6, 1908. Denied.

Mason Williams, Trustee, etc., Petitioner, v. National Bank of Commerce of St. Louis, Mo. [No. 668.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 159 Fed. 615.

Mr. Edwin C. Brandenburg for petitioner.

Mr. Charles W. Ogden for respondent.

April 6, 1908. Denied.

*J. T. Woodward, Petitioner, v. James D. Davidson et al. [No. 669.] [547]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 156 Fed. 915.

Messrs. George R. Peck, H. H. Field, and E. C. Hughes for petitioner.

Mr. Edward Brady for respondents.

April 6, 1908. Denied.

Eva T. Brough et al., Petitioners, v. Charles K. Seymour. [No. 675.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Presley K. Ewing for petitioners.

Messrs. Roger W. Butterfield and Willard F. Keeney for respondent.

April 6, 1908. Denied.

Robert H. Kobusch, Petitioner, v. William H. Hand, Trustee, etc. [No. 678.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 156 Fed. 660.

Mr. James L. Hopkins for petitioner.

Messrs. E. C. and F. W. Brandenburg for respondent.

April 6, 1908. Denied.

Lutcher & Moore Lumber Company et al., Petitioners, v. William H. Knight et al. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. A. P. Pujo for petitioners.

No appearance for respondents.

April 6, 1908. Granted.

E. H. McCutchen & Co. et al., Petitioners, v. A. N. Bort. [No. 681.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 157 Fed. 182.

Mr. Elbert H. Hubbard for petitioners.

No appearance for respondent.

April 13, 1908. Denied.

*Armand Schmoll, Petitioner, v. United States. [No. 684.] [548]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 157 Fed. 1005.

Messrs. W. Wickham Smith and John K. Maxwell for petitioner.

The Attorney General and the Solicitor General for respondent.

April 13, 1908. Denied.

ROBERT DOLLAR et al., Petitioners, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY et al. [No. 685.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles Page, E. J. McCutchen, and Samuel Knight for petitioners.

Mr. Walter H. Robinson for respondents.

April 13, 1908. Denied.

WILLIAM PORTER DAVIS, JR., Trustee, etc., Petitioner, v. B. CROMPTON et al., AS CROMPTON-THAYER LOOM CO. [No. 587.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 158 Fed. 735.

Mr. Samuel W. Cooper for petitioner.

Mr. Wm. A. Carr for respondents.

April 20, 1908. Denied.

VILLAGE OF SARATOGA SPRINGS et al., Petitioners, v. CAMERON SEPTIC TANK COMPANY. [No. 688.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 159 Fed. 453.

Messrs. Charles L. Sturtevant and Melville Church for petitioners.

Mr. Livingston Gifford for respondent.

April 20, 1908. Denied.

FRANK T. W. PALMER, Petitioner, v. FORDYCE G. BRADLEY et al. [No. 691.]

[549] Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 83 C. C. A. 231, 154 Fed. 311.

Messrs. John Barton Payne and John J. Lordan for petitioner.

Messrs. John J. Herrick and John P. Wilson for respondents.

April 20, 1908. Denied.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Petitioner, v. THE STEAMSHIP "WERDENFELS," etc. [No. 693.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 158 Fed. 1023.

Messrs. James J. Macklin and LaRoy S. Gove for petitioner.

Mr. Charles C. Burlingham for respondent.

April 20, 1908. Denied.

GEORGE B. CHRISTIE et al., Petitioners, v. FANE STEAMSHIP COMPANY. [No. 701.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 159 Fed. 648.

Mr. Duane E. Fox for petitioners.

Messrs. J. D. Rouse, Wm. Grant, and Wm. B. Grant for respondent.

April 20, 1908. Denied.

GUSTAV HOLMGREN, Petitioner, v. UNITED STATES. [No. 718.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Heber J. May in behalf of Mr. William M. Madden for the petitioner.

The Solicitor General for the respondent.

April 27, 1908. Granted.

BOARD OF COUNTY COMMISSIONERS OF FREEBORN COUNTY, MINN., Petitioner, v. INTERSTATE DRAINAGE AND INVESTMENT CO. [No. 647.]

Petition for a *Writ of Certiorari to the [550] United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 158 Fed. 270.

Mr. Norman E. Peterson for petitioner.

Mr. Thomas D. Healy for respondent.

April 27, 1908. Denied.

VICTOR A. COOK, Petitioner, v. MOBILE, JACKSON, & KANSAS CITY RAILROAD COMPANY. [No. 692.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Hannis Taylor for petitioner.

Messrs. Wm. H. McIntosh and Jos. C. Rich for respondent.

April 27, 1908. Denied.

MARTIN W. STEWART et al., Petitioners, v. BOARD OF TRUSTEES OF PARK COLLEGE et al. [No. 717.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 156 Fed. 773.

Mr. W. B. C. Brown for petitioners.

Mr. Henry L. Alden for respondents.

April 27, 1908. Denied.

HYGIENIC CHEMICAL COMPANY et al., Petitioners, v. RUMFORD CHEMICAL WORKS. [No. 699.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Willard Parker Butler and Edwin T. Rice for petitioners.

Messrs. Philip Mauro and C. A. L. Massie for respondent.

May 4, 1908. Granted.

GREEN COUNTY, KENTUCKY, Petitioner, v. MARY AMIS QUINLAN, Executrix, etc. [No. 714]; and GREEN COUNTY, KENTUCKY, Petitioner, v. JOHN THOMAS'S EXECUTOR et al. [No. 715.]

Petitions for Writs of Certiorari to the [551] United *States Circuit Court of Appeals for the Sixth Circuit.

Mr. Ernest Macpherson for petitioner.

Messrs. Edmund F. Trabue, George Du Relle, and Attilla Cox, Jr., for Quinlan, executrix.

Mr. Alex. Pope Humphrey for Thomas's executor et al.

May 4, 1908. Granted.

UNITED STATES Petitioner, v. JOHN W. DICKINSON. [No. 731.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Attorney General, the Solicitor General, and Mr. Asa P. French for petitioner.

Messrs. Frank W. Hackett and Samuel L. Powers for respondent.

May 4, 1908. Granted.

G. & C. MERRIAM COMPANY, Petitioner, v. GEORGE W. OGILVIE. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 159 Fed. 638.

Messrs. Charles N. Judson, Wm. B. Hale, and Frank F. Reed for petitioner.

No appearance for respondent.

May 4, 1908. Denied.

GRACE GLEASON et al., Petitioners, v. DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. [No. 726.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 159 Fed. 383.

Mr. John W. Griggs for petitioners.

Mr. John G. Johnson for respondent.

May 4, 1908. Denied.

LEMERT S. COOK, Petitioner, v. UNITED STATES. [No. 732.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 159 Fed. 919.

Mr. A. M. Imbrie for petitioner.

The Attorney General and the Solicitor General for respondent.

May 4, 1908. Denied.

*ADOLFO SIXTO, Plaintiff in Error, v. LAUREANO SARRIA. [No. 186.] [552]

In Error to the District Court of the United States for Porto Rico.

Mr. N. B. K. Pettingill for plaintiff in error.

Mr. Frederic D. McKenney for defendant in error.

March 2, 1908. Dismissed with costs, on motion of counsel for plaintiff in error.

GEORGE L. STEARNS, Appellant, v. LEO V. YOUNGWORTH, United States Marshal, etc. [No. 619.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Mr. Will D. Gould for appellant.

The Attorney General and the Solicitor General for appellee.

March 9, 1908. Final order reversed with costs, and cause remanded with directions to discharge the petitioner, without prejudice to a renewal of the application to remove, on confession of error, and motion of Mr. Solicitor General Hoyt for the appellee.

JOSEPH J. SLOCUM et al., Trustees, et al., Appellants, v. UNITED STATES. [No. 145.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 71 C. C. A. 404, 140 Fed. 65.

Messrs. A. B. Browne and Alex. Britton for appellants.

The Attorney General for appellee.

March 9, 1908. Dismissed, on motion of Mr. A. B. Browne, for the appellants.

JOHN C. WANDS et al. v. WABASH RAILROAD COMPANY et al. [No. 172.]

On a certificate from the United States Circuit *Court of Appeals for the Eighth [553] Circuit.

Mr. Paul Bakewell for Wands et al.

Messrs. Chas. C. Linthicum and Otto R. Barnett for railroad company et al.

March 9, 1908. Request of the United States circuit court of appeals for the eighth circuit for leave to withdraw certificate herein granted, and case stricken from the docket.

ANDERSON GRAY, Appellant, v. EQUITABLE MORTGAGE COMPANY OF KANSAS CITY, Mo., et al. [No. 276.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. Thomas F. Doran for appellant.

No appearance for appellees.

March 13, 1908. Dismissed with costs, on motion of counsel for the appellant.

L. LECHENGER et al., Plaintiffs in Error, v. MERCHANTS' NATIONAL BANK OF HOUSTON et al. [No. 200.]

In Error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas.

See same case below (Tex. Civ. App.) 96 S. W. 638.

Messrs. Edgar Watkins, Frank C. Jones, and Jas. A. Baker for plaintiffs in error.

Messrs. A. L. Jackson, John W. Parker, and Hannis Taylor for defendants in error.

March 19, 1908. Dismissed with costs, per stipulation.

EDGAR JADWIN et al., Plaintiffs in Error, v. STATE OF TEXAS. [No. 17.]

In Error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas.

See same case below (Tex. Civ. App) 85 S. W. 490.

The Attorney General for plaintiffs in error.

Mr. Robert V. Davidson for defendant in error.

April 13, 1908. Dismissed with costs, on motion of Mr. Solicitor General Hoyt for the plaintiffs in error.

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[554]*PACIFIC EXPRESS COMPANY et al., Plaintiffs in Error, v. M. W. NEEDHAM. [No. 239.]

In Error to the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas.

Mr. J. M. McCormick for plaintiffs in error.

No appearance for defendant in error.

April 15, 1908. Dismissed with costs, on motion of counsel for the plaintiffs in error.

GEORGE H. PENROSE, Appellant, v. UNITED STATES. [No. 291.]

Appeal from the Court of Claims.

See same case below, 42 Ct. Cl. 29.

Messrs. Henry C. Willcox and Frederic D. McKenney for appellant.

The Attorney General for appellee.

April 20, 1908. Dismissed on motion of Mr. Frederic D. McKenney for the appellant.

J. N. SEALE, Plaintiff in Error, v. STATE OF GEORGIA. [No. 226.]

In Error to the Supreme Court of the State of Georgia.

See same case below, 126 Ga. 644, 55 S. E. 472.

Messrs. John J. Strickland and W. A. Henderson for plaintiff in error.

No appearance for defendant in error.

April 24, 1908. Upon suggestion of death of plaintiff in error by Mr. W. A. Henderson, of counsel for plaintiff in error, case abated and Writ of Error dismissed.

MORRIS ROSENFIELD et al., Plaintiffs in Error, v. COMMONWEALTH OF KENTUCKY, by T. C. Albritton, Revenue Agent. [No. 287.]

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 29 Ky. L. Rep. 1179, 96 S. W. 1134.

Mr. John Marshall for plaintiffs in error.

Mr. James Breathitt for defendant in error.

April 27, 1908. Dismissed with costs, per stipulation.

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OF THE

UNITED STATES

AT

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1907.

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[1]*EMPIRE STATE CATTLE COMPANY, W. E. Waite, E. F. Waite, et al., Petitioners,

v.

ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY. (No. 178.)

MINNESOTA & DAKOTA CATTLE COMPANY, Petitioner,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY. (No. 179.)

(See S. C. Reporter's ed. 1–21.)

Trial — directed verdict — peremptory instruction — subsequent special requests.

1. The request by both parties for peremptory instructions in their favor does not amount to a submission of the facts to the court, so as to exclude the right of the plaintiffs to have the case go to the jury in accordance with subsequent special requests asked on their behalf.

Appeal — scope of review — directed verdict.

2. The review by an appellate court of the action of the trial court in giving a peremptory instruction in favor of the defendant after denying plaintiffs' request for a peremptory instruction in their favor, and their subsequent special requests, is not confined to determining whether there was any support in the evidence for the inferences drawn by the trial court, but extends to determining whether the special instructions asked were rightly refused either because of their inherent unsoundness, or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury.

Trial — directed verdict.

3. A peremptory instruction is properly given on behalf of the carrier in an action against it to recover for a loss to a shipment of cattle, alleged to have been occasioned by its negligence, where the undisputed evidence is of such a character as would make it the duty of the court to set aside the verdict if the case had been given to the jury, and the verdict rendered in favor of the plaintiffs.

Carriers — loss to freight — deviation from route.

4. Deviation by a carrier of live stock from the usual and most direct route because of a washout on a connecting line, and the bad condition of its own track, will not, in the entire absence of all negligence in selecting the new route, which is as reasonably direct as is available under existing conditions, render the carrier liable for a loss occasioned by a flood at a point on such new route.

[Nos. 178, 179.]

Argued March 13, 16, 17, 1908. Decided May 4, 1908.

ON WRITS of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review judgments which affirmed judgments of the Circuit Court for the First Division of the Judicial District of Kansas, directing a verdict in favor of the carrier in an action against it to recover for loss to a shipment. Affirmed.

See same case below, in No. 178, 77 C. C. A. 601, 147 Fed. 457; in No. 179, 77 C. C. A. 607, 147 Fed. 463.

The facts are stated in the opinion.

Messrs. **James S. Botsford** and **R. E. Ball** argued the cause, and, with Messrs. Buckner F. Deatherage and Odus G. Young, filed a brief for petitioners:

The trial court having ruled that upon all the evidence the plaintiff had no case, the evidence which was excluded should be considered by this court, with the evidence which was received. The plaintiffs in these cases are entitled to have all of the evidence in the record considered, the evidence offered by plaintiffs and excluded by the court, as well as the evidence that was received.

Union P. R. Co. v. Harris, 12 C. C. A. 602, 27 U. S. App. 450, 63 Fed. 800.

The court should have submitted the question of negligence to the jury.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 663, 21 L. ed. 745, 749; Union P. R. Co. v. McDonald, 152 U. S. 262, 275, 38 L. ed. 434, 440. 14 Sup. Ct. Rep. 619; Marande v. Texas & P. R. Co. 184 U. S. 173, 46 L. ed. 487, 22 Sup. Ct. Rep. 340.

The question of proximate cause was also for the jury, and not for the court; and the court erred in not submitting it to the jury.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, 9 Rose's Notes (U. S.) 125.

Contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause.

Livezey v. Philadelphia, 64 Pa. 106, 3 Am. Rep. 578; Helbling v. Allegheny Cemetery Co. 201 Pa. 171, 50 Atl. 970; Morrison v. Davis, 20 Pa. 177, 57 Am. Dec. 695; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Wallace v. Clayton, 42 Ga. 443; Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Merritt v. Earle, 29 N. Y. 116, 86 Am. Dec. 292; Michaels v. New York C. R. Co. 30 N. Y. 570, 86 Am. Dec. 415; Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709; Michigan C. R. Co. v. Curtis, 80 Ill. 324; Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; Blodgett v. Abbot, 72 Wis. 516, 7 Am. St. Rep. 873, 40 N. W. 491; Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 651; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594; McGraw v. Baltimore & O. R. Co. 18 W. Va. 361, 41 Am. Rep. 696; Smith v. Western R. Co. 91 Ala. 456, 11 L.R.A. 619, 24 Am. St. Rep. 929, 8 So. 754; Coosa River S. B. Co. v. Barclay, 30 Ala. 127; Nugent v. Smith, L. R. 1 C. P. Div. 19, 423; 1 Am. & Eng. Enc. Law, 2d ed. p. 595; 5 Am. & Eng. Enc. Law, 2d ed. p. 234; Hutchinson, Carr. §§ 181, 187, 188; 6 Enc. Pl. & Pr. pp. 377–384; Strouss v. Wabash, St. L. & P. R. Co. 17 Fed. 212; Caldwell v. Southern Exp. Co. 1 Flipp. 85, Fed. Cas. No. 2,303; Tompkins v. Ulster, Fed Cas. No. 14,087a; Southern P. Co. v. Schoer, 57 L.R.A. 707, 52 C. C. A. 274, 114 Fed. 466; Newport News & M. Valley Co. v. United States, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488; Clark v. Barnwell, 12 How. 280, 13 L. ed. 988; Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; The Majestic, 166 U. S. 376, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597; Gratiot Street Warehouse Co. v. Missouri, K. & T. R. Co. 124 Mo. App. 545, 102 S. W. 11.

The deviation of the cattle to Kansas City was both wrongful and negligent. If it was negligent,—which was a question for the jury,—the company was liable on that ground. If the cattle were safe at Strong City, then it was unnecessary, and therefore wrongful; and if wrongful, the defendant is liable. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then it was wrongful, and the company is liable on that ground alone.

Crosby v. Fitch, 12 Conn. 423, 31 Am. Dec. 745; Philadelphia & R. R. Co. v. Beck, 125 Pa. 620, 11 Am. St. Rep. 924, 17 Atl. 505; Phillips v. Brigham, 26 Ga. 617, 71 Am. Dec. 227; Georgia R. Co. v. Cole, 68 Ga. 623; Cassilay v. Young, 4 B. Mon. 265, 39 Am. Dec. 505; Sager v. Portsmouth, S. & P. & E. R. Co. 31 Me. 238, 50 Am. Dec. 659; Little Miami R. Co. v. Washburn, 22 Ohio St. 324; American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Brown & H. Co. v. Pennsylvania Co. 63 Minn. 546, 65 N. W. 961; Hedricks v. The Morning Star, 18 La. Ann. 353; Hastings v. Pepper, 11 Pick. 41; Proctor v. Eastern R. Co. 105 Mass. 512; Galveston, H. & H. R. Co. v. Allison, 59 Tex. 193; Johnson v. New York C. R. Co. 33 N. Y. 611, 88 Am. Dec. 416; Goodrich v. Thompson, 44 N. Y. 324; Maghee v. Camden & A. R. Transp. Co. 45 N. Y. 514, 6 Am. Rep. 124; Keeney v. Grand Trunk R. Co. 47 N. Y. 525; Robertson v. National S. S. Co. 14 N. Y. Supp. 313; S. D. Seavey Co. v. Union Transit Co. 106 Wis. 394, 82 N. W. 285; Alabama & V. R. Co. v. Brichetto, 72 Miss. 891, 18 So. 421; Louisville & N. R. Co. v. Odil, 96 Tenn. 61, 54 Am. St. Rep. 820, 33 S. W. 611; Merchants Despatch Transp. Co. v. Kahn, 76 Ill. 520; 1 Am. & Eng. Enc. Law, 2d ed. p. 594; 5 Am. & Eng. Enc. Law, 2d ed. p. 426; Hutchinson, Carr, §§ 190, 191; Lawson, Bailments, § 127; 6 Cyc. Law & Proc. p. 384; Marsh v. Union P. R. Co. 3 McCrary, 236, 9 Fed. 873; Maryland Ins. Co. v. LeRoy, 7 Cranch, 26, 3 L. ed. 257; Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 568, 572, 11 Sup. Ct. Rep. 1; Constable v. National S. S. Co. 154 U. S. 51, 61, 38 L. ed. 903, 909, 14 Sup. Ct.

Rep. 1062; Texas & P. R. Co. v. Eastin (Tex.) 102 S. W. 106.

The want of food and water in the viaducts where the cattle were driven by men, and not the flood considered as an act of God, was the direct, immediate, and proximate cause of the loss. And if the driving of the cattle up into the viaducts was made necessary by the neglect of defendant to drive or ship the cattle up out of the valley, then such negligence and the act of driving the cattle up into the viaducts were the last, efficient, immediate, and direct cause of the loss and damage. Some of the authorities agree that, where human agency containing no element of negligence contributes to produce the loss, the carrier is not excused by the act of God.

New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; The Majestic, 166 U. S. 376, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597; Merritt v. Earle, 29 N. Y. 116, 86 Am. Dec. 292; Michaels v. New York C. R. Co. 30 N. Y. 570, 86 Am. Dec. 415; Constable v. National S. S. Co. 154 U. S. 66, 38 L. ed. 911, 14 Sup. Ct. Rep. 1062.

Since the evidence showed negligence on the part of the railway company, concurrent with the act of God, the defendant carrier was liable.

Fentiman v. Atchison, T. & S. F. R. Co. (Tex. Civ. App.) 98 S. W. 939; Gratiot Street Warehouse Co. v. Missouri, K. & T. R. Co. 124 Mo. App. 545, 102 S. W. 11; Alabama G. S. R. Co. v. Elliott (Ala.) 9 L.R.A.(N.S.) 1264, 43 So. 738.

Messrs. **Gardiner Lathrop** and **Robert Dunlap** argued the cause, and, with Messrs. William R. Smith and C. Angevine, filed a brief for respondent:

This flood at Kansas City was so extraordinary, unprecedented, and sudden in its final catastrophe as not to have been anticipated by the inhabitants in that locality.

Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885; Lightfoot v. St. Louis & S. F. R. Co. 126 Mo. App. 532, 104 S. W. 483; Moffatt Commission Co. v. Union P. R. Co. 113 Mo. App. 544, 88 S. W. 117.

As each party asked for a peremptory instruction in its favor, and argued and submitted such instructions together to the court, and the court determined the same, it must be assumed that they both submitted the case to the court to find the facts upon the assumption that under the evidence there was only involved a question of law as to liability or nonliability.

Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; Bankers' Mut. Casualty Co. v. State Bank, 80 C. C. A. 32, 150 Fed. 78; Defiance v. McGonigale, 80 C. C. A. 425, 150 Fed. 689; Johnson v. Chesapeake & O. R. Co. 91 Va. 171, 21 S. E. 238; Insurance Co. of N. A. v. Wisconsin C. R. Co. 67 C. C. A. 300, 134 Fed. 798; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 77 C. C. A. 601, 147 Fed. 459; Nashville, C. & St. L. R. Co. v. Sansom, 113 Tenn. 683, 84 S. W. 616; Howell v. Wright, 122 N. Y. 667, 25 N. E. 912.

Moreover. a request to go to the jury must specifically point out the question of fact upon which its judgment is desired. It is settled, even in the New York courts, whose decisions are relied upon by our opponents, that a request must be in such form that the judge may properly charge in the terms of the request, without qualification.

Carpenter v. Stilwell, 11 N. Y. 79; Winchell v. Hicks, 18 N. Y. 565; Van Akin v. Caler, 48 Barb. 61; Waters v. Marrin, 13 Daly, 57.

Therefore, even according to the rule of practice in the New York courts, whose decisions are relied upon, where both parties ask for the direction of a verdict a motion by one of them to withdraw his request and go to the jury on the case in general will not be granted.

Groves v. Acker, 85 Hun. 492, 33 N. Y. Supp. 406.

If the case for any reason was rightly decided by the trial judge, his judgment should not be disturbed because of some alleged error of practice adopted by the circuit court of appeals, since substantial justice between the parties has been done.

West v. Camden, 135 U. S. 508. 34 L. ed. 255, 10 Sup. Ct. Rep. 838.

It is well settled in the Federal courts that it is the duty of the trial judge to direct a verdict in favor of a party when, if the verdict as rendered by the jury were against such party, it would be the duty of the court to set the same aside and grant a new trial; and that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or for defendant, as the one or the other may be proper, where the evidence is undisputed or of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it.

Southern P. Co. v. Pool, 160 U. S. 440, 40 L. ed. 486, 16 Sup. Ct. Rep. 338; Goodlander Mill Co. v. Standard Oil Co. 27 L. R. A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Christensen v. Metropolitan Street R. Co. 70 C. C. A. 657, 137 Fed. 708; Marande v. Texas & P. R. Co. 184 U. S. 191, 46 L. ed. 495, 22 Sup. Ct. Rep. 340;

Bowditch v. Boston, 101 U. S. 18, 25 L. ed. 980; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

An inference of negligence cannot be based on a presumption, or on speculation or conjecture.

Leonard v. Miami Min. Co. 78 C. C. A. 517, 148 Fed. 827; Pennsylvania R. Co. v. McCaffrey, 79 C. C. A. 224, 149 Fed. 404.

Many cases might be cited in which this court determined that, as but one inference could reasonably be drawn from the evidence, the defendant in the case involved was not guilty of negligence as a matter of law.

District of Columbia v. Moulton, 182 U. S. 576, 579, 45 L. ed. 1237, 1239, 21 Sup. Ct. Rep. 840; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 246, 37 L. ed. 1068, 1070. See also Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193, 14 Sup. Ct. Rep. 85; Charnock v. Texas & P. R. Co. 194 U. S. 432, 438, 48 L. ed. 1057, 1059, 24 Sup. Ct. Rep. 671.

The question of proximate cause becomes a question of law where the causal connection of defendant's alleged negligence with the loss or damage complained of is evidently not proximate.

Goodlander Mill Co. v. Standard Oil Co. supra; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 444; Seymour v. Union Stock Yards & Transit Co. 224 Ill. 579, 79 N. E. 950.

The question whether there was any wrongful deviation from any instructions of the plaintiffs, or from any contract of the defendant, was also a question of law for the court.

Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745.

In passing on the ruling of the trial court in directing a verdict for defendant, it would not be proper to consider evidence or testimony which was stricken out or not admitted by the court, as the rulings in that respect could only be considered under separate and distinct assignments, in accordance with the rules of the circuit court of appeals and of this court.

Van Stone v. Stillwell & B. Mfg. Co. 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. Rep. 181; Supreme Council, C. K. A v. Fidelity & C. Co. 11 C. C. A. 98, 22 U. S. App. 439, 63 Fed. 48.

The direct and proximate cause of the damage complained of was this flood. It was the efficient and dominating cause of the damage, the *causa sine qua non.*

Ætna F. Ins. Co. v. Boon, 95 U. S. 130, 131, 24 L. ed. 398, 399.

Liability for negligence depends on the probability of the consequences complained of,—that is, its capability of being foreseen by a reasonable man. A party is usually held liable for those consequences which usually flow from his act or omission, and which as a reasonable man, in the light of the circumstances surrounding him, he may foresee as likely to result from such act or omission. The doctrine of proximate and remote cause is peculiarly applicable to, and indeed constitutes a part of the definition of, negligence.

Pollock, Torts, p. 36; Daniel v. Metropolitan R. Co. L. R. 5 H. L. 45; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; Stefanowski v. Chain Belt Co. 129 Wis. 484, 7 L.R.A. (N.S.) 955, 109 N. W. 532; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; 1 Sutherland, Damages, 3d ed. § 16; 1 Shearm. & Redf. Neg. 4th ed. § 28; Fleming v. Beck, 48 Pa. 313; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Morrison v. Davis, 20 Pa. 175, 57 Am. Dec. 695; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 952; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1.

While there is an admitted conflict in the decisions upon this question of proximate cause, yet the rulings of the Federal courts and the weight of authority are to the effect that even an antecedent negligent delay in transportation cannot be regarded as the proximate cause of damage, where it appears that a subsequent act of God, such as an extraordinary flood, intervened and was the efficient and producing cause.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909, 7 Rose's Notes (U. S.) 298; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 237, 35 L. ed. 158, 11 Sup. Ct. Rep. 554; Hutchinson, Carr. 2d ed. §§ 193–195; 5 Am. & Eng. Enc. Law, 2d ed. pp. 259, 260; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A. (N. S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885; Moffatt Commission Co. v. Union P. R. Co. 113 Mo. App. 544, 88 S. W. 117. See also Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Denny v. New York C. R. Co. 13 Gray, 481, 74 Am. Dec. 645; Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am.

Rep. 106; McClary v. Sioux City & P. R. Co. 3 Neb. 44, 19 Am. Rep. 631; Michigan C. R. Co. v. Burrows, 33 Mich. 6; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264; Clark v. Pacific R. Co. 39 Mo. 184, 90 Am. Dec. 458; Herring v. Chesapeake & W. R. Co. 101 Va. 778, 45 S. E. 322; Gilson v. Delaware & H. Canal Co. 65 Vt. 213, 36 Am. St. Rep. 839, 26 Atl. 70; The Startle, 115 Fed. 560; 13 Am. & Eng. Enc. Law, 2d ed. p. 722; Herr v. Lebanon, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529.

When overtaken by such an extraordinary disaster as the one in question, the carrier is placed in the position of a bailee or agent for the owner or shipper, and is required to use only reasonable care to protect the shipment against further damage or peril.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 189, 190, 19 L. ed. 909, 912, 913; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; Charnock v. Texas & P. R. Co. 194 U. S. 432, 48 L. ed. 1057, 24 Sup. Ct. Rep. 671; Washburn-Crosby Co. v. William Johnston & Co. 60 C. C. A. 187, 125 Fed. 273.

There can be no hardship in such a rule in the present case, inasmuch as some of the plaintiffs, as well as their agents, accompanied the shipment and were in charge thereof, as the contract provided.

4 Elliott, Railroads, p. 2348, § 1516, note 3.

It is easy to confound subsequent knowledge acquired by the happening of an event with that which was only apparent prior to the occurrence. It would not be fair to measure a man's foresight by his hindsight.

Grier v. St. Louis Merchants Bridge Terminal R. Co. 108 Mo. App. 565, 84 S. W. 158; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594; American Exp. Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561; Libby v. Maine C. R. Co. 85 Me. 34, 20 L.R.A. 812, 26 Atl. 943; Wallace v. Clayton, 42 Ga. 443; American Brewing Asso. v. Talbot, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 683; Webb's Pollock, Torts, pp. 45, 46; Norris v. Savannah, F. & W. R. Co. 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; Smith v. Western R. Co. 91 Ala. 455, 11 L.R.A. 619, 24 Am. St. Rep. 929, 8 So. 754; Long v. Pennsylvania R. Co. 147 Pa. 343, 14 L.R.A. 741, 30 Am. St. Rep. 732, 23 Atl. 459; Gulf, C. & S. F. R. Co. v. Compton (Tex. Civ. App.) 38 S. W. 220; International & G. N. R. Co. v. Bergman (Tex. Civ. App.) 64 S. W. 999; Norfolk & W. R. Co. v. Marshall, 90 Va. 836, 20 S. E. 823.

As during the transit over defendant's lines a condition arose which showed that the cattle could not be delivered by defendant to the Burlington road at Atchison, as it had intended to do, without further delays likely to injure the shipment, it was, in any aspect of the case, justified in arranging for delivery to the Missouri Pacific at Kansas City, and in transporting the cattle to the Union stock yards at that place. In doing so there would have been no wrongful deviation, even if the contract had expressly provided for carriage over its own line to Atchison. It was simply acting in accordance with a well-established custom.

Hostetter v. Park, 137 U. S. 31, 40, 34 L. ed. 569, 572, 11 Sup. Ct. Rep. 1; Missouri, K. & T. R. Co. v. Olive (Tex. Civ. App.) 23 S. W. 526; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 21 L.R.A. 117, 23 Am. St. Rep. 579, 32 N. E. 476; 1 Am. & Eng. Enc. Law, 2d ed. p. 1064; 5 Am. & Eng. Enc. Law, 2d ed. pp. 424, 425; Phelps v. Hill [1891] 1 Q. B. 605; Ray, Negligence of Imposed Duties, 317; International & G. N. R. Co. v. Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; The Niagara v. Cordes, 21 How. 7, 24, 25, 16 L. ed. 41, 46, 47; Patrick v. Ludlow, 3 Johns. Cas. 10, 2 Am. Dec. 130; Reade v. Commercial Ins. Co. 3 Johns. 352, 3 Am. Dec. 495; Regan v. Grand Trunk R. Co. 61 N. H. 579; Foster v. Great Western R. Co. [1904] 2 K. B. 306.

Mr. Justice **White** delivered the opinion of the court:

With the object of saving them from destruction by the flood which engulfed portions of Kansas City on May 31 and the first week of June, 1903, more than 3,000 head of cattle belonging to the petitioners, which were in the Kansas City stock yards, were driven and crowded upon certain overhead viaducts in those yards. For about seven days, until the subsidence of the flood, they were there detained, and could not be properly fed and watered. Many of them died and the remainder were greatly lessened in value. These actions were brought by the petitioners to recover for the loss so sustained, upon the ground that the cattle were in the control of the defendant railway company as a common carrier, and that the loss sustained was occasioned by its negligence.

The railway company defended in each case upon the ground that, before the loss happened, it had delivered the cattle to a connecting carrier; but that, if the cattle were in its custody, it was without fault, and the damage was solely the result of an act of God; that is, the flood above referred to.

As the cases depended upon substantially similar facts and involved identical questions of law, they were tried together, and at the close of the evidence the trial court denied

[7] a peremptory *instruction asked on behalf of the plaintiffs, and gave one asked on behalf of the railway company. 135 Fed. 135.

While there was some contention in the argument as to what took place concerning the requests for peremptory instructions, we think the bill of exceptions establishes that, at the close of the evidence, the plaintiffs requested a peremptory instruction in their favor, and, on its being refused, duly excepted and asked a number of special instructions, which were each in turn refused, and exceptions were separately reserved, and the court then granted a request for a peremptory instruction in favor of the railway company, to which the plaintiffs excepted.

On the writs of error which were prosecuted from the circuit court of appeals for the eighth circuit, that court affirmed the judgment on the ground that, as both parties had asked a peremptory instruction, the facts were thereby submitted to the trial judge; and hence, the only inquiry open was whether any evidence had been introduced which tended to support the inferences of fact drawn by the trial judge from the evidence. One of the members of the circuit court of appeals (Circuit Judge Sandborn) did not concur in the opinion of the court, because he deemed that, as the request for a peremptory instruction, made on behalf of plaintiffs, was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court, so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 77 C. C. A. 601, 147 Fed. 457.

The cases are here because of the allowance of writs of certiorari. They present similar questions of fact and law, were argued together, and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider [8] the question *which gave rise to a division of opinion in the circuit court of appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence, then, as said in Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, "the facts having been thus submitted to the court, we are limited, in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof." If, on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope; that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness, or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in Beuttell v. Magone, supra, that where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting, or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of Beuttell v. Magone, by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in Beuttell v. Magone has been pointed out in several recent decisions of circuit courts of appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the circuit court of appeals of the sixth circuit, in Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37, 41, and was also lucidly stated in the concurring opinion of *Shelby, Circuit [9] Judge, in McCormack v. National City Bank, 73 C. C. A. 350, 142 Fed. 132, where, referring to Beuttell v. Magone, he said (p. 351):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted, facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in Beuttell v. Magone, supra, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in Beuttell v. Magone, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of facts if he asks the court to submit such questions to the jury. Kirtz v. Peck, 113 N. Y. 226, 21 N. E. 130; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court, so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction, in view of the special requests asked on behalf of the plain-[10]tiffs. The *correctness, therefore, of the action of the court in giving the peremptory instruction depends not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. McGuire v. Blount, 199 U. S. 142, 148, 50 L. ed. 125, 130, 26 Sup. Ct. Rep. 1, and cases cited; Marande v. Texas & P. R. Co. 184 U. S. 191, 46 L. ed. 495, 22 Sup. Ct. Rep. 340, and cases cited; Southern P. Co. v. Pool, 160 U. S. 440, 40 L. ed. 486, 16 Sup. Ct. Rep. 338, and cases cited.

To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose, and the proof which is embodied in the bill of exceptions relied on to justify the inference of liability on the part of the railway company.

The action brought by the Minnesota & Dakota Cattle Company concerned 1,635 head of cattle, shipped from Kenna, in the territory of New Mexico, and 659 head, shipped from Bovina, Texas, both in the latter part of May, 1903, to Evarts, South Dakota, over the line of the Pecos Valley & Northeastern Railway Company, to be transported by that company "and connecting carriers." The other action concerned 798 head of cattle, shipped about the same time, at Hereford, Texas, by the Pecos & Northern Texas Railway Company, "and connecting carriers," to the same place in South Dakota.

There were written contracts of shipment, which it was declared embodied the entire agreement of the parties, and which contained stipulations restricting the liability of each carrier to his own line. In none of the contracts was there a specification as to the several lines of railroad over which the cattle should be transported. The station agent of the initial carrier, however, delivered way bills to the train conductors, routing the *cattle by the Atchison, Topeka,[11] & Santa Fé Railway to Atchison, thence by the Burlington Railroad from Atchison to Council Bluffs, and thence by the Milwaukee road from Council Bluffs to destination in South Dakota. Such station agent also made a memorandum on the back of some of the contracts, "Hereford to Atchison;" on others the indorsement was "Kenna, N. M., to Evarts, S. D.;" on others the indorsement was "Kenna, N. M., to Atchison, Kan.;" on others the indorsement was "Bovina, Tex., to Atchison, Kan." It was stipulated that the stock was not to be transported in any specified time nor delivered at destination at any particular date, nor in season for any particular market. The shipper also expressly assumed the risk of, and released the company from, any loss which might be sustained by reason of any delay in the transportation of the stock, or injury thereto caused by damage to tracks or yards from storms and washouts. There was also an express agreement on the part of the shipper to care for the stock at feeding points. The company, on its part, agreed as follows:

"The company agrees to stop cars at any of its stations for watering and feeding, where it has facilities for so doing, whenever requested to do so in writing by the owner or attendant in charge, and the party of the second part agrees not to confine his stock for longer period than twenty-eight consecutive hours without unloading the same for rest, feeding, and water for a period of at least five consecutive hours, provided he is not prevented from doing so by storm or other accidental causes."

The Pecos Valley & Northeastern Railway was the more southerly of the initial carriers. It connected at its northern terminus with the Pecos & Northern Texas road, and this latter road connected with the

Atchison, Topeka, & Santa Fé. This latter road, from its point of connection with the Pecos and Northern Texas Railway Company (at Amarillo or Higgins, Texas), extends in a generally northeasterly direction through Oklahoma and Kansas. The main line extends by way of Topeka to Kansas City; but at Emporia, south of Topeka, [12]*there is a branch line or cutoff extending towards Kansas City, and which joins the main line running from Topeka to Kansas City at a place called Holliday, 13 miles west of Kansas City. From Topeka, where the main line veers eastwardly to Kansas City, there is a branch line running to Atchison, which is about 50 miles north or northwest of Kansas City, on the Missouri river. At Kansas City both the Burlington and the Missouri Pacific systems connect with the Atchison, the two roads named operating lines which run in a northwesterly direction, on opposite banks of the Missouri river, to Council Bluffs and Omaha, respectively, and the two roads in question also connect at Atchison with the Atchison road, which reaches that point by the branch from Topeka. The Missouri Pacific and Burlington systems connect, respectively, at Omaha and Council Bluffs, with the Chicago, Milwaukee, & St. Paul Railway, and the latter road extends to Evarts, South Dakota.

The Atchison Company had feeding yards at Wellington and Strong City, these places being on the line of its road and situated to the south of Emporia. The road also had feeding yards at Emporia. There was no yard for such purposes, however, between Emporia and Atchison, or at Atchison itself, nor did the Burlington road have feeding yards at Atchison. The proof also was that to unload and reload an ordinary train load of cattle required from four to five hours. There were, in 1903, when the shipments in question were made, as there are at the present time, large public stock yards at Kansas City, where stock in transit could be unloaded for feeding and rest, and to enable it to be transferred from one road to another.

The cattle in controversy were conveyed from the starting points in four trains, and the order in which they arrived at feeding stations was as follows: Empire company train (21 cars), arrived at Strong City (north of and run of five hours from Wellington) on Wednesday, May 27, 1903, 12:10 A. M.; first Minnesota company train (20 cars), arrived at Wellington on Tuesday, May 26, 1903, between 10 and 11 P. M.; second Minnesota company train (19 cars), [13]arrived at Wellington on Wednesday, *May 27, 1903, 5:30 P. M.; third Minnesota company train (20 cars), arrived at Wellington on Wednesday, May 27, 1903, between 6 and 7 P. M.

About six or seven hours before the arrival at Strong City of the train containing the Empire Company cattle, above referred to, a shipment of cattle made by the same company to the same destination, but which is not here involved, had reached Strong City, and had been there unloaded for feeding and rest. Early on the next morning (Wednesday, May 27) the reloading of these cattle was commenced, but was stopped because of a notice to the Atchison of a washout on the Burlington road, north of Atchison. Notice, however, having been received by the Atchison from the Burlington on the afternoon of the same day that the washout had been repaired, the cattle were again reloaded and the train left Strong City at about 8:30 o'clock that night (Wednesday, May 27). In ordinary course the train would have been delivered to the Burlington at Atchison at about daylight the next (Thursday) morning; but about 1 o'clock on that morning the Burlington sent the following message to the Atchison company: "We cannot now accept Evarts stock. Our line washed out again. Will inform you when we can transmit stock." The chief clerk of the general superintendent of the Atchison, in communicating this message to him, also informed him that the track at Valley Falls, a station on the Atchison road between Topeka and Atchison, was in very bad condition, and that there was "no certainty as to how long it will be passable." We shall trace the further movement of this train hereafter.

Promptly after its arrival at Wellington the cattle in the first train of the Minnesota company were unloaded for food and rest. They were reloaded at about 5 o'clock on Wednesday morning, May 27. When information as to the washout on the Burlington came, early on that morning, the cattle were again unloaded; but when the notification was received that the tracks of the Burlington had been repaired, the cattle were a second time reloaded, and the train left Wellington that evening *at about 8 o'clock for Atchison. [14] When the train was a few miles east of Strong City, very early on Thursday morning, it was ordered to return as far as Strong City and there unload. This order was given in consequence of the second message from the Burlington road, above referred to. From this situation it resulted that all the cattle in controversy were in the yards of the Atchison at Wellington or Strong City, that road being uncertain as to the condition of its own tracks on the branch road from Topeka to Atchison, and knowing to a certainty that the Burlington had declined to receive the cattle at Atchison, on account of the condition of its tracks. Under these circumstances, promptly, on Thursday morning, negotiations were commenced by the Atchison with the Missouri Pacific road, and by noon that road had agreed to receive the cattle at Kansas City, and soon afterward instructions were given to load the stock then at Wellington and Strong City, preparatory to being forwarded to Kansas City.

The first Empire company train, which was on its way to Atchison when the information of the break came, on Thursday morning, and whose movements we have said we would hereafter trace, along with a train of twenty-two cars which had preceded it with cattle destined to Sioux City, was ordered to proceed to Kansas City, and did so. One of the Minnesota company trains, of nineteen cars, at the Wellington yards, was also directed to depart for Kansas City on Thursday. Before, however, it was practicable to move the other cattle trains which remained at Wellington and Strong City, uncertainty arose as to the ability of the Missouri Pacific to take the cattle forward from Kansas City, caused by a telegram on that subject, received from the general superintendent of the Missouri Pacific road. By about 9 o'clock on that (Thursday) evening, however, this uncertainty was dispelled, and about the same time the Atchison company was notified by the Burlington that it also was in a condition to receive and forward cattle at Kansas City. On the next (Friday) morning the first Minnesota company train of twenty cars, [15] which was at Strong City, *to which point it had been turned back on the advice of the washout on the Burlington road, and the Empire train of twenty-one cars originally unloaded at Strong City, were reloaded, and the two trains were consolidated into one and started about noon on Friday for Kansas City. So, also, the third Minnesota company train of twenty cars, which had been held at Wellington, waiting for an opportunity to send it forward, left there early Friday morning.

The three train loads of cattle previously referred to, which had been ordered to Kansas City and started for that point during Thursday before the uncertainty arose as to the ability of the Missouri Pacific to receive and forward the cattle from Kansas City, reached that place as follows: forty-two cars, consisting of the Sioux City and first Empire train, arrived on the morning of Friday, and were delivered to the Burlington, and went forward. The nineteen cars belonging to the Minnesota company, which had left Wellington also on Thursday, arrived about 3 o'clock on the afternoon of Friday, and, because of the length of the journey from Wellington, did not go forward, but were unloaded at the stock yards for food and rest. The trains which did not get away from Wellington and Strong City on Thursday, before the uncertainty arose, but which left those places on Friday, after the uncertainty had been dispelled, reached Kansas City early on Saturday morning. The first of these latter train loads, the twenty cars from Wellington, arrived at about 6 o'clock, and the cars were placed on the transfer track of the Missouri Pacific at the stock yards, and were taken in charge by the switching crew of that company and were unloaded at its chutes at the stock yards. The second—that is, the consolidated train from Strong City—arrived an hour or two afterwards, and was unloaded at the stock yards, the delivery there being claimed to be a delivery to the Missouri Pacific Company.

In the early part of the forenoon of Saturday some of the local officers of the Missouri Pacific, asserting that they had not been notified by the general officers of that road of an arrangement *to take the cattle, [16] hesitated to do so. By noon, however, the doubt was dispelled, since the local officers of the Missouri Pacific applied to the Atchison for cars to move the cattle. Steps were taken by the Atchison to at once furnish the cars; but before midday the Atchison company was notified that the cars would not be required, as the Missouri Pacific would be unable, because of the condition of its tracks, to move the cattle forward on that day.

Prior to the shipments of the cattle in question and at the time of the movement of the trains to which we have referred, there had been copious rainfalls in the valley of the Kaw, or Kansas, river, a tributary of the Missouri river, emptying into the same at Kansas City, and the interruptions and washouts to which we have referred were the results of flood conditions created by such rains. The Kansas, or Kaw, river and the Missouri river north of Kansas City, and the Kaw river, especially at Kansas City, were undoubtedly in a more or less accentuated flood condition. On Saturday morning the stage of the Kansas river at Kansas City was slightly below, and certainly was not higher than, that of the previous highest flood recorded at that point; *viz.*, the flood of 1881. The stage of the 1881 rise, however, was not considered dangerous in the yards in 1903, as in the prior flood the water only came upon a small portion of the yard, and afterwards the yards were filled and graded, so that in 1903 a rise equaling that of 1881 would not have come into any of the pens. The reports on Saturday from the weather observer at Topeka, Kansas City, and from other sources, were not alarming. Between the time, on Saturday morning, when the cattle were put in the stock yards, and Sunday morning, the river rose 4 feet. Indeed, on Sunday morning the water was 1 to 4 feet deep over one half to three fourths of the yard. On that morning all the live stock were put on the viaducts, which were about 10 feet above the level of the yards. During daylight Sunday the water rose another 4 feet, and during Sunday night and Monday morning 5 feet more, and when the rise [17]ceased, on June 1, the river *was 13½ feet above the high-water mark of 1881.

The stock yards were entirely submerged, and the entire bottoms, east and west of the river, clear to the bluffs, were flooded,—the water in that territory being about 5 and 6 to 14 feet deep. Situated within this district was the live stock exchange building, containing a bank and numerous offices, including those used by the live-stock officials of the different roads. There was also within the flood area a number of other banks, numerous hotels, stores, and lumber yards; all the packing houses of Kansas City, railroad shops and yards, and the union depot; nearly all the large factories, warehouses, implement houses, and wholesale grocery stores. So unexpected to all concerned was the rise of the river that not a dollar's worth of property was removed in anticipation of the flood. Many thousands of homes in Kansas City were submerged, and the inhabitants fled to the hills and other places of safety, with nothing saved from destruction but the clothing they had on. An illustration of the suddenness of the disaster is afforded by the following: During the morning of Sunday the finest passenger train of the Atchison road, its California limited, from Chicago, arrived at the union depot with passengers. The engine was uncoupled from the train and moved to the coal chute, and, after coaling, on account of the rapid rise of the water and floating driftwood, was unable to get back to the depot. When the flood came on Sunday morning, May 31, it swept fifteen or sixteen bridges from their piers, about two thousand houses from their foundations, hundreds of freight cars from the tracks, and every lumber yard in the bottom lands, and the lumber was swept away. Houses, lumber, cars, and other wreckage were piled in the streets, completely blocking them, and drifted upon the wrecked bridges. The one bridge which stood was the Missouri Pacific bridge, upon which, for safety, there had been stationed seventeen locomotives. The *débris* carried against that bridge completely dammed the river, so that the water ran over the top of the locomotives on the [18]bridge. *The vast accumulation of *débris* in the streets and against the bridges obstructed the flow of the water, so that the river rose higher than it otherwise would have done, it being 10 feet and 5 inches higher at the mouth of Turkey creek, near the stock yards, than it was at Hannibal bridge, over the Missouri river, at about a mile below.

For a period of seven or eight days, whilst these appalling conditions continued, the cattle remaining upon the viaducts, as we have said, could not be properly fed and watered, and over five hundred perished, and the remainder were greatly injured. After the subsidence of the flood, owing to the fact that the cattle were in such a starved and weakened condition as to be unfit to be carried forward to the point of destination, the railway company, seeking to minimize the loss, and with the consent of the plaintiffs, and after they had refused to receive the cattle, carried the remainder of the herd to pastures in Lyon county, Kansas, where they were held until about the 10th of July following, when they were forwarded by the railway company on the original billing to Atchison, Kansas, and from thence to the place of destination over the Burlington and St. Paul roads.

With these undisputed facts in mind let us briefly consider the contentions relied upon to establish the liability of the railway company, in order to determine whether there was any evidence of negligence adequate to have justified the submission of the case to the jury.

1. It is urged that the company was negligent in detaining the cattle at Wellington and Strong City, and in not carrying them promptly by way of Topeka to Atchison, and there delivering them to the Burlington. The undisputed facts which we have stated concerning the prompt arrival of the cattle at Wellington and Strong City, the early initiation of their movement forward as routed, the information as to the washouts on the Burlington line and of the bad condition of the track of the Atchison company, the unloading and reloading, and the final impossibility of sending the cattle forward by way of *Topeka to Atchison, we think com-[19] pletely answer the proposition, and leave room for no other conclusion than that it would have been the duty of the court to set aside any verdict which had been rendered upon the contrary hypothesis.

2. It is insisted that, even if there was no proof of negligence on the part of the company because of its failure to move the cattle by way of Topeka to Atchison, they should have been detained at the Strong City and Wellington feeding stations "until the flood, which had been on in the Kaw river, had subsided." And, although argued as a separate proposition, involved in and connected with the contention just stated, it is urged that the railway company was negligent in deviating the shipments to Kansas City, thereby taking the cattle into the low-

lands at the mouth of the river, in front of the approaching flood. But we think these contentions are disposed of by the statement of the undisputed facts which we have heretofore made. Whether, irrespective of negligence, the railway company, as a matter of law, was without the lawful power, when the break in the lines occurred, to seek to discharge its duty to forward promptly, by sending the cattle *via* Kansas City, is a subject which we shall hereafter separately consider. The propositions we are now considering are, therefore, to be tested solely by considering whether there was any proof tending to show negligence in sending the cattle *via* Kansas City. That the stock yards at Kansas City under ordinary conditions were a fit connecting point to send the cattle, in view of the break in the line of connection to Atchison *via* Topeka, cannot be disputed. The propositions therefore reduce themselves to the contention that the flood conditions were such that it was negligence on the part of the carrier to send the cattle to Kansas City, because the railroad officials knew, or should have known, that it would be unsafe to send them to that point. We are of opinion, however, that the undisputed facts which we have recited, concerning the eligibility and safety of the stock yards at Kansas City under normal conditions, and the unexpected and unprecedented character of the flood which [20] subsequently *engulfed those yards, entirely disposes of the contention. But the want of merit in the proposition does not alone depend upon these general considerations, as we think that the record abundantly shows that there was no reasonable ground whatever for the contention that the officers of the Atchison company were in any way lacking in diligence in endeavoring to ascertain the flood conditions and the probability as to a further rise in the river, which might render it hazardous to take the cattle to Kansas City. This is also indisputably shown by the negotiations with the Burlington and Missouri Pacific roads in respect to receiving the cattle at Kansas City, as it is manifest that those officials, like all others concerned in the vast interests which were destroyed by the food in question, had not the slightest suspicion, or reason to indulge in the suspicion, that a flood of such unprecedented and injurious proportions would come upon Kansas City. These considerations and those which we have previously stated effectually, also, dispose of the last contention as to acts of alleged negligence on the part of the railway company, *viz.*, that the railway company was negligent in failing to move, or cause to be moved, the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

It remains only to consider the proposition that, irrespective of the absence of all negligence, the railway company was, as a matter of law, responsible, because of an alleged wrongful deviation, caused by carrying the cattle *via* Kansas City instead of *via* Topeka to Atchison, for delivery there to the Burlington road. No express agreement was shown to carry the cattle to Atchison *via* Topeka. But, as that route was the usual and most direct one for such shipments, and as the owners were to be subjected to the expense of feeding *en route*, we shall assume, for the sake of argument, the best possible view for the plaintiffs, *viz.*, that the duty of the railway company, under normal conditions, was to transport the cattle by that route. But this general duty, assumed though it be, was, in the very nature of things, restrained and limited by the right [21] *of the carrier, in case of necessity, especially in order that it might carry on the operations of its road, to resort to such other reasonably direct route as was available under existing conditions to carry freight of this character to destination. By the admiralty law, a departure from the regular course of a shipment, when done under the usage of trade, is no deviation. Hostetter v. Park, 137 U. S. 31, 40, 34 L. ed. 569, 572, 11 Sup. Ct. Rep. 1. So, also, in Constable v. National S. S. Co. 154 U. S. 52, 38 L. ed. 906, 14 Sup. Ct. Rep. 1062, it was said: "In the law maritime a deviation is defined as a 'voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the ship insured.'" As we think the undisputed proof to which we have referred not only established the existence of the necessity for the change of route, but also, beyond dispute, demonstrated that there was an entire absence of all negligence in selecting that route, we are clearly of opinion that no liability was entailed simply by reason of the change, even if that change could in law be treated as a concurring and proximate cause of the damages which subsequently resulted.

Affirmed.

ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY, Plff. in Err.,
v.
JOHN R. DONOHUE.

(See S. C. Reporter's ed. 21-40.)

Public lands — homestead — entry on contiguous quarter sections.

1. A homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may,

when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim.

Public lands — homestead entry — effect of relinquishment.

2. The relinquishment of a homestead entry after final decision of the Secretary of the Interior in favor of the entryman in a contest with a railway company claiming under a subsequent selection of indemnity lands does not inure to the benefit of the railway company, in view of the provision of the act of August 5, 1892 (27 Stat. at L. 390, chap. 382), confining such selection to lands not mineral and not reserved, "and to which no adverse right or claim shall have attached or have been initiated," and such land, by the express provisions of the act of May 14, 1880 (21 Stat. at L. 141, chap. 89, U. S. Comp. Stat. 1901, p. 1393), is open to settlement and entry.

[No. 440.]

Submitted January 10, 1908. Decided May 4, 1908.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Itasca County, in that state, holding a railway company liable as trustee for an entryman under the timber and stone act. Affirmed.

See same case below, 101 Minn. 239, 112 N. W. 413.

The facts are stated in the opinion.

Mr. **Thomas R. Benton** submitted the cause for plaintiff in error:

A settlement upon any part of a quarter section is in legal effect a settlement upon that entire quarter section (Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800); but a settlement on part of one quarter section is not in legal effect a settlement upon another quarter section or another section.

Ferguson v. McLaughlin, 96 U. S. 174, 24 L. ed. 624; Reynolds v. Cole, 5 Land Dec. 556; Brown v. Central P. R. Co. 6 Land Dec. 151; Union P. R. Co. v. Simmons, 6 Land Dec. 172; Hemsworth v. Holland, 7 Land Dec. 76; Pooler v. Johnston, 13 Land Dec. 134; Staples v. Richardson, 16 Land Dec. 248; Peasley v. Whiting, 18 Land Dec. 356; Perry v. Haskins, 23 Land Dec. 50; Kenny v. Johnson, 25 Land Dec. 394.

The doctrine that the notice given by settlement and improvement extends only to the quarter section on which such settlement and improvement is made has been extended so far as to cover a case of settlement on a tract that has public land on one side only.

Brown v. Howlett, 17 Land Dec. 522.

The modification of the rule, first announced in the Hickey case, that the rule is restricted to adverse claims under the settlement laws, and does not extend to a railroad selection, is not supported by the authorities.

Ferguson v. McLaughlin; Brown v. Central P. R. Co.; Union P. R. Co. v. Simmons; and Peasley v. Whiting,—supra; United States v. Central P. R. Co. 84 Fed. 88.

Abandonment and relinquishment of the Hickey homestead entry did not restore the land in controversy to the public domain, and open it to entry by defendant in error under the timber and stone land law.

The Secretary's decision allowing Hickey's heirs to make completion of entry was not a final judgment annulling the railway selection, but, on the contrary, simply suspended the selection until the entry was completed by complying with the requirements of U. S. Rev. Stat. § 2291, U. S. Comp. Stat. 1901, p. 1390; and the selection was pending when the homestead entry was relinquished and canceled.

New Orleans v. Paine, 147 U. S. 261–266, 37 L. ed. 162–164, 13 Sup. Ct. Rep. 303; Peyton v. Desmond, 63 C. C. A. 651, 129 Fed. 8.

Mr. **John R. Donohue** *in propria persona* submitted the cause for defendant in error:

By reason of the settlement made by Hickey, and the completion of entry by him and his heirs, the land in controversy was segregated from the mass of public land, and was not open for selection by the railway company, and, upon subsequent relinquishment filed, did not inure to the benefit of the railway company, but reverted to the government as public lands open for entry.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Oregon & C. R. Co. v. United States, 190 U. S. 186, 47 L. ed. 1012, 23 Sup. Ct. Rep. 673; United States v. Turner, 54 Fed. 228; De Lacey v. Northern P. R. Co. 19 C. C. A. 157, 44 U. S. App. 257, 72 Fed. 726; St. Paul, M. & M. R. Co. v. Leech, 3 Land Dec. 506; Boumhoefer v. St. Paul M. & M. R. Co. 22 Land Dec. 292; Fish v. Northern P. R. Co. 23 Land Dec.

15; Northern P. R. Co. v. Loomis, 21 Land Dec. 395; Chicago, St. P. M. & O. R. Co. 9 Land Dec. 221; Southern P. R. Co. v. Brown, 9 Land Dec. 173; Northern P. R. Co. v. Kerry, 10 Land Dec. 290; Northern P. R. Co. v. Potter, 11 Land Dec. 531; Hudson v. Central P. R. Co. 15 Land Dec. 112; Missouri, K. & T. R. Co. v. Troxel, 17 Land Dec. 122.

The doctrine that a tract of land lawfully appropriated becomes thereafter severed from the mass of public lands, and, if relinquished or abandoned, reverts to the government, applies as well to indemnity lands as it does to granted lands.

Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615; DeLacey v. Northern P. R. Co.; Fish v. Northern P. R. Co.; and Northern P. R. Co. v. Loomis, supra; Re Southern P. R. Co. 21 Land Dec. 423; Hastings & D. R. Co. v. Christenson, 22 Land Dec. 257; California v. Southern P. R. Co. 27 Land Dec. 542; Prince Invest. Co. v. Eheim, 55 Minn. 36, 56 N. W. 239; St. Paul & S. C. R. Co. v. Ward, 47 Minn. 40, 49 N. W. 401; Missouri, K. & T. R. Co. v. Beal, 10 Land Dec. 504; Hensley v. Missouri, K. & T. R. Co. 12 Land Dec. 19; Bright v. Northern P. R. Co. 6 Land Dec. 613; Hastings & D. R. Co. v. St. Paul, M. & M. R. Co. 13 Land Dec. 535.

As regards indemnity or lieu lands, the rights of the railroad company do not attach by relation as of the date of the act, but only when the selection of the specific sections is actually made in the manner prescribed.

Barney v. Winona & St. P. R. Co. 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; United States v. McLaughlin, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; Gertgens v. O'Connor, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94; United States v. Anderson, 194 U. S. 394, 48 L. ed. 1035, 24 Sup. Ct. Rep. 716; Humbird v. Avery, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123; St. Paul, M. & M. R. Co. v. Sage, 17 C. C. A. 558, 36 U. S. App. 340, 71 Fed. 40; Wisconsin C. R. Co. v. Forsythe, 43 Fed. 867; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

Mr. Justice **White** delivered the opinion of the court:

Jerry Hickey, having the legal qualifications, in March, 1893, *settled upon unsur- [25] veyed public land of the United States, situated in the Duluth land district, Minnesota. The land was within the territory in which plaintiff in error, hereafter called the railway company, was entitled to make indemnity selections. This right, however, was limited to land as to which, at the time, "no right or claim had attached or been initiated" in favor of another. Act of August 5, 1892 (27 Stat. at L. 390, chap. 382). In the land office of the district aforesaid, two years and eight months after the settlement by Hickey, that is, in December, 1895, the railway company made indemnity selections, embracing not only the land upon which Hickey had built his residence, but all the unsurveyed land contiguous thereto, which, under any contingency, could have been acquired by Hickey in virtue of his settlement. Seven months after—on July 22, 1896—the official plat or survey of the township in which the lands were situated was filed. On that day Hickey made application to enter the tract, under the homestead laws. This application embraced five contiguous lots, located, however, in different quarter sections; *viz.*, one lot (No. 12) in section 3, and four lots (Nos. 9, 10, 14, and 15) in section 4. The whole five lots contained in all about 160 acres, because lots 14 and 15 were fractional. The improvements made by Hickey were on lot 15.

On the day Hickey filed his application the railway company presented a supplementary list of its selections, conforming them to the survey of the township. Because of the conflict between the claim of Hickey and that of the railway company, a contest ensued. It is unnecessary to recite the vicissitudes of the controversy, the death of Hickey pending the contest, the substitution of his mother as his sole heir, and the proceedings by which the claim of the railway company came to be limited to the lots outside of the fractional quarter section on which the improvements of Hickey had been made. Suffice it to say that ultimately the Secretary of the Interior decided in favor of the Hickey claim. It was held that the effect of the settlement was to initiate a homestead right as to all the *land claimed in the [26] application to enter, and therefore, under the terms of its grant, the railway company was precluded from making a selection of the lands in dispute. In reaching this conclusion the Secretary found as a fact that, in making his homestead settlement, Hickey had plainly manifested his intention to embrace within his homestead the land which he subsequently sought to enter, in such manner as to cause it to be well known to all in the community, as early as 1893, the year of the settlement, what were the boundaries of the tract for which he intended to obtain a patent. 32 Land Dec. 8. In consequence of this final decision the mother of Hickey made a homestead entry for the five lots. Subsequently, in the Cass lake land district, Minnesota, to which the land had been transferred, the mother of Hickey filed in the local land office a relinquishment of her claim to the entire tract. Simultaneously, Donohue, the defendant in error, filed an application to enter the land under the timber and stone act, and his claim was allowed. The railway company, however, contested as to the lots other than 14 and 15 in section 4, on the ground that the effect of the relinquishment by the heir of Hickey was to cause the selections which had formerly been rejected to become operative as against the entry of Donohue as to the land outside of the quarter section on which the improvements of Hickey had been constructed. The contest thus created was finally decided by the Secretary of the Interior in favor of the railway company, and a patent issued to it for the lots in dispute. This proceeding was then commenced in the courts of Minnesota by Donohue to hold the railway company liable as his trustee, upon the ground of error in law committed by the Secretary of the Interior in refusing to sustain his entry. The court below decided in favor of Donohue. 101 Minn. 239, 112 N. W. 413. Upon this writ of error the correctness of its action is the question for decision.

The errors assigned and the arguments at bar rest upon two contentions: First. That the original decision of the Secretary of the Interior in favor of the Hickey homestead entry [27] was *wrong as a matter of law, because Hickey, by his settlement, had power to initiate a claim to land only in the fractional quarter section within which his improvements had been placed, and, therefore, that all the other lands outside of such quarter section, although embraced in the application for entry, were subject to selection by the railway company, because unappropriated public land of the United States, against which no claim had been initiated. Second. Because even if the decision of the Land Department in favor of the Hickey application was not erroneous as a matter of law, the court below erred in not giving effect to the ruling of the Department in favor of the railroad company and against the Donohue entry.

To dispose of the first contention requires us to take into view the legislation concerning the right to acquire public lands by preemptors and homesteaders.

The act of September 4, 1841 (5 Stat. at L. 455, chap. 16), together with the supplemental act of March 3, 1843 (5 Stat. at L. 619, chap. 86), superseded all earlier statutes, and were the basis of the pre-emption laws in force on the repeal of those laws in 1891. The act of September 4, 1841, was entitled "An act to Appropriate the Proceeds of the Sales of the Public Lands, and to Grant Pre-emption Rights;" and §§ 10 to 15 dealt with the subject of pre-emption. By § 10 it was provided that one who possessed certain qualifications and made settlement in person upon surveyed public lands subject to be so settled, and who should inhabit and improve the same, and who had or should erect a dwelling thereon, might enter with the register of the land office for the district in which such land might lie, "by legal subdivisions, any number of acres, not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land. . . ." This provision of the statute of 1841 was substantially reenacted in § 2259 of the Revised Statutes. Under the law of 1841, claims to public land might be initiated, prior to record notice, by settlement upon surveyed land subject to private entry, thirty days being allowed the settler within which to *file his declaratory [28] statement with the register of the proper district. Act Sept. 4, 1841 (chap. 16, § 15, 5 Stat. at L. 457, Rev. Stat. § 2264). Subsequently, where the land settled upon had not been proclaimed for sale, the settler was allowed three months in which to file his claim. Act March 3, 1843 (chap. 86, § 5, 5 Stat. at L. 620, Rev. Stat. 2265).

It was not, however, until 1862, that preemptions were allowed, under proper restrictions, on the unsurveyed public lands generally. Act of May 30, 1862 (12 Stat. at L. 410, chap. 86). By § 7 of that act the settler on unsurveyed lands was not required to make his declaratory statement until three months from the date of the receipt at the district land office of the approved plat of the township embracing his preemption settlement.

From the beginning the Land Department has construed the pre-emption laws as conferring an alternative right either to select a regular quarter section of 160 acres or the same quantity of land embraced in two or more contiguous legal subdivisions, although in different quarter sections. See circular of September 15, 1841 (1 Lester, Land Laws, p. 362). The practice of the Land Office is illustrated in a case passed upon by the Attorney General in 1871. Re Shaw, Copp, Land Laws, p. 309. One Shaw filed a declaratory statement embracing tracts situated not alone in different quarter sections, but in different townships, and aggregating more than 195 acres. From a ruling of the Commissioner requiring the pre-emptor to select which of the legal subdivisions he would omit from his entry so as to include his principal improvements, preserve the contiguity of the land remaining, and approximate to 160 acres, Shaw appealed, and the Secretary of the Interior requested the advice of the Attorney General. In recommending that the decision of the Commissioner be affirmed, after calling attention to the fact that the technical quarter section, through the unavoidable inaccuracy of surveys in adjusting meridians, etc., often exceeded or fell below 160 acres, it was said:

"The pre-emption settler has the right, under the act of 1841, to enter either 160 [29]acres in legal subdivisions *lying contiguous to each other without reference to the quarter-section lines, or he has the right to enter a quarter section as such, in which case he can take the amount of land contained therein as shown by the official survey. In entering a 'quarter section,' he cannot, of course, depart from the ascertained lines, but must take 160 acres or less, as the case may be.

"In the case under consideration, Shaw claims by legal subdivision, but not according to the lines of a quarter section. Part of the land is in one township, in sec. 2, and part in another township, in sec. 35. He should be allowed to enter any number of the legal subdivisions contiguous to each other and including his dwelling so that the whole shall not in amount exceed 160 acres, but he cannot, under the act, take more than that amount, because the land claimed does not constitute what is legally known as a 'quarter section.'"

On May 15, 1874, the right of a qualified pre-emptor to locate a pre-emption claim upon land lying in two adjoining townships was expressly recognized in Re McHenry, Copp, Land Laws, 295. And these principles, as will hereafter be seen, governed equally as to settlements on unsurveyed as on surveyed land.

The homestead law was enacted on May 20, 1862. 12 Stat. at L. 392, chap. 75. By that act, differing from the pre-emption law, the rights of the settler only attached to the land from the date of the entry in the proper land office. Maddox v. Burnham, 156 U. S. 544, 546, 39 L. ed. 527, 15 Sup. Ct. Rep. 448. The text of that act, afterwards embodied in Rev. Stat. §§ 2289 et seq. (U. S. Comp. Stat. 1901, p. 1388), makes it obvious that it was contemplated that, as under the settled rule applied in the enforcement of the pre-emption laws, the homesteader was not to be confined to a particular regular quarter-section tract in order that he might receive 160 acres, but was authorized to make up the allotted quantity by joining contiguous legal subdivisions.

This is further illustrated by the text of § 2306, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1415), which provides that every person entitled to enter a soldier's and sailor's homestead, who had previously entered, under the *homestead laws, a quantity of land [30] less than 160 acres, was authorized "to enter so much land as, when added to the quantity previously entered, should not exceed 160 acres."

It was not until May 14, 1880 (chap. 89, 21 Stat. at L. 141, U. S. Comp. Stat. 1901, p. 1393), that a homestead entry was permitted to be made upon unsurveyed public land. The statute which operated this important change moreover modified the homestead law in an important particular. Thus, for the first time, both as to the surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the Land Office. These results arose from § 3 of the act, reading as follows:

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record; and his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws."

See Maddox v. Burnham, supra.

It cannot be doubted that, at the inception, the Land Office considered that, under the homestead law, a settler was entitled to take his 160 acres not alone from a regular quarter section, but to make up, as was the case under the pre-emption law, the quantity allowed by law, by taking adjoining and contiguous legal subdivisions; and that such has continued to be the rule by which the statute has been enforced to this time, both as respects settlements upon unsurveyed as well as surveyed lands. See circular October 30, 1862 (2 Lester, Land Laws, p. 248); departmental instructions as to entries on public lands, contained in bound volumes published in 1899 and 1904; circular August 4, 1906, 35 Land Dec. pp. 187 to 200.

*Both under the pre-emption law and under [31] the homestead law, after the act of 1880, the rights of the settler were initiated by settlement. In general terms it may be said that the pre-emption laws (Rev. Stat. §§ 2257 to 2288, U. S. Comp. Stat. 1901, pp. 1381-1385), as a condition to an entry of public lands, merely required that the appropriation should have been for the exclusive use of the settler, that he should erect a dwelling house on the land, reside upon the tract, and improve the same. By the homestead law, residence upon and cultivation of the land was required. Under neither law was there a specific requirement as to when the improvement of the land should be commenced or as to the nature and extent of such improvement, nor was there any requirement that the land selected should be inclosed.

As, under both the pre-emption and homestead laws, whether the settlement was made upon surveyed or unsurveyed land, the law did not make it necessary to file or record a claim in respect to the land until a considerable period of time had elapsed after the initiation of the right by settlement, it necessarily came to pass that controversies arose from rights asserted by others to land upon which a settlement had been made, but as to which no exact specification appeared upon the records of the Land Office of the location and extent of the land claimed. In the administration of the land laws, in the endeavor to protect the rights of third parties acting in good faith, and, at the same time, to give effect to the rights arising from a settlement and the relation back of the claim when filed to its initiation by settlement, the decisions of the Land Office, while consistent in the interpretation of the statutes, perhaps present, from the nature of the subject, some lack of precision in the appreciation of the facts involved in particular cases. It is certain, however, that, viewing comprehensively the rulings of the Land Department, the subject has been considered in two aspects,—first, the sufficiency of acts done by a settler upon or after initiating a claim to give notice of the extent of his claim to another settler; and, second, the sufficiency of like acts to entitle to a patent for the land as against the government. [32] In both *of the classes it is undoubted that the administrative rule has been, as to surveyed and unsurveyed lands, that the notice effected solely by improvements upon the land is confined to land within the particular quarter section on which the improvements are situated. Re Hall, 5 Land Dec. 141. And this ruling was predicated upon the assumed import of the decision in Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800.

In the first class of cases, however, that is, in contests between settlers, where the claim of the first settler embraced not only land within the legal subdivision on which the improvements had been placed, but contiguous land lying in another quarter section, the ruling has ever been that any conduct of the first settler adequate to convey actual or constructive notice to a subsequent settler that the claim had been initiated not only to the land upon which the improvements were situated, but as to contiguous land, even though in another quarter section, sufficed to preserve the rights of the first settler. The scope of the rulings on this subject is illustrated by a decision of the Secretary of the Interior made in 1893, in Sweet v. Doyle, 17 Land Dec. 197. In that case the Secretary maintained the homestead right of Sweet to land lying in different sections. In doing so, reviewing previous decisions, attention was called to the fact that it had been ruled that the original settler might defeat an attempted settlement by another before the time when record notice was required, in any of the following modes: 1, as to a technical quarter section, by the settlement upon and placing of improvements thereon; 2, as to all of a tract, although lying in different quarter sections, by improvements on each subdivision of the land outside of the quarter section on which he had settled; 3, by actual notice to an intruder of the extent of the settlement claim. Two cases decided in 1887 (Brown v. Central P. R. Co. 6 Land Dec. 151, and Union P. R. Co. v. Simmons, 6 Land Dec. 172) illustrate the recognition by the Land Department of a right in a qualified pre-emptor to settle upon unsurveyed land, although lying in more than one quarter section.

*As to the second aspect, that is, the nature and character of the acts of the settler [33] essential to initiate and preserve a claim to land as against the government, the rulings of the Land Department have been liberal towards the settler, and his good faith and honest purpose to comply with the demands of the statute have primarily been considered, thus carrying out the injunction of this court in Tarpey v. Madsen, 178 U. S. 220, 44 L. ed. 1044, 20 Sup. Ct. Rep. 849, and cases there cited, to the effect that regard should be had, in passing on the rights of settlers, to the fact that "the law deals tenderly with one who, in good faith, goes upon the public lands with the view of making a home thereon." The general course of the Land Department on the subject is illustrated by two decisions,—Findley v. Ford, 11 Land. Dec. 173, and Holman v. Hickerson, 17 Land. Dec. 200.

As a result of this review of the legislation concerning pre-emptions and homesteads, and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim.

Conclusive as is the text of the statutes and the long-continued administrative construction which has enforced them, it is nevertheless insisted that a contrary rule must be applied because of the decision in Ferguson v. McLaughlin, 96 U. S. 174, 24 L. ed. 624. That case concerned a special act applicable alone to California, giving a right to pre-empt unsurveyed lands, and the special act governed the rights of the settler by the general rules controlling under the pre-emption law of 1841, which, it is insisted, by the act of 1880 is made determinative of the right of a homesteader in respect to a settlement on unsurveyed land. The argument rests upon a misconception of the [34]effect *of the decision in the cited case, or, in any event, assumes that expressions found in the opinion must be now held to govern a question not arising on the record in that case.

Without going into great detail, the material facts of the case, as shown by the file record and the statement of facts contained in the opinion, were these: Two persons settled on two distinct and separate, but contiguous, parcels of unsurveyed public land. Ferguson bought the rights of both these parties. On one of the tracts there was a dwelling and other valuable improvements, and Ferguson resided on that tract and cultivated and pastured both tracts. In March, 1866, by virtue of an act of the legislature of California, extending the limits of the town of Santa Clara, the parcel upon which was situated the residence of Ferguson, the possessory right to which had been acquired by him, came to be included within the limits of the town of Santa Clara. By a plat of the United States survey, filed on May 19, 1866, it was shown that the tract, the possessory right to which had been acquired by Ferguson, and which was outside of the corporation limits of the town referred to, lay in township 6. Thereafter Ferguson filed his declaratory statement, claiming the right to enter this parcel under the pre-emption laws. Subsequently, in October, 1866, the United States plat of survey of township 7, which embraced the town of Santa Clara, and therefore the residence tract of Ferguson, was filed. Ferguson then sought to amend his former declaratory statement so as to embrace the parcel of land situated in the town of Santa Clara, in township 7, upon which his residence and other improvements stood. The register and receiver, however, refused to allow this to be done, and required Ferguson to make a separate declaratory statement for that parcel. Subsequently, in virtue of a provision of an act of Congress, Ferguson, as the possessor of the lot and improvements referred to as situated in township 7, became the owner of that parcel by deed from the town. A contest ensued in the land office between Ferguson and a railway company claiming by statutory grant, which contest related solely to a portion *of the land in township 6,[35] and upon which he filed his first declaratory statement. No controversy was had as to the land included in the second declaratory statement, which related to the land in the town of Santa Clara, because Ferguson had acquired that land from the town, in conformity to the act of Congress. The local land officers decided that Ferguson was not entitled to the land in township 6, which he claimed as a pre-emptor, "upon the sole and exclusive ground" that his dwelling was not upon the land so claimed. This action was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, it being further found that, by reason of sales of portions of the land after filing, Ferguson could not be regarded as a bona fide settler. A patent issued to the railway company for the land which it claimed, and a transferee of the company brought ejectment against Ferguson in a state court of California to obtain possession of the land, and Ferguson, under the practice in California, by way of cross complaint, challenged the legal correctness of the ruling of the Land Department, and asserted that the railroad and its transferee held the land as his trustee. The trial court, as did the supreme court of California, sustained the correctness of the ruling of the Land Department, and the case came to this court. Here the action of the court below was affirmed, the court, in its opinion, declaring that the ruling of the Land Department, rejecting the claim because the residence of Ferguson was not on any part of the congressional subdivision "to which the land belonged," was not only correct, but was also an expression of the well-established rule of the Land Department. True it is that, in the course of the opinion, expressions were used which permit of the construction that it was intended to be decided that a homestead settler could only acquire land within a regular quarter section, on which must be his improvements. But the decision must be confined to the question before the court, which was the right of a settler to claim a tract of 160 acres of land under the homestead law, when, on no part of the land for which the patent [36]was claimed, had the improvements *required by the statute been made. Not only the issues in the case make this clear, but this also results from the statement of the court, that its conclusion was in accord with, and was intended to uphold and apply, the rulings of the Land Department from the beginning. This must follow, because, if the language of the opinion relied upon in the argument were to be given the meaning now attributed to it, it would result that the opinion, instead of giving sanction to and maintaining the rulings of the Land Department, would have overthrown the entire administrative construction of the act enforced from the beginning. For whilst it is true, as has been shown, that the Land Department had always held that there must be compliance with the statutory requirements as to a dwelling and improvements on the tract settled upon and claimed, those rulings went *pari passu* with the consistent and settled rule by which a settler was allowed to take the land which he claimed from different quarter sections if he had given adequate notice of the extent of his claim both within and without the legal subdivision in which his improvements were situated. And this view of the true meaning of the decision in the Ferguson Case, irrespective of general expressions found in the opinion, is fortified by the fact that, since that case was decided, in not one of the rulings of the Land Department has the case been referred to as changing the settled rule then prevailing, and which has been continued without interruption. Indeed, when the settled construction of the Land Department is taken into view, and the unbroken application of that rule by it is borne in mind, the conclusion necessarily follows that Congress, in enacting the act of 1880, clearly must have had in mind the settled rule of the Land Department which the Ferguson Case declared the court affirmed.

If we could bring ourselves to disregard the settled administrative construction prevailing for so many years, impliedly, if not expressly, recognized by Congress, and should look at the subject as an original question, it cannot be doubted that, even upon the hypothesis that statements in the opinion [37]in *Ferguson v. McLaughlin justify the assumption now based upon them, such assumption would cause the decision in that case, if applied to the issue here presented, to be destructive of the rights of settlers to initiate claims, both as to surveyed and unsurveyed land, prior to the time of making formal application to enter the land. This is said, because it is apparent that the right given by the statute would be destroyed if it be that a homesteader who settles upon surveyed land, and locates his residence in an eligible situation upon a quarter-quarter section, relying upon fertile land in other quarter sections to enable him to make his settlement fruitful, can, after having given public manifestation of his intention as to the boundaries of his claim, have all the land, except only the quarter-quarter section on which he resides, taken away from him by someone else before the time arrives when, by law, the homesteader is required to make application to enter. And the same thing is more cogently true of unsurveyed land. No more apt illustration of the unjust result referred to could be given than is disclosed by this very case; for, as we have said, the claim of Hickey embraced, among other land, two lots forming a fractional quarter section. This was occasioned by the existence of a body of water which controlled the survey and caused the fractional quarter section consisting solely of the two lots referred to. It was upon this quarter section, bordering upon the water, that Hickey erected his dwelling. It is apparent that the right given by statute would be unavailing if it were to be held that Hickey had not the legal power to initiate any claim to the contiguous land, thus confining him to the fractional lots bounded by the water, in effect cutting off the only land which could possibly have made the settlement beneficial, although immediately on such settlement, as found by the Land Department, Hickey had manifested to the whole community his purpose to claim the land which he afterwards applied to enter, in order to make up his 160 acres.

Concluding from the foregoing that the Land Department was right in its original decision as to the right of Hickey to *enter[38] the land as a homestead, we are brought to consider the second proposition; that is, whether the Department was right in rejecting the timber entry of Donohue and awarding the land to the railroad company. When that question is considered in its ultimate aspect it will be apparent not only that it is related to the question of the validity of the settlement of Hickey, but it necessarily follows that the validity of that settlement in effect demonstrates the error of law committed by the Department in its ruling as to the Donohue entry.

The decision of the Secretary of the Interior, which finally sustained the application of Hickey, and directed that, upon the completion of the entry, the selection of the railway company should be canceled, was made on February 11, 1903. Mrs. Hickey, as the heir of her son, completed the entry in June following. About a month afterwards, however, she filed a written relinquishment of the entry in the local land office, and on the same day Donohue made a timber and stone application for the land and was allowed to enter the same. On report by the local land office of the relinquishment of Mrs. Hickey, the General Land Office, in February, 1904, accepted the relinquishment and canceled the homestead entry. At the same time, however, the Commissioner instructed the local land officers as follows:

"This releases from suspension the selection by the St. Paul, Minneapolis, & Manitoba Railway Company under act of August 5, 1892 [27 Stat. at L. 390, chap. 382], of lot 12, sec. 3, and lots 9 and 10, sec. 4,—lots 14 and 15 not appearing to be within the company's original selection.

"You will inform Mrs. Hickey of the above action, and also advise the company thereof, and that thirty days' preference right will be allowed it in which to perfect its selection of said lot 12, sec. 3, and lots 9 and 10, sec. 4, in accordance with its Duluth list 7 (supplemental to list 5) filed July 22, 1896."

In March, 1904, the Commissioner, writing to the local land officers in regard to a report by them of the allowance of Donohue's timber culture entry, said:

[39] *"This entry should not have been allowed; the contest for this land was between the railway company and the heirs of Jerry Hickey; but before the final action on the case, and the rejection of the company's application to select, the claim of the heirs of Hickey was relinquished and their homestead canceled, which left the land subject to the application of the company.

"You will, therefore, notify the company in accordance with instructions of February 18, allowing it thirty days from notice in which to perfect its selection.

"The entry of Donohue will be held suspended, subject to the action of the company; and should it perfect the selection, the entry will be held for cancelation."

The railway company perfected its selection of the lands in controversy, and the "entry of Donohue was held for cancelation, subject to appeal." Donohue appealed; but, in an opinion dated December 16, 1904, the action of the Commissioner was approved, and this decision was reaffirmed in an opinion dated March 17, 1905, ruling adversely upon a motion to review. The selection made by the railway company was approved by the Secretary of the Interior, and a patent was issued for the land.

The Secretary of the Interior, in ruling upon the effect of the relinquishment of Mrs. Hickey, and in passing upon the claim of Donohue, proceeded upon the hypothesis that the controversy presented by the appeal of Donohue was really a prolongation or extension of the original contest, and that the relinquishment of Mrs. Hickey constituted an abandonment of the homestead application, and, being made during the contest, conclusively established that the settlement of Hickey was not made in "good faith," and that such relinquishment operated to make the settlement of Hickey inefficacious to initiate a claim to the land, thereby validating the selection made by the railway company.

But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the *contest, and disregarded the previous [40] and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey, and decided that, by such settlement, he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since, by the terms of the act of August 5, 1892 (27 Stat. at L. 390, chap. 382), the railway company was confined in its selection of indemnity lands to lands nonmineral, and not reserved, "and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection. . . ." When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railroad company. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Oregon & C. R. Co. v. United States, 190 U. S. 186, 47 L. ed. 1012, 23 Sup. Ct. Rep. 673.

Further, the decision refusing recognition to the Donohue entry, and awarding the land to the railway company, disregarded the statutory right of Mrs. Hickey to relinquish, and of Donohue to make application for, the land, conferred by the 1st section of the act of May 14, 1880 (chap. 89, 21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392), reading as follows:

". . . when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

Affirmed.

The Chief Justice, Mr. Justice **Brewer**, and Mr. Justice **Moody** dissent.

[41]*W. H. GAZLAY, Hanna F. Gazlay, Hulda G. Miller, et al., Appts.,
v.
FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, Bankrupt.

(See S. C. Reporter's ed. 41-49.)

Landlord and tenant — forfeiture of lease — sale by trustee in bankruptcy.
A sale by a trustee in bankruptcy, under order of court, of his bankrupt's interest as lessee in a lease of real property, is not a breach of a condition in such lease, imposing a forfeiture if the lessee assigned the lease, or the lessee's interest should be sold under execution or other legal process without the lessor's written consent.

[No. 164.]

Argued March 11, 1908. Decided May 18, 1908.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Ohio, dismissing the petition of certain lessors of a bankrupt to forfeit the lease in the event of a sale by the trustee in bankruptcy under the court's order. Affirmed.

See same case below, 77 C. C. A. 662, 14 L.R.A.(N.S.) 1199, 147 Fed. 678.

Statement by Mr. Chief Justice **Fuller:**

June 16, 1902, W. H. Gazlay, Hanna F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart, and Clara G. Kuhn entered into a written agreement as lessors with one J. D. Kueny, whereby, in consideration of the rents to be paid and the covenants to be performed by said lessee, his heirs and assigns, they leased to said Kueny certain premises situated on the east side of Vine street, south of Sixth street, Cincinnati, Ohio, for a period of ten years, with the privilege of ten years additional.

The lease contained the following condition:

"Provided, however, that if said lessee shall assign this lease or underlet said premises, or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of this lease by *said [42] lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess, and enjoy as in their first and former estate, and thereupon this lease and everything therein contained on the said lessors' behalf to be done and performed shall cease, determine, and be utterly void."

On the 9th of April the lessors filed a petition in the superior court of Cincinnati,

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NOTE.—Transfer of lessee's interest, in bankruptcy or insolvency proceedings, as breach of covenant in lease against assignment or sale.

A covenant not to assign without the written consent of the lessor is not violated by the transfer of his term by an involuntary bankrupt to his assignee in bankruptcy. Doe ex dem. Cheere v. Smith, 1 Marsh. 359, 2 Rose, 280, 5 Taunt. 975.

But in Magee v. Rankin, 29 U. C. Q. B. 257, such a condition was held violated by a voluntary assignment in insolvency.

Re Breck, 8 Ben. 93, Fed. Cas. No. 1,822, a voluntary bankruptcy proceeding, contains a *dictum* to the same effect.

A covenant not to assign, underlet, or otherwise part with the demised premises, without the lessor's written consent, is violated by a voluntary assignment to a trustee in bankruptcy for the benefit of a lessee's creditors. Holland v. Cole, 1 Hurlst. & C. 67, 8 Jur. N. S. 1066, 31 L. J. Exch. N. S. 481, 6 L. T. N. S. 503, 10 Week. Rep. 563.

But a covenant not to assign or underlet without the lessor's consent is not violated by the filing of a voluntary petition in bankruptcy by the lessee, where under the bankruptcy act the filing of such a petition does not, *ipso facto*, effect the assignment of the debtor's property for the benefit of his creditors. Re Riggs [1901] 2 K. B. 16.

It was said in Weatherall v. Geering, 12 Ves. Jr. 504, that a covenant against the assignment of a lease running to the lessee and his assigns, without the written consent of the lessor, did not prevent the lease passing by operation of law to the lessee's assignee in bankruptcy in favor of general creditors.

In Randol v. Scott, 110 Cal. 590, 42 Pac. 976, a covenant against assignment was held not to be violated by the inclusion, by a member of a copartnership among his assets in a voluntary insolvency proceeding, of a half interest in a lease to the firm, such assignment being by operation of law, and so not within the meaning of the covenant.

In Goring v. Warner, 2 Eq. Cas. Abr. 100, it was held that a covenant that a lessee, his executors and administrators, shall not assign the lease without the written consent of the lessor, was not violated by the bankruptcy of the lessee's executor, who had entered upon and taken possession of the premises; and his assignee in bankruptcy might assign the leasehold term to a purchaser thereof, such transfer being by operation of law.

In Wilkinson v. Wilkinson, G. Cooper, 259, the bankruptcy of a devisee of a leasehold conditioned against assignment or

Ohio, against J. D. Kueny for the recovery of rent due under the lease. In their petition the lessors asked that a receiver be appointed to take charge of all the property of said J. D. Kueny, including said leasehold estate, and that said leasehold premises and the unexpired term be sold, "subject, however, to all the terms, covenants, and conditions contained in the lease from said plaintiffs to said J. D. Kueny." The court thereupon appointed receivers to take charge of and manage said property, and later made an order directing said receivers to sell all of the personal property of said J. D. Kueny, including the leasehold estate, and under said order all of said property, including said leasehold estate, was sold to H. D. Brown, who took possession of the same, made extensive improvements thereon, and paid to the lessors the rent reserved under said lease, from the time he took possession, July, 1905, to January, 1906, when proceedings were begun against him in the district court of the United States for the southern district of Ohio, western division, to have him adjudged a bankrupt.

Pending the adjudication, a receiver was appointed, who took charge of all of Brown's property, including said leasehold estate, and who, as such receiver, paid to said lessors the rent reserved in said lease for the month of January, 1906.

In February, 1906, the appellee herein, Fletcher R. Williams, was elected as trustee in bankruptcy of the estate and effects of said Brown, and on March 1, 1906, he filed in the bankruptcy proceeding an application for the sale of said leasehold estate, making the lessors parties thereto, and asking that they be required to set up any claim they might have upon the same. *Process [43] was issued and served upon all but one of the lessors on March 5, 1906, and on that one on March 9, 1906.

On March 6, 1906, said trustee paid to W. A. Gazlay rent for the month of February, 1906, the amount paid being the monthly sum named in the said lease. Thereupon said lessors, coming in for the purposes of the motion only, filed a motion to be dismissed from the proceedings on the ground that the court had no jurisdiction over their persons, which motion was overruled by the referee in bankruptcy. Thereupon the lessors filed an answer, "and, without intending to enter their appearance herein, but acting under protest and the direction of the court," alleged that the lease contained the condition, among others, "that if said lessee should assign the lease or underlet said leased premises or any other part thereof, or if said lessee's interest therein should be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns first had; or if said lessee or assign should fail to keep any of the other covenants of the lease by lessee to be kept, it should be lawful for said lessors, their assigns or heirs, into said premises to re-

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other disposal thereof was held not a violation of such covenant.

In Roe ex dem. Hunter v. Galliers, 2 T. R. 133, and Gentle v. Faulkner, 69 L. J. Q. B. N. S. 848, 81 L. T. N. S. 294, it is held that it may be stipulated in a lease that it shall be forfeited upon the bankruptcy of the lessee.

But in Randol v. Scott, supra, a covenant against making or permitting an assignment of a lease, in bankruptcy or otherwise, without the lessor's consent, was held to be against public policy and in express contravention of the insolvency law.

Sale by assignee or trustee.

In Doe ex dem. Goodbehere v. Bevan, 2 Rose, 456, 3 Maule & S. 353, it was said that a lease might be assigned under a bankruptcy commission without violating a covenant against assigning without the lessor's consent.

It is observed by Lord Hardwicke in Philpot v. Hoare, 2 Atk. 219, that the covenants of a lease not to assign without the lessor's consent do not extend to the lessee's assignee in bankruptcy, unless the covenant expressly includes the lessee and his assigns, in which case the covenant will include assignees by operation of law.

And it is generally held that such a covenant does not cover assignment by operation of law, and is not violated by an assignment by the lessee's assignee in bankruptcy. Allen v. Bennett, Fed. Cas. No. 214; Ex parte Cocks, 2 Deacon, Bankr. 14; Goring v. Warner, supra.

And in Bemis v. Wilder, 100 Mass. 446, in holding that such a covenant was not violated by the sale of a leasehold by the lessee's assignee in a voluntary insolvency proceeding, it was said that the rule that an assignment by operation of law passes the estate discharged of the covenant to the assignee is not affected by the voluntary character of the insolvency proceedings.

A covenant against the demise, lease, subletting, or parting with possession of a leasehold in any manner without the consent of the lessor is not violated by its sale by the lessee's assignee in bankruptcy. Ex parte Sherman, Buck, Bankr. Cas. 462.

But in Doe ex dem. Lockwood v. Clarke, 8 East, 185, it was held that a covenant not to let, assign, or set over, or otherwise dispose of a lease which was to continue for a fixed term, provided the lessee, his executor, etc., should so long continue actually to occupy the demised premises, was violated by a sale of the leasehold by the lessee's assignee in bankruptcy, as the lessee's continued residence upon the demised premises was essential to continuance of the lease for the full term.

enter and the same to have again, repossess, and enjoy, as in the first and former estate; and thereupon this lease and everything therein contained on said lessor's behalf to be done and performed, should cease, determine, and be utterly void. They further say that said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only, and that said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein. That at the time of filing of the application herein, so far as they know or are informed, the said lessors had no claim in said leasehold premises adverse to said trustee in bankruptcy."

The case was submitted to the referee upon these pleadings, an agreed statement of facts, and the arguments and briefs of counsel.

[44] *The referee found that the trustee, being in lawful possession of said leasehold estate, the court had jurisdiction of the persons and subject-matter of the suit; that the claim of the lessors, assuming that they had one and that it would be enforceable only after a sale, nevertheless was in the nature of a cloud upon the title of the trustee to said leasehold estate, and, as such, could be determined in this proceeding in advance of its happening; and he thereupon held that the lessors had no right, as against the trustee in bankruptcy herein, to forfeit the lease in the event of a sale by him under the court's order, and ordered the trustee to sell the same free from any claim or right on the part of the lessors to forfeit the same. To these findings and this judgment of the referee the lessors took exception and filed a petition for a review of the same in the district court in bankruptcy. The referee certified his proceedings to the district court, where, upon a hearing on the pleadings and facts, the findings and judgment of the referee were affirmed and the petition dismissed.

From this judgment the lessors took an appeal to the United States circuit court of appeals for the sixth circuit. There the cause was again submitted upon the same pleadings and facts as in the district court, and that court affirmed the judgment of the district court, and held that the clause in said lease providing for its forfeiture in case of a sale of the same under execution or other legal process, without the lessors' written consent thereto, had no application to a sale by the trustee in bankruptcy, and that therefore the lessors could not forfeit the lease in case the trustees herein should sell the same. 77 C. C. A. 662, 147 Fed. 678.

From this judgment the present appeal was taken.

Mr. Oscar W. Kuhn argued the cause and filed a brief for appellants:

As between the original parties to this lease, the condition "that if lessee's interest should be sold under execution or other legal process without the lessors' written consent, it might be forfeited by the lessors," was a lawful and valid condition, and in the event of such a sale would have rendered the lease voidable in the hands of the purchaser.

Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; King v. Topping, M'Clel. & Y. 544; Davis v. Eyton, 4 Moore & P. 820; Doe ex dem. Lockwood v. Clarke, 8 East, 185; Re Ells, 98 Fed. 967; Tiffany, Real Prop. p. 106; 1 Taylor, Land. & T. 409.

The sale of a leasehold estate, subject to all of the terms, covenants, and conditions of a lease, may be lawfully made, and when so made the purchaser takes the lease subject to such terms, covenants, and conditions.

Kew v. Trainor, 150 Ill. 150, 37 N. E. 223; Springer v. Chicago Real Estate Land & Title Co. 202 Ill. 17, 66 N. E. 850.

The lease contains no provision for its forfeiture in the event of the bankruptcy of the lessee. Therefore Brown's bankruptcy was not a violation of any of the provisions of the lease. Nor was the passing of Brown's title to his trustee in bankruptcy a violation of any of the provisions of the lease relating to an assignment or sale of it, because this passing of the title to the trustee was accomplished, not by a voluntary assignment, nor by a sale under execution or other legal process, but solely by force of the bankrupt act, § 70 (a); and therefore the lessors had no right to forfeit the lease in the hands of the trustee.

Watson v. Merrill, 14 Am. Bankr. Rep. 458; Re Curtis, 9 Am. Bankr. Rep. 286; Farnum v. Hefner, supra; Re Pennewell, 9 Am. Bankr. Rep. 490.

But since Brown held the leasehold estate subject to all of the terms, covenants, and conditions of the lease, which made it liable to be forfeited in the event of its sale under legal process without the written consent of the lessors, and since the title of the trustee in bankruptcy is the same as that of the bankrupt, Brown, it follows that the trustee holds the title to the leasehold estate subject to all of the terms, covenants, and conditions of the lease; and a sale of it by him under legal process without the lessor's written consent will make it liable to be forfeited in the hands of any purchaser at such a sale.

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

Messrs. **Province M. Pogue** and **Walter A. De Camp** argued the cause and filed a brief for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The passage of the lessees' estate from Brown, the bankrupt, to Williams, the trustee, as of the date of the adjudication, was by operation of law, and not by the act of the bankrupt, nor was it by sale. The condition imposed forfeiture if the lessee assigned the lease or the lessees' interest should be sold under execution or other legal process without lessors' written consent.

A sale by the trustee for the benefit of Brown's creditors was not forbidden by the condition and would not be in breach thereof. It would not be a voluntary assignment by the lessee, nor a sale of the lessee's interest, but of the trustee's interest, held under the bankruptcy proceedings, for the benefit of creditors. Jones, in his work on Landlord and Tenant, lays it down (§ 466) that "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation [48] of law, but the covenant may be so *drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law." The covenant here is not of that character.

The doctrine of Dumpor's Case, 4 Coke, 119, 1 Smith, Lead. Cas. *85, is that a condition not to alien without license is determined by the first license granted; and District Judge Thompson expressed the opinion that it was applicable here, and that the sale to Brown, under the order of the superior court of Cincinnati, entered on the petition of these lessors for the recovery of rent, set the leasehold free from the forfeiture clauses, especially as that court did not direct that the sale be subject to the terms, covenants, and conditions of the lease, as prayed for in the petition. Moreover, the lessors, in their answer in these proceedings, stated that "said lease and the premises thereby leased passed into the possession of Harry D. Brown, the bankrupt herein, without the written consent of said lessors, but with their acquiescence only; and that the said condition in said lease is still in full force and effect as against said Harry D. Brown and his trustee in bankruptcy herein."

In respect of the lessors, Brown may be treated, then, as if he were the original lessee; and the sale by his assignee in bankruptcy, under order of the bankruptcy court, was not a breach of the condition in question. The language of Bayley, J., in Doe ex dem. Goodbehere v. Bevan, 3 Maule & S. 353, cited by the court of appeals, is applicable.

The premises in question in this case, being a public house, were demised by Goodbehere to one Shaw for a term of years, and Shaw covenanted that he, his executors, etc., should not nor would, during the term, assign the indenture, or his or their interest therein, or assign, set, or underlet the messuage and premises, or any part thereof, to any person or persons whatsoever, without the consent in writing of the lessor, his executors, etc. Proviso, that in case Shaw, his executors, etc., should part with his or their interest in the premises, or any part thereof, contrary to his covenant, that the lessor might *re-enter. Afterwards [49] Shaw deposited this lease with Whitbread & Company as a security for the repayment of money borrowed of them; and, becoming bankrupt. and his estate and effects being assigned by the commissioners to his assignees, the lease was, upon the petition of Whitbread & Company, directed by the Lord Chancellor to be sold in discharge of their debt, and was, accordingly, sold to the defendant, and, without the consent of Goodbehere, assigned to the defendant by the assignees, and he entered. etc. The trial judge ruled that this was not a breach of the proviso not to assign without consent, etc., inasmuch as the covenant did not extend to Shaw's assignees, they being assignees in law; wherefore he directed a nonsuit. The rule to set aside the nonsuit was discharged on argument before Lord Ellenborough, Ch. J.; LeBlanc, J.; Bayley, J., and Dampier, J. (delivering concurring opinions); and Bayley, J., said:

"It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act, but by the operation of law, transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands, to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

Decree affirmed.

[50]*REUBEN QUICK BEAR, Ralph Eagle Feather, and Charles Tackett, on Behalf of Themselves and All Other Members of the Sioux Tribe of Indians of the Rosebud Agency, South Dakota, Appts.,

v.

FRANCIS E. LEUPP, Commissioner of Indian Affairs; James Rudolph Garfield, Secretary of the Interior; George Bruce Cortelyou, Secretary of the Treasury, et al.

(See S. C. Reporter's ed. 50-82.)

Indians — appropriations — sectarian schools.

The declaration of policy that the government shall make "no appropriation whatever for education in any sectarian school," contained in the various Indian appropriation acts, has reference only to gratuitous appropriations of public moneys, and has no application to appropriations made to fulfil obligations under the Sioux treaty of April 29, 1868 (15 Stat. at L. 635, 637), or to expenditures of the income of the trust fund set apart by the act of March 2, 1889 (25 Stat. at L. 888, 894, 895, chap. 405), § 17, for the use of the Sioux Nation, in part consideration of cessions of lands to the United States.

[No. 569.]

Argued February 26, 27, 1908. Decided May 18, 1908.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District, enjoining the payment of certain moneys for the support of sectarian schools on an Indian reservation, and remanded the case, with directions to dismiss the bill. Affirmed.

See same case below, 35 Wash. L. Rep. 766.

Statement by Mr. Chief Justice **Fuller**:

The appellants filed their bill in equity in the supreme court of the district of Columbia, alleging that:

"1. The plaintiffs are citizens of the United States, and members of the Sioux tribe of Indians of the Rosebud agency, in the state of South Dakota, and bring this suit in their own right as well as for all other members of the Sioux tribe of Indians of the Rosebud agency.

"2. The defendants are citizens of the United States and residents of the District of Columbia, and are sued in this action as the Commissioner of Indian Affairs, the Secretary of the Interior, the Secretary of the Treasury, the Treasurer of *the United[51] States, and the Comptroller of the Treasury, respectively.

"3. That by article 7 of the Sioux treaty of April 29, 1868 (15 Stat. at L. 635, 637), continued in force for twenty years after July 1, 1889, by § 17 of the act of March 2, 1889 (25 Stat. at L. 888, 894, 895, chap. 405), the United States agreed that for every thirty children of the said Sioux tribe who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

"4. That, for the purpose of carrying out the above provision of the said treaty during the fiscal year ending June 30, 1906, the following appropriation was made by the act of March 3, 1905, § 1 (33 Stat. at L. 1048, 1055, chap. 1479):

"'For support and maintenance of day and industrial schools, including erection and repairs of school buildings in accordance with article seven of the treaty of April twenty-nine, eighteen hundred and sixty-eight, which article is continued in force for twenty years by section seventeen of the act of March second, eighteen hundred and eighty-nine, two hundred and twenty-five thousand dollars.'

"The fund so appropriated is generally known as the Sioux treaty fund.

"5. That § 17 of the said act of March 2, 1889, further provides as follows:

"'And in addition thereto there shall be set apart out of any money in the Treasury not otherwise appropriated, the sum of three million of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which at five per centum per annum, shall be appropriated, under the direction of the Secretary of the Interior, to the use of the Indians receiving rations and annuities upon the reservations created by this act, in proportion to the numbers that shall *so receive rations and annuities[52] at the time that this act takes effect, as follows: One half of said interest shall be so expended for the promotion of industrial and other suitable education among said Indians, and the other half thereof in such manner and for such purposes, including reasonable cash payments *per capita* as, in the judgment of said Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support.'

"This fund of $3,000,000 is generally known as the Sioux trust fund.

NOTE.—On appropriations to aid sectarian institutions—see note to Dakota Synod v. State, 14 L.R.A. 418.

"6. That the interest on the said Sioux trust fund is paid annually by the United States in accordance with the provisions of the second clause of the act of April 1, 1880 (21 Stat. at L. 70, chap. 41), reading as follows:

"'And the United States shall pay interest semiannually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.'

"7. That the act of June 7, 1897, § 1 (30 Stat. at L. 62, 79, chap. 3), contains the following provision:

"'And it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school.'

"8. That, in violation of the said provision of the act of June 7, 1897, the said Francis E. Leupp, Commissioner of Indian Affairs, as aforesaid, has made or intends to make, for and on behalf of the United States, a contract with the Bureau of Catholic Indian Missions of Washington, District of Columbia, a sectarian organization, for the care, education, and maintenance, during the fiscal year ending June 30, 1906, of a number of Indian pupils of the said Sioux tribe, at a sectarian school on the said Rosebud reservation, known as the St. Francis Mission Boarding School, and in the said contract has agreed to pay, or intends to agree to pay, to the said Bureau [53] of Catholic Indian *Missions of Washington, District of Columbia, a certain rate per quarter as compensation for every pupil in attendance at the said school under the said contract, the said payment (which, as the plaintiffs are informed and believe, will amount to the sum of $27,000), to be made either from the said Sioux treaty fund, or from the interest of the said Sioux trust fund, or from both.

"9. That all payments made to the said Bureau of Catholic Indian Missions of Washington, District of Columbia, under the said contract, either out of the said Sioux treaty fund or out of the interest of the said Sioux trust fund, will be payments for education in a sectarian school, and will be unlawful diversions of funds appropriated by Congress, and in violation of the above-recited provision of the act of June 7, 1897, and such payments will seriously deplete the interest of said Sioux trust fund, to the great injury of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud agency, and will unlawfully diminish the amount of money which should be expended out of the said Sioux treaty fund and the interest of the said Sioux trust fund for lawful purposes, for the benefit of the said plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud agency, and will also unlawfully diminish the cash payments which the said plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud agency are entitled to receive *per capita* out of the interest of the said Sioux trust fund.

"10. That the plaintiffs have never requested nor authorized the payment of any part of the said Sioux treaty fund, or of the interest of the said Sioux trust fund, to the said Bureau of Catholic Indian Missions of Washington, District of Columbia, or any other person or organization whatever, for the education of Indian pupils of the said Sioux tribe in the said St. Francis Mission Boarding School, or any other sectarian school whatever, but have, on the contrary, protested against any use of either of the said funds, or the interest of the same, for the purpose of such education.

*"11. That the plaintiffs have no remedy [54] at law.

"Wherefore the plaintiffs ask relief, as follows:

"1. That a permanent injunction issue against the said Francis E. Leupp, Commissioner of Indian Affairs, to restrain him from executing any contract with the said Bureau of Catholic Indian Missions of Washington, District of Columbia, or any other sectarian organization whatever, for the support, education, or maintenance of any Indian pupils of the said Sioux tribe at the said St. Francis Mission Boarding School, or any other sectarian school on the said Rosebud reservation or elsewhere, and that a permanent injunction issue against the said Francis E. Leupp, Commissioner of Indian Affairs, and the said Ethan Allen Hitchcock, Secretary of the Interior, to restrain them from paying or authorizing the payment of, either by themselves or by any of their subordinate officers or agents whatever, any moneys of either the said Sioux treaty fund or the interest of the said Sioux trust fund, or any other fund appropriated, either by permanent appropriation or otherwise, for the uses of the said Sioux tribe, to the said Bureau of Catholic Indian Missions of Washington, District of Columbia, or to any other sectarian organization whatever, for the support, education, or maintenance of any Indian pupils of the said Sioux tribe, at the said St. Francis Mission Boarding School or any other sectarian school on the said Rosebud reservation or elsewhere."

2. And for a permanent injunction against the drawing, countersigning, and paying "any warrants in favor of the said Bureau of Catholic Indian Missions of Washington, District of Columbia, or any other sectarian organization whatever, for the support, education, and maintenance of any Indian pupils of the said Sioux tribe at the said St. Francis Mission Boarding School, or any other sectarian school on the said Rosebud reservation or elsewhere, payable out of any money appropriated, either by permanent appropriation or otherwise, for the uses of the said Sioux tribe."

3. And for general relief.

[55] *The defendants answered, 1. Admitting "that the plaintiffs are citizens of the United States, and members of the Sioux tribe of Indians, but aver that the said Indians are only nominal plaintiffs, the real plaintiff being the Indian Rights Association, who have had this suit brought for the purpose of testing the validity of the contract hereinafter referred to."

2. Admitting "that they are residents of the District of Columbia, and are sued in this action as Commissioner of Indian Affairs, the Secretary of the Interior, the Secretary of the Treasury, the Treasurer of the United States, and the Comptroller of the Treasury, respectively. These defendants, as officers of the government of the United States, have no interest in the controversy raised by the bill, except to perform their duties under the law, and they, therefore, as such officers, respectfully submit the validity of the contract hereinafter referred to, and the payments thereunder, to the judgment of this honorable court. The real defendant in interest is the 'Bureau of Catholic Indian Missions,'—a corporation duly incorporated by chapter 363 of the acts of assembly of Maryland for the year 1894, for the object, *inter alia*, of educating the American Indian directly, and also indirectly, by training their teachers and others, especially to train their youth to become self-sustaining men and women, using such methods of instruction in the principles of religion and of human knowledge as may be best adapted to these purposes.

"As the object of the bill filed is to test the validity of a contract made between the Commissioner for Indian Affairs and the said 'Bureau of Catholic Indian Missions,' and the validity of the payment of the money thereunder, this answer will set forth the facts and the statutes of the United States under which it is contended that such contract and the payment of money thereunder are valid."

This the answer then did at length, and inasmuch as the case was submitted on bill and answer with certain statements of the Commissioner of Indian Affairs, it is thought that the answer *should be given [56] substantially in full as it is in the margin.†

The case was heard on the bill, the answer, and "certain *proofs, consisting of re- [57] plies made by the Commissioner of Indian Affairs to certain questions asked in be-

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†"3. These defendants admit the allegations of paragraph 3 of the bill, but the pertinent part of the Sioux treaty of April 29, 1868, is only partially stated therein. The full statement of that part of the Sioux treaty will be hereinafter made.

"4. These defendants admit the allegations of paragraph 4 of the bill.

"5. These defendants admit the allegations in paragraph 5 of the bill, but aver that though the provision from § 17 of the act of March 2, 1889, is correctly stated, as far as it goes, there are other portions of said act which should be called to the attention of the court, which is accordingly done hereafter in this answer.

"6. These defendants admit the allegations in paragraph 6 of the bill, but aver that, although clause 2 of the act of April, 1880, is correctly stated, as far as it goes, there are other provisions of law to be called to the attention of the court in this connection, which is accordingly done in the subsequent part of this answer.

"7. These defendants admit the allegations in paragraph 7 of the bill, but aver that, although the provision in the act of June 7, 1897, § 1, is correctly stated as far as it goes, the section is not fully stated, nor are other parts of the act referred to which bear directly on the question raised by the bill.

"8. These defendants admit that, within the meaning of the acts of Congress the 'Bureau of Catholic Indian Missions' is a sectarian organization, and the industrial school known as the 'St. Francis Mission Boarding School,' on the Rosebud reservation, is a sectarian school.

"These defendants further say that a contract was made by and between F. E. Leupp, Commissioner of Indian Affairs, for and on behalf of the United States of America, and 'the Bureau of Catholic Indian Missions,' for the care, education, and maintenance during the fiscal year ending June 30, 1906, of 250 Indian pupils of the Sioux tribe of Indians, at the industrial school known as St. Francis Mission Boarding School, on the Rosebud reservation, and by such contract it was agreed that there should be paid to the 'Bureau of Catholic Indian Missions' twenty-seven dollars ($27) per quarter for every pupil in attendance, provided there should not be paid under the contract a sum aggregating more than twenty-seven thousand dollars ($27,000). This amount, according to the contract, was to be paid from either or all of the funds of the Sioux tribe of Indians, designated technically as 'Interest on Sioux Fund,' 'Education Sioux Nation,' and 'Support of Sioux of Different Tribes, Subsistence, and Civilization,' all of which, however, are embraced in the two funds stated half of the plaintiffs, and also of certain [58]statements in the reports of the *Commissioner of Indian Affairs for the years 1895 and 1906, inclusive," and was argued by counsel, and, upon consideration, an injunction was decreed from "paying, or authorizing the payment of, either by them[59]selves or by any of their subordinate *officers or agents whatever, any moneys of the Sioux treaty fund, referred to in the said bill and answer, appropriated for the uses of the Sioux tribe of Indians, to the Bureau of Catholic Indian Missions, at Washington, District of Columbia, for the [60]support, education, *or maintenance of any Indian pupils of the said Sioux tribe, at the St. Francis Mission Boarding School on the Rosebud reservation in the state of South Dakota, as provided *in the contract referred[61] to in said bill and answer, and that the defendants be further restrained from drawing, countersigning, and paying any warrants in favor of the said Bureau of Catholic *Indian Missions, for the purpose[62] aforesaid, payable out of the said Sioux treaty fund; and

"It is further ordered, adjudged, and decreed that so much of the prayer of the said bill as asks that an injunction issue *against the defendants, restraining them[63] from paying or authorizing the payment of any of the interest of the Sioux trust fund to the said Bureau of Catholic Indian Missions under the said contract, be refused; and

*"It is further ordered and adjudged that[64]

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in the bill; to wit, the 'Sioux treaty fund,' described in paragraph 4 of the bill, and 'the Sioux trust fund,' described in paragraph 5 of the bill.

"This contract has been fully performed by the 'Bureau of Catholic Indian Missions,' and there is due to it thereunder from the said funds the total amount of twenty-seven thousand dollars ($27,000) if the said contract was legally made. This contract was approved by the Acting Secretary of the Interior. Mr. Jesse E. Wilson, by direction of the President of the United States; but, by the same direction, no payments have been made under it, in order that the validity of the contract might be determined by the courts of the United States. The circumstances under which this contract was entered into and approved are hereinafter more fully stated.

"These defendants deny the allegation in paragraph 8 of the bill, that this contract was made in violation of the act of June 7, 1897, or in violation of any other act of Congress.

"9. These defendants admit that payments under this contract will be payments for education in a sectarian school, as the term 'sectarian school' is defined in the acts of Congress, but they deny that said payments will be in violation of the act of June 7, 1897, and they further deny that such payments will deplete the interest of said 'Sioux trust fund' to the injury of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud agency; and they further deny that such payments will unlawfully diminish the amount of money which should be expended out of the said 'Sioux treaty fund,' and the interest of the 'Sioux trust fund' for lawful purposes for the benefit of the plaintiffs and all other members of the said Sioux tribe of Indians of the Rosebud agency; and they further deny that said payments will also unlawfully diminish the cash payments which the said plaintiffs and other members of the said Sioux tribe of Indians of the Rosebud agency are entitled to receive *per capita* out of the interest of the said 'Sioux trust fund,' as alleged in paragraph 9 of said bill; all of which will more fully and at large appear by the detailed statements in this answer hereinafter made.

"10. These defendants admit that the plaintiffs, to wit, the three Indians whose names appear as plaintiffs in the caption of this bill, have never requested or authorized the payment of any part of the Sioux treaty or trust fund to the said 'Bureau of Catholic Indian Missions,' or any other person or organization whatsoever for the education of Indian pupils of the said Sioux tribe in said 'St. Francis Mission Boarding School,' or any other sectarian boarding school whatever; but, on the contrary, these defendants admit that the said plaintiffs protest against any use of either of the said funds, or the interest of the same, for the purpose of such education, as stated in paragraph 10 of the bill.

"11. But now these defendants, further answering, say that, although they have answered in terms all the allegations in all the paragraphs of the bill contained, it is necessary, for a full understanding of the rights of the parties, that all the pertinent facts connected with the use of money under the contract of the United States for the education of the Indians in contract schools which are sectarian within the meaning of the acts of Congress should be stated, so that, in the light of all these facts, only a few of which are stated in the bill, the legality of the contract assailed may be judicially determined.

"12. The Catholic missions schools were erected many years ago at the cost of charitable Catholics, and with the approval of the authorities of the government of the United States, whose policy it was then to encourage the education and civilization of the Indians through the work of religious organizations. Under the provisions of the act of 1819, ten thousand dollars ($10,000) were appropriated for the purpose of extending financial help 'to such associations or individuals who are already engaged in educating the Indians,' as may be approved by the War Department.

"In 1820, twenty-one schools conducted by different religious societies were given each party pay the respective costs by each incurred."

Each party prayed an appeal from so much of the decree as was adverse to them.

[65]It was stipulated "that the amount *which was to have been paid from the Sioux treaty fund under the contract in regard to which this suit is brought is approximately $24,000."

[66] *The case was submitted on record and briefs, and the court affirmed the decree below in respect of the income of the "trust fund," and reversed the injunction against the payment from the "treaty fund," and remanded the case with directions to dismiss the bill at the cost of the complainants, whereupon the case was brought to this court on appeal.

Messrs. **Charles C. Binney** and **Hampton L. Carson** argued the cause, and, with Mr. N. Dubois Miller, filed a brief for appellants.

Mr. **Edgar H. Gans** and Solicitor General **Hoyt** argued the cause, and, with Attorney General Bonaparte, filed a brief for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We concur in the decree of the court of appeals of the District, and the reasoning by which its conclusion is supported, as set forth in the opinion of Wright, J., speaking for the court. 35 Wash. L. Rep. 766.

The validity of the contract for $27,000

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eleven thousand eight hundred and thirty-eight dollars ($11,838), and from that date until 1870 the principal educational work in relation to the Indians was under the auspices of those bodies, aided more or less by the government. For a long time the different denominational schools referred to were aided by the government without any formal contract.

"In 1870 [16 Stat. at L. 335, chap. 296], an act of Congress was passed appropriating one hundred thousand dollars ($100,000) for the support of Indian schools among Indian tribes not otherwise provided for, *i. e.*, among tribes not having treaty stipulations providing funds for educational purposes, and these appropriations continued until 1876. Contracts were made annually with the mission schools of the different denominations, payable out of this appropriation for the education of Indian pupils. As to the tribes having funds for educational purposes under treaty stipulations, contracts were also made with the mission schools of the different denominations payable out of the treaty funds. In 1876, Congress began the general appropriation 'for the support of industrial schools and other educational purposes for the Indian tribes,' and these annual appropriations from the public moneys of the United States have been made from that time until the present. These appropriations always were put in the appropriation acts under the heading 'Support of Schools,' and from these public funds, and, in the discretion of the Commissioner of Indian Affairs, from the tribal funds hereinafter explained, were paid the amounts due under the contracts made by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, with the various denominational schools for the education of Indian pupils.

"Some time before 1895 opposition developed to these contracts with denominational schools, on the ground that the public moneys of the United States, raised by taxation, should not be used for education in sectarian institutions; and also for other reasons.

"Accordingly there is found in the appropriation act of 1894, chap. 290 (28 Stat. at L. p. 311), approved August 15, 1894, in that part of the act appropriating the public moneys for the support of Indian schools and under the heading 'For Support of Schools,' the following:

" 'That the expenditure of the money appropriated for school purposes under this act shall be at all times under the supervision and direction of the Commissioner for Indian Affairs and in all respects in conformity with such conditions, rules, and regulations as to the conduct of and methods of instruction and expenditure of money as may, from time to time, be prescribed by him, subject to the approval of the Secretary of the Interior.

" 'Provided, That the Secretary of the Interior is hereby directed to inquire into and investigate the propriety of discontinuing contract schools and whether, in his judgment, the same can be done without detriment to the education of the Indian children, and that he submit to Congress at the next session the result of such investigation, including an estimate of the additional cost, if any, of substituting government schools for contract schools, together with such recommendations as he may deem proper.'

"In his annual report for the fiscal year ending June 30, 1894, the Secretary of the Interior said:

" 'The contract schools are now the subject of general discussion. I agree fully with those who oppose the use of public money for the support of sectarian schools. But this question should be considered practically. The schools have grown up. Money has been invested in their construction at a time when they were recognized as wise instrumentalities for the accomplishment of good. I do not think it proper to allow the intense feeling of opposition to sectarian education, which is showing itself all over the land, to induce the Department to disregard existing conditions. We need the schools now, or else we need a large appropriation to build schools to take their place.

" 'It would scarcely be just to abolish them entirely,—to abandon instantly a pol-is attacked on the ground that all contracts for sectarian education among the Indians are forbidden by certain provisos contained in the Indian appropriation acts of 1895, 1896, 1897, 1898, and 1899. But if those provisos relate only to the appropriations made by the government out of the public moneys of the United States, raised by taxation from persons of all creeds and faiths, or none at all, and appropriated gratuitously for the purpose of education among the Indians, and not to "tribal funds," which belong to the Indians themselves, then the contract must be sustained. The difference between one class of appropriations and the other has long been recognized in the annual appropriation acts. The gratuitous appropriation of public moneys for the purpose of Indian education has always been made under the heading, "Support of Schools;" whilst the appropriation of the "treaty fund" has always been under the heading, "Fulfilling Treaty Stipulations and Support of Indian Tribes;" and that from the "trust fund" is not in the Indian appropriation acts at all. One class of appropriations relates to public moneys belonging to the government; the other to moneys which belong to the Indians and which is administered for them by the government.

*From the history of appropriations of [78] public moneys for education of Indians, set forth in the brief of counsel for appellees, and again at length in the answer, it appears that before 1895 the government, for a number of years, had made contracts for

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icy so long recognized. My own suggestion is that they should be decreased at the rate of not less than 20 per cent a year. Thus, in a few years more, they would cease to exist, and during this time the bureau would be gradually prepared to do without them, while they might gather strength to continue without government aid. This is the policy which is now controlling the Department, and, unless it is changed by legislation, it will be continued. The decrease in the appropriation for the present fiscal year is 20 per cent.'

"Congress, in pursuance of this recommendation, introduced for the first time in the appropriation act of 1895, chap 188 (28 Stat. at L. 888), a limitation on the use of public money in sectarian schools.

"The act appropriates, under the heading 'Support of Schools,' of the public moneys of the United States 'for support of Indian day and industrial schools and for other educational purposes . . . $1,164,350. . . .

" 'Provided, That the Secretary of the Interior shall make contracts, but only with present contract schools, for the education of Indian pupils during the fiscal year ending June 30, 1896, to an extent not exceeding 80 per cent of the amount so used for the fiscal year 1895, and the government shall, as early as practicable, make provision for the education of Indian children in government schools.' 28 Stat. at L. 903, chap. 188.

"Congress, in the Indian appropriation act of 1896, chap. 398, appropriated from the public moneys of the United States, under the head 'Support of Schools,' 'for support of Indian day and industrial schools and for other educational purposes, . . . $1,235,000, . . .' and then as a qualification upon the appropriation, and following immediately thereupon, under the same heading, 'Support of Schools,' occurs the following language in the act: " 'And it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school. Provided, That the Secretary of the Interior may make contracts with contract schools, apportioning, as near as may be, the amount so contracted for among schools of various denominations, for the education of Indian pupils during fiscal year 1897, but shall only make such contracts at places where nonsectarian schools cannot be provided for such Indian children, and to an amount not exceeding 50 per centum of the amount so used for the fiscal year 1895.' 29 Stat. at L. p. 345.

"Congress, in the Indian appropriation act of 1897, chap. 3, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' 'for support of Indian day and industrial schools, and for other educational purposes . . . $1,200,000 . . .' and then, as a qualification upon this appropriation, and following immediately thereupon, under the same heading, 'Support of Schools,' occurs the following language:

" 'And it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school. Provided, That the Secretary of the Interior may make contracts with contract schools, apportioning, as near as may be, the amount so contracted for among schools of various denominations, for the education of Indian pupils during the fiscal year 1898, but shall only make such contracts at places where nonsectarian schools cannot be provided for such Indian children, and to an amount not exceeding 40 per cent of the amount so used for the fiscal year 1895.' 30 Stat. at L. p. 79.

"Congress, in the Indian appropriation act of 1898, chap. 545, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' for support of Indian day and industrial schools, and for other educational purposes . . . $1,100,000 . . . Provided, That the Secretary of the Interior may make contracts with contract schools, apportioning, as near as may be, the amount so contracted for among other schools of various denominations, for the education of Indian pupils during the fiscal year 1899, but shall only make such contracts at places where nonsectarian schools cannot be provided for such Indian children, and to an amount not ex-sectarian schools for the education of the Indians, and the money due on these contracts was paid, in the discretion of the Commissioner of Indian Affairs, from the "tribal funds" and from the gratuitous public appropriations. But in 1894 opposition developed against appropriating public moneys for sectarian education. Accordingly, in the Indian appropriation act of 1894, under the heading of "Support of Schools," the Secretary of the Interior was directed to investigate the propriety of discontinuing contract schools, and to make such recommendations as he might deem proper. The Secretary suggested a gradual reduction in the public appropriations on account of the money which had been invested in these schools, with the approbation of the government. He said: "It would be scarcely just to abolish them entirely,—to abandon instantly a policy so long recognized,"—and suggested that they should be decreased at the rate of not less than 20 per cent a year. Thus, in a few years they would cease to exist; and during this time the bureau would be gradually prepared to do without them, while they might gather strength to continue without government aid.

Accordingly, Congress introduced in the appropriation act of 1895 a limitation on the use of public moneys in sectarian schools. This act appropriated under the heading, "Support of Schools," "for support of Indian day and industrial schools and for other educational purposes . . .

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ceeding 30 per cent of the amount so used for the fiscal year 1895.' 30 Stat. at L. p. 587.

"Congress, in the Indian appropriation act of 1899, chap. 324, appropriated from the public moneys of the United States, under the head of 'Support of Schools,' 'for support of Indian day and industrial schools, and for other educational purposes, . . . $1,100,000 . . . Provided, That the Secretary of the Interior may make contracts with contract schools, apportioning as near as may be the amount so contracted for among schools of various denominations, for the education of Indian pupils during the fiscal year 1900, but shall only make such contracts at places where nonsectarian schools cannot be provided for such Indian children, and to an amount not exceeding 15 per centum of the amount so used for the fiscal year 1895, the same to be divided proportionately among the said several contract schools, this being the final appropriation for sectarian schools.' 30 Stat. at L. p. 942.

"The several Indian annual appropriation acts since 1899, to wit, beginning with 1900 to the present time, contain under the head of 'Support of Schools' simply a general appropriation of public moneys 'for the support of Indian and industrial schools, and for other educational purposes,' without any proviso in any of them respecting contracts with sectarian schools, or without any statement in any of them of the policy of the government with respect to sectarian schools.

"It will be observed that the phrase 'and it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school,' which is cited and relied on in paragraph 7 of the bill, is found only in the Indian appropriation acts of 1896 and 1897, and in no prior or subsequent acts of Congress; that in these two acts it is a limitation on the appropriation of public moneys, and is found only under the heading 'Support of Schools,' under which the public money of the United States is appropriated for support of Indian schools, and does not occur in any other part of these acts of Congress. These defendants, therefore, submit, that this statement of policy, in so far as it can now have any legal effect, was intended only to apply to appropriations of public moneys for education in sectarian schools; and inasmuch as the appropriation of public moneys for these purposes was being reduced from year to year by a percentage which would make the last appropriation to be for the fiscal year ending June 30, 1900, there was no necessity for repeating the phrase containing the policy of the government in any acts after 1897. The cessation of the appropriation from the public moneys for education in the sectarian schools was treated as the accomplishment of the purpose contained in the statement of the policy found in the acts of 1896 and 1897.

"The above paragraph contains all the matter pertinent to the appropriation of public moneys for the support of education in sectarian schools. These appropriations ceased with the Indian appropriation act of 1899, have never been made since, nor is anyone asking that they should be made, or that any public moneys of the United States raised by taxation should be employed for such purposes.

"13. But these defendants, further answering, say that, entirely separate and apart from the public moneys which, as stated in paragraph 12 of this answer, were appropriated until 1899 for education in sectarian schools, there are other funds, known as 'tribal funds,' which may be applied for these purposes. These funds, these defendants respectfully submit, are not public moneys, but really belong to the Indians themselves; and it is the purpose of this paragraph of this answer to give a general account of these funds, and a particular account of the 'tribal funds' of the Sioux Indians, which are directly in controversy in this case, will be given in the next paragraph.

"These 'tribal funds' may be roughly grouped into two classes: (a) Where cessions of land or other property have been made by the Indians, and, in consideration thereof, a certain sum of money is deposited in the Treasury of the United States, which

$1,164,350, . . . Provided, That the Secretary of the Interior shall make contracts, but only with present contract schools, for the education of Indian pupils during the fiscal year ending June 30, 1896, to an extent not exceeding eighty per centum of the amount so used for the fiscal year 1895, and the government shall, as early as practicable, make provision for the education of the Indian children in government schools."

[79] *This limitation of 80 per cent was to be expended for contract schools, which were those that, up to that time, had educated Indians through the use of public moneys, and had no relation and did not refer to "tribal funds."

In the appropriation act of 1896, under the same heading, "Support of Schools," the appropriation of public money of $1,235,000 was limited by a proviso that contracts should only be made at places where nonsectarian schools cannot be provided for Indian children, to an amount not exceeding 50 per cent of the amount so used for the fiscal year 1895, and immediately following the appropriation of public money appears the expression, "and it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school." This limitation, if it can be given effect as such, manifestly applies to the use of public moneys gratuitously appropriated for such purpose, and not to moneys belonging to the Indians themselves. In the appropriation act of 1897 the same declaration of

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is used for the Indians in the discretion of the Secretary of the Interior. These are called 'trust funds.' (b) Where cessions of land or other property have been made by the Indians under treaties, and in consideration therefor the government of the United States has, by treaty, bound itself to furnish money for the civilization and education of the Indians. These are called 'treaty funds.'

"Examples of these funds are as follows:

"Menominee fund: Interest, $7,651.96 per annum (treaty of 1848, art. 5, 9 Stat. at L. 952).

"Menominee log fund: Interest, $76,313.98 per annum (act of March 22, 1882, 22 Stat. at L. 30, chap. 46; act of June 12, 1890, 26 Stat. at L. 146, chap. 418).

"Osage fund: Interest, $416,371.95 per annum (treaty 1865, art. 2, 14 Stat. at L. 687; act July 15, 1870, 16 Stat. at L. 362, chap. 296; act of June 16, 1880, 21 Stat. at L. 292, chap. 251).

"Osage fund: Interest on $69,120, 5 per cent (treaty June 2d, 1825, for educational purposes per Senate resolution, Jan. 9, 1838, 7 Stat. at L. 242).

"The yearly amounts provided for the Indians under treaties are annually appropriated in the Indian appropriation acts, not in that part of the act under the title 'Support of Schools' which appropriated the public money of the United States, but under the heading 'Fulfilling Treaty Stipulations with, and Support of, Indian Tribes;' for, although formally appropriated, the moneys are not regarded as the moneys of the United States, but moneys belonging to the Indians, due to them under the treaties, in consideration of their cession of lands and other rights.

"But, inasmuch as, according to Indian custom, the property is held in common, and inasmuch as the Indians are regarded as wards of the nation, the money is not distributed *per capita*, but is expended for them, and for their benefit and advantage, under the discretion of the Secretary of the Interior. For some of the laws conferring this discretion, see 14 Stat. at L. 687; 16 Stat. at L. 362, chap. 296; 21 Stat. at L. 292, chap. 251; 22 Stat. at L. 30, chap. 46; 25 Stat. at L. 895, chap. 405; 26 Stat. at L. 146, 344, chaps. 418, 807.

"14. As to the 'Sioux funds' directly in controversy, the facts are as follows:

"On March 2, 1889, the act of Congress of 1889, chap. 405, was approved. This was entitled, 'An Act to Divide a Portion of the Reservation of the Sioux Nation of Indians in Dakota into Separate Reservations, and to Secure the Relinquishment of the Indian Title to the Remainder.' Under this act the Indians made certain cessions of land, and, in partial consideration therefor, it was provided in § 17 of the act as follows:

"'And, in addition thereto, there shall be set apart out of any money in the Treasury not otherwise appropriated the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest on which, at five per centum per annum, shall be appropriated under the direction of the Secretary of the Interior to the use of the Indians receiving rations and annuities upon the reservations created by this act, in proportion to the numbers that shall so receive rations and annuities at the time this act takes effect, as follows: One half of said interest shall be so expended for the promotion of industrial and other suitable education among said Indians, and the other half . . . for such purposes, including reasonable cash payments *per capita*, as, in the judgment of said Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support.' 25 Stat. at L. 895.

"This is the fund called the 'Sioux trust fund' in the 5th paragraph of this bill.

"The method of the payment of the interest on this fund was changed in 1880 by the act of 1880, chapter 41, as follows:

"'The Secretary of the Interior be, and he is hereby, authorized to deposit in the Treasury of the United States any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States policy occurs as a limitation on the appropriation of public moneys for the support of schools, and the amount applicable to contract schools was limited to 40 per cent of the amount used in 1895. In the act of 1898 the amount applicable to contract schools was limited to 30 per cent, and in the act of 1899 the amount so applicable was limited to 15 per cent, these words being added: "This being the final appropriation for sectarian schools." The declaration of the settled policy of the government is found only in the acts of 1896 and 1897, and was entirely carried out by the reductions provided for

Since 1899 public moneys are appropriated under the heading, "Support of Schools," "for the support of Indian and industrial schools, and for other educational purposes," without saying anything about sectarian schools. This was not needed, as the effect of the legislation was to make subsequent appropriations for education mean that sectarian schools were excluded in sharing in them, unless otherwise provided.

*As has been shown, in 1868 the United [80] States made a treaty with the Sioux Indians, under which the Indians made large cessions of land and other rights. In consideration of this the United States agreed that for every thirty children a house should be provided and a teacher competent to teach the elementary branches of our English education should be furnished for twenty years. In 1877, in consideration of fur-

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bonds or other stocks and securities belonging to the Indian trust fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits in lieu of investments, and the United States shall pay interest semiannually from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties, or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.' 21 Stat. at L. 70.

"This provision is partially cited in the bill in paragraph 6.

"15. Under a treaty between the United States and different tribes of Sioux Indians, made on April 29, 1868 (15 Stat. at L. 635), these Indians made large cessions of land and other rights, and, in partial consideration therefor, the United States agreed with them as follows:

" 'Art. 7. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school, and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with, and the United States agrees that, for every thirty children between said ages, who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.'

"By the act of Congress of February 28, 1877, chap. 72 (19 Stat. at L. 254-256), ratifying an agreement with bands of Sioux Nation, in consideration of further land cessions, it was provided:

" 'In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization, to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868.'

"By the 17th section of the act of 1889, chap. 405 (25 Stat. at L. 894), it was provided:

" 'That the 7th article of the said treaty of April 29, 1868, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect.'

"By the act of 1905, chap. 1479 (33 Stat. at L. p. 1048), entitled—

" 'An Act Making Appropriations for Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Fiscal Year Ending June 30th, 1906, and for Other Purposes'—it was provided under the heading 'Fulfilling Treaty Stipulations with, and Support of, Indian Tribes' as follows:

" 'For support and maintenance of day and industrial schools, including erection and repairs of school buildings in accordance with art. 7 of the treaty of April 29th, 1868, which article is continued in force for twenty years by § 17 of the act of March 2, 1889, $225,000.'

"A similar appropriation has been annually made for many years back in the Indian appropriation acts.

"This is the 'treaty fund' in dispute, referred to in the 4th paragraph of the bill.

"These defendants respectfully represent that this 'treaty fund' does not differ from the 'trust fund,' in the main point that it is money belonging to the Indians, and not public money of the United States.

"Both funds arise from cessions made by the Indians of lands and other rights. The ther land cessions, the United States agreed to furnish all necessary aid to assist the Indians in the work of civilization, and furnish them schools and instruction in mechanical and agricultural arts, as provided by the treaty of 1868. In 1889 Congress extended the obligation of the treaty for twenty years, subject to such modifications as Congress should deem most effective, to secure the Indians equivalent benefits of such education. Thereafter, in every annual Indian appropriation act, there was an appropriation to carry out the terms of this treaty, under the heading, "Fulfilling Treaty Stipulations with, and Support of, Indian Tribes."

These appropriations rested on different grounds from the gratuitous appropriations of public moneys under the heading, "Support of Schools." The two subjects were separately treated in each act, and naturally, as they are essentially different in character. One is the gratuitous appropriation of public moneys for the purpose of Indian education; but the "treaty fund" is not public money in this sense. It is the Indians' money, or, at least, is dealt with by the government as if it belonged to them, as morally it does. It differs from the "trust fund" in this: The "trust fund" has been set aside for the Indians, and the income expended for their benefit, which expenditure required no annual appropriation. The whole amount due the Indians for certain land cessions was appropriated in one lump sum by the act of 1889 (25 Stat. at L. 888,

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one is a specific sum of which the United States is a trustee for the Indians; the other is an obligation payable in instalments under the agreement of a treaty.

"These defendants, therefore, respectfully submit that as to both of these funds there is nothing to prevent the Secretary of the Interior from using them in his discretion, and especially from using them as the real owners thereof desire and request.

"16. Prior to 1900 the sectarian schools were aided by appropriation from the public moneys, and, in the discretion of the Secretary of the Interior, from the tribal funds just described.

"In 1900, not only the public appropriations ceased, as has been heretofore shown, but all aid from the tribal funds also ceased, except as to the Osage treaty and trust funds hereinbefore referred to. At the request of the Osage Indians, their treaty funds have been annually and uninterruptedly applied to the Catholic mission schools under annual contract with the Commissioner of Indian Affairs, approved by the Secretary of the Interior. With the exception of the Osage funds, no 'tribal funds' were applied to education in denominational schools from 1900 to 1904.

"In the meantime application was made to President McKinley by the 'Bureau of Catholic Indian Missions' for the revocation of the 'Browning ruling' and the use of 'tribal funds' for the education of the Catholic Indian children in Catholic schools.

"On September 30, 1896, the then Commissioner of Indian Affairs, D. M. Browning, in answer to the question, 'whether parents of Indian children have the right to decide where their children shall attend school,' said:

"'It is your duty first to build up and maintain the government day schools, as indicated in your letter, and the Indian parents have no right to designate which school their children shall attend.'

"This was the 'Browning ruling.' It was ordered abrogated by President McKinley in 1901, and some eight months after, to wit, January 17, 1902, it was formally abrogated by the Commissioner of Indian Affairs with the approval of the Secretary of the Interior.

"The question of the use of the 'tribal funds' was referred by President McKinley to the Secretary of the Interior, and by him to the Commissioner of Indian Affairs, who decided adversely to the appropriation on February 12, 1901.

"17. On or about January 1, 1904, the matter of the application for the use of 'tribal funds' for the education of Indian children in mission schools was brought to the attention of President Roosevelt by the 'Bureau of Catholic Indian Missions,' who urged that the Indians should be allowed to use their own money in educating their own children in the schools of their choice.

"President Roosevelt took up the matter on January 22, 1904, at a meeting in the executive office of the White House, at which were present the Attorney General (Mr. Knox) and Mr. Russell, of the Department of Justice, and Secretaries Hitchcock, Cortelyou, and Wilson, and Postmaster General Payne. The President was legally advised that, notwithstanding the declaration of Congressional intent not to make appropriations in the future of public moneys of the American people for sectarian institutions, the previous laws giving the Secretary of the Interior discretion to use certain moneys of the Indians, held in trust, in any way that he might see fit, including assistance to sectarian schools, were not repealed, and consequently his discretion remained.

"The President decided that, inasmuch as the legal authority existed to grant the request of the Indians, they were entitled, as a matter of moral right, to have the moneys coming to them used for the education of their children at the schools of their choice.

"A full and detailed statement of the action of the President in 1904 is set forth in his letter of February 3, 1905, which, with its inclosure, is herein set out at length:

. . . .

"'This new request was submitted to the Department of Justice, and the Department decided, as set forth in the accompanying report, that the prohibition of the law as to chap. 405). This "trust fund" is held for the Indians, and not distributed *per capita,* being held as property in common. The money is distributed in accordance with the discretion of the Secretary of the Interior, [81]but really belongs to *the Indians. The President declared it to be the moral right of the Indians to have this "trust fund" applied to the education of the Indians in the schools of their choice, and the same view was entertained by the supreme court of the District of Columbia and the court of appeals of the District. But the "treaty fund" has exactly the same characteristics. They are moneys belonging really to the Indians. They are the price of land ceded by the Indians to the government. The only difference is that, in the "treaty fund," the debt to the Indians created and secured by the treaty is paid by annual appropriations. They are not gratuitous appropriations of public moneys, but the payment, as we repeat, of a treaty debt in instalments. We perceive no justification for applying the proviso or declaration of policy to the payment of treaty obligations, the two things being distinct and different in nature, and having no relation to each other, except that both are technically appropriations.

Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. Robert v. Bradfield, 12 App. D. C. 475; Bradfield v. Roberts, 175 U. S. 291, 44 L. ed. 168, 20 Sup. Ct. Rep. 121. But it is contended that the spirit of the Constitution requires that the declaration of policy that the government "shall make no appropriation whatever for education in any sectarian schools" should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence, that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an *establishment of religion or[82] prohibiting the free exercise thereof. The court of appeals well said:

"The 'treaty' and 'trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education: and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit, and in part for their education: it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it: such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complainants contend."

The *cestuis que trust* cannot be deprived of their rights by the trustee in the exercise of power implied.

Decree affirmed.

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the use of public moneys for sectarian schools did not extend to moneys belonging to the Indians themselves, and not to the public, and that these moneys belonging to the Indians themselves might be applied in accordance with the desire of the Indians for the support of the schools to which they were sending their children. There was, in my judgment, no question that, inasmuch as the legal authority existed to grant the request of the Indians, they were entitled, as a matter of moral right, to have the moneys coming to them used for the education of their children at the schools of their choice. Care must be taken, of course, to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled. But, if these two conditions are fulfilled, it is, in my opinion, just and right that the Indians themselves should have their wishes respected when they request that their own money —not the money of the public—be applied to the support of certain schools to which they desire to send their children. The practice will be continued by the Department unless Congress should decree to the contrary, or, of course, unless the courts should decide that the decision of the Department of Justice is erroneous.'

"This communication inclosed a letter from the Attorney General, setting forth at length the grounds for the conclusion 'that, notwithstanding the declaration of Congressional intent not to make appropriations in the future of public moneys of the American people for sectarian institutions, the previous laws giving the Secretary of the Interior discretion to use certain moneys of the Indians, held in trust, in any way that he might see fit, including assistance to sectarian schools, were not repealed, and consequently his discretion remained. For some of these laws, see 14 Stat. at L. 687; 16 Stat. at L. 362, chap. 296; 21 Stat. at L. 292, chap. 251; 22 Stat. at L. 30, chap. 46; 25 Stat. at L. 895, chap. 405; 26 Stat. at L. 146, 344, chaps. 418, 807.'

. . . .

"Accordingly the following contracts were made by the United States with various sectarian organizations for the education of Indian children from 'tribal funds' for the fiscal year ending June 30, 1906:

Name of School.	Denomination.	Pupils.	Tribe.	Rate per annum.	Total for year.
St. Joseph	Catholic	170	Menominee	$108	$18,360
St. Louis	Catholic	75	Osage	125	9,375
St. John	Catholic	65	Osage	125	8,125
Immaculate Conception	Catholic	65	Sioux	108	7,020
Holy Rosary	Catholic	200	Sioux	108	21,600
St. Francis	Catholic	250	Sioux	108	27,000
St. Labre	Catholic	60	Northern Cheyenne	108	6,480
St. Mary	Catholic	10	Quapaw	50	500
Zoas' Boarding School	Lutheran	40	Menominee	108	4,320
Total		935			$102,780

"In June, 1905, the Commissioner of Indian Affairs was notified by the 'Bureau of Catholic Indian Missions' that it was prepared to care for and educate during the fiscal year ending June 30, 1906, Indian pupils at the several schools carried on by it among the Sioux, Menominee, Osage, Northern Cheyenne, and Quapaw tribes, upon the same terms and conditions as stipulated in its contracts for carrying on these schools for the fiscal year 1905, and requested that it be granted a renewal of the contracts in question, payable in each case from the trust and treaty funds of the tribe among which the school is located, for the twelve months beginning July 1, 1905.

"To this application the Commissioner replied that the request would receive careful consideration; that the applicability of the trust and treaty funds had been submitted to the proper authorities for a definite determination, and indicated how petitions should be prepared, and the safeguards under which the signatures of the Indians should be made. Petitions were duly filed, signed under all the safeguards, by the Catholic Indians.

"In the meantime the schools were opened at the usual time and instruction given to the required number of pupils, in the confidence that the contracts applied for would be renewed.

"The Attorney General not having rendered any decision in the matter, the President, by a letter dated December 23, 1905, addressed to the Commissioner of Indian Affairs, after quoting a part of his letter of February 3, 1905, hereinbefore referred to, said:

"'There are two kinds of Indian funds involved in this matter. One is the trust fund, which requires no appropriation by Congress, and which clearly is to be administered as the Indians themselves request. As regards this fund, you will treat it on the assumption that the Indians have the right to say how it shall be used, so far as choosing the schools to which their children are to go is concerned; and each Indian in a tribe to be credited with his *pro rata* share of the funds, which you will apply for him to the government school, where that is the school used, or to the church school, where that is the school used, instead of segregating any portion of the fund for the support of the government school, and prorating the balance.

"'The other fund consists of moneys appropriated by Congress in pursuance of treaty stipulations. As to these moneys it is uncertain as to whether or not the prohibition by Congress of their application for contract schools applies,—that is, whether or not we have the power legally to use these moneys as we clearly have the power to use the trust funds. It appears that certain of the contract schools are now being run in the belief that my letter, quoted above, authorized the use of the treaty funds. It would be a great hardship, in the absence of any clearly-defined law on the subject, to cut them off at this time arbitrarily, and inasmuch as there is a serious question involved, I direct that, until the close of the fiscal year, these schools be paid for their services out of the moneys appropriated by Congress, in pursuance of treaty obligations, on the same basis as the schools paid out of the trust funds,—always exercising the precautions directed in my letter of February 3d, 1905, "to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled." But no new contracts are to be entered into for such payments after the close of the present fiscal year, unless there is authorization by Congress or some determination by the courts.'

"Accordingly, the contracts for the fiscal year ending June 30, 1905, hereinafter set forth, were renewed for the fiscal year ending June 30, 1906, the new contracts being executed as of July 1, 1905.

"The services have been performed under all these contracts and the money paid in all of them, except under the contract with the 'Bureau of Catholic Indian Missions' for the education of 250 Indian pupils at St. Francis Mission School on the Rosebud reservation. The payment of the $27,000 which is due under this contract has been withheld pending the decision by this honorable court as to validity of the contract and the appropriation of tribal funds for such purposes.

"18. And these defendants, specifically answering as to the contract in dispute, say:

"That it is a contract made between F. E. Leupp, Commissioner of Indian Affairs, for and on behalf of the United States of America, and the 'Bureau of Catholic Indian Missions,' executed as of July 1, 1905, for the care, education, and maintenance of 250 Indian pupils at the St. Francis Mission School, Rosebud reservation, South Dakota, at $108 *per capita*, per annum, amounting to $27.000. The contract was approved by Jesse E. Wilson, Acting Secretary of the Interior.

"Application for the contract was made by the 'Bureau of Catholic Indian Missions' on June 6, 1905.

"On March 26, 1906, a petition duly signed and genuinely signed by 212 members of the Sioux tribe of Indians of the Rosebud agency, South Dakota, was filed, asking that the said contract applied for be entered into with the bureau.

"The payments under the contract were to be made from the 'Sioux trust fund' and the 'Sioux treaty fund,' as hereinbefore described, in the discretion of the Commissioner of Indian Affairs.

"There are 4,986 Indians on the rolls of the Rosebud reservation, and the amount of tribal income applicable to education, in the discretion of the Commissioner, is—

$250,047.90, or a *per capita* of $50.15.

"The 212 petitioners represent 669 shares, or $33,550.35, and of this they ask that $27,000 be used for the education of their children in St. Francis Mission School. The following table will represent the *pro rata* shares in these tribal funds, and the *per capita* shares:

4,986	Indians,
669	shares Petitions,
4,317	Petitions (non-petitions)
4,986	

$250,047.90	Tribal funds, $50.15 *per capita.*
33,550.35	Tribal funds, $50.15 *per capita.*
$250,047.90	Tribal funds, $50.15 *per capita.*

"The cost of the government school for the fiscal year was about $76,830. Since the shares of the petitioning Indians amount to $33,550.35, and the sum asked for the school is only $27,000 out of this share, and the petitions were genuinely signed, the terms of the executive order of President Roosevelt of February 3d, 1905, *e. g.*, 'to see that any petition by the Indians is genuine, and that the money appropriated for any given school represents only the *pro rata* proportion to which the Indians making the petition are entitled,' have been strictly carried out.

"The services under this contract have been fully performed to the satisfaction of the Commissioner of Indian Affairs, and the twenty-seven thousand dollars ($27,000) agreed to be paid is due and payable, if this honorable court determines that it is legally payable out of the 'Sioux trust fund' and the 'Sioux treaty fund.'"

. . . .

ALBERT W. BROWN, Plff. in Err.,
v.
ESTATE OF GEORGE N. FLETCHER, Deceased.

(See S. C. Reporter's ed. 82–95.)

Judgments — of sister state — effect.

1. There is no such relation between an executor and administrator with the will annexed, appointed in another state, as will make a decree against the latter binding upon the former or the estate in his possession.

Judgments — of sister state — effect.

2. A decree entered, after an order of revivor, against the administrator with the will annexed of a nonresident, who had died pending suit, confirming an award in arbitration proceedings had in the suit under a rule of court, does not bind the nonresident executors and legatees, who did not appear and were not validly served with process, although the stipulation for submission to arbitration provided that the arbitration should continue in case of the death of either party, and that his successors and legal representatives should be bound by the final award.

[No. 220.]

Argued April 30, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Wayne County, in that state, af-

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NOTE.—On the right to revive suit and continue same against foreign representative of a deceased defendant over whom jurisdiction was obtained in his lifetime—see note to Brown v. Fletcher, 15 L.R.A.(N.S.) 632.

As to full faith and credit to be given judgments of courts of other state—see notes to Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; Huntington v. Atterill, 36 L. ed. U. S. 1123; and Bailey v. Mosher, 11 C. C. A. 318.

firming a decision of the Probate Court for that county, disallowing a claim against a decedent's estate, based on a judgment of another state. Affirmed.

See same case below, 146 Mich. 401, 109 N. W. 686.

Statement by Mr. Justice **Brewer:**

On April 24, 1874, a bill of complaint in a suit for an accounting was filed in the supreme judicial court of Massachusetts, sitting in equity, against George N. Fletcher, of Detroit, Michigan. The latter personally appeared and defended the suit. Without going into the details of the protracted litigation in Massachusetts, or showing how the plaintiff in error became at last the plaintiff in whose favor the Massachusetts court entered judgment, it is enough to say that on april 4, 1892, an agreement was made between the parties for submitting to arbitration all the claims and demands either party might have against the other; providing that the arbitration should be under rule of court, and that it should not operate as a discontinuance of the suit. It was further stipulated that the decease of either party should not terminate the submission, but that the arbitration should continue, and his successors and legal representatives should be bound by the final award therein. On October 18, 1893, the Hon. William L. Putnam was selected as arbitrator. On May 22, 1894, he filed a preliminary award. After this, and before a final award, Fletcher died, leaving a will, which was probated in the probate court of Wayne county, Michigan. Letters testamentary were issued to his executors, citizens of Michigan, who qualified as such, and took possession of the decedent's estate in [84]Michigan. *His principal estate, as well as his domicil, was in Michigan, but he owned two small tracts in Massachusetts. The probate court of Middlesex county, Massachusetts, by proceedings, regular in form, appointed Frank B. Cotton, a citizen of that state, administrator with the will annexed. The Massachusetts property was afterwards sold by that administrator for $350.

After the death of Fletcher the principal suit was revived, the administrator entered his appearance therein, and an order was made by the Massachusetts court that the executors and the children and residuary legatees of the decedent be notified to appear, and that in default thereof the arbitration proceed. They were notified by personal service of the order in the state of Michigan, but did not appear. The arbitration proceeded in their absence and a final award was made. It should also be stated that, on his death, Fletcher's counsel withdrew their appearance in the case. On April 14, 1903, the Massachusetts supreme judicial court confirmed the awards of the arbitrator, and adjudged that Albert W. Brown recover from Frank B. Cotton, administrator with the will annexed, the sum of $394,372.87 and $4,495.85 as interest and the costs of suits, afterwards taxed as $5,385.40. It was further adjudged and decreed that the Michigan executors of the last will were bound by the final award of the arbitrator, and liable to pay to Albert W. Brown the aforesaid sums; that the legal representatives of George N. Fletcher were likewise bound by the award and liable for any deficiency. Thereafter the decree of the Massachusetts court was filed in the probate court of Wayne county, Michigan, as evidence of a claim against the estate. It was disallowed by that court, and, on appeal to the supreme court of Michigan, the disallowance was affirmed. 146 Mich. 401, 109 N. W. 686. Thereupon the case was brought here on error.

Mr. **Harrison Geer** argued the cause and filed a brief for plaintiff in error:

The rule is universal that the death of a party to a suit in equity does not amount to a determination of the suit, but that its effect is merely to suspend the proceedings until new parties are brought before the court. When the suit is revived, the cause proceeds to its regular determination.

5 Enc. Pl. & Pr. pp. 790, 791; Story, Eq. Pl. & Pr. § 354; Clarke v. Mathewson, 12 Pet. 171, 9 L. ed. 1043; Mellus v. Thompson, 1 Cliff. 129, Fed. Cas. No. 9,405; Hoxie v. Carr, 1 Sumn. 178, Fed. Cas. No. 6,802; Sanford v. Sanford, 28 Conn. 6.

The revivor of suits in Massachusetts, on the death of a party, is regulated by statutes which do away with the necessity for a bill of revivor.

Cheney v. Gleason, 125 Mass. 174; Parker v. Simpson, 180 Mass. 358, 62 N. E. 401.

While the right of the supreme judicial court in equity for Suffolk county to proceed in the suit was suspended by Fletcher's death, the court was not thereby devested of jurisdiction. It retained the jurisdiction possessed by it in the lifetime of Fletcher until the cause was finally determined.

2 Black, Judgm. § 912; Freeman, Judgm. § 142; Sanford v. Sanford, supra; Evans v. Percifull, 5 Ark. 429; Quarl v. Abbett, 102 Ind. 240, 52 Am. Rep. 662, 1 N. E. 476; Gray v. Bowles, 74 Mo. 419; Nations v. Johnson, 24 How. 202, 16 L. ed. 631. See also Smith v. Engle, 44 Iowa, 265; Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100; Field v. Saginaw Circuit Judge, 124 Mich. 68, 82 N. W. 798.

The court having possessed jurisdiction of the cause until it was finally determined, its exercise of that jurisdiction cannot be questioned in a collateral proceeding like the one at bar. There is a marked distinction between the jurisdiction of a court, and its exercise of that jurisdiction. If it has no jurisdiction, any judgment rendered by it is absolutely void, and may be attacked in a collateral proceeding. If it has jurisdiction, but exercises it wrongfully, its judgment may be reversed on appeal, but it cannot be questioned in a collateral proceeding.

17 Am. & Eng. Enc. Law, 2d ed. p. 1042; Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585; Chase v. Christianson, 41 Cal. 255. See also Laing v. Rigney, supra; Babb v. Bruere, 23 Mo. App. 606; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73.

Even if the suit had not been revived after Fletcher's death, the decree would be merely voidable, and not void, or subject to attack in a collateral proceeding like the case at bar. While a court ought to cease the exercise of its jurisdiction over a party on his death, its failure to do so can only be corrected in a direct proceeding. The court having possessed jurisdiction in the lifetime of the party, and having retained such jurisdiction until the final determination of the suit, its exercise of that jurisdiction, even after the death of the party, is not subject to collateral attack.

2 Black, Judgm. § 200; Freeman, Judgm. §§ 140–153; 17 Am. & Eng. Enc. Law, 2d ed. p. 1070; New Orleans v. Gaines (New Orleans v. Whitney) 138 U. S. 612, 34 L. ed. 1108, 11 Sup. Ct. Rep. 428; Reid v. Holmes, 127 Mass. 326; Collins v. Mitchell, 5 Fla. 364; Neale v. Utz, 75 Va. 480; Yaple v. Titus, 41 Pa. 195, 80 Am. Dec. 604; Carr v. Townsend, 63 Pa. 202; Swasey v. Antram, 24 Ohio St. 87; Claflin v. Dunne, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; Hayes v. Shaw, 20 Minn. 405, Gil. 355; Stocking v. Hanson, 22 Minn. 542; Watt v. Brookover, 29 Am. St. Rep. 816 note; Webber v. Stanton, 1 Mich. N. P. 97.

While the principles applicable to the case at bar have many times been recognized, their application to the facts of a case like the one at bar has been judicially considered in only one case, so far as we have been able to find.

Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138.

The decision in Creighton v. Murphy, supra, although unique, rests upon well-established legal principles.

Nations v. Johnson, 24 How. 195, 16 L. ed. 628.

The efficacy, as evidence, of the decree in the case at bar, was not changed by the revival of the suit.

Fitzsimmons v. Johnson, supra; see also Laing v. Rigney and Field v. Saginaw Circuit Judge, supra.

It was originally the doctrine of courts of equity that their decrees could operate only *in personam*, and not *in rem*. This doctrine has been somewhat changed by modern legislation, but it is still the universal doctrine that where the subject-matter of the suit, either real or personal property, is situated beyond the territorial jurisdiction of the court, the decree of the court can operate only *in personam*.

1 Pom. Eq. Jur. 3d ed. § 428; 4 Pom. Eq. Jur. 3d ed. § 1318.

The doctrine is recognized in both Massachusetts and Michigan.

Pingree v. Coffin, 12 Gray, 305; Brown v. Desmond, 100 Mass. 269; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Noble v. Grandin, 125 Mich. 383, 84 N. W. 465.

It is thus clear that the suit in the supreme judicial court in equity for Suffolk county was a proceeding *in personam*. Having been a proceeding *in personam* in the lifetime of Fletcher, and the jurisdiction of the court not having been affected by his death, the suit remained a proceeding *in personam* until it was finally determined. It was not changed by his death from a proceeding *in personam* to a proceeding quasi *in rem*.

Sheldon v. Warner, 59 Mich. 444. 26 N. W. 667.

The case of Dunlap v. Byers, supra, is like the case at bar in many essential features.

The Massachusetts court has, in effect, decided that these statutes did not so limit its authority that the decree rendered by it is one simply to be satisfied out of the assets in the hands of the administrator with the will annexed of Fletcher's estate; and this court must accept that construction.

Lewis's Sutherland, Stat. Constr. §§ 314–319; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289.

Fletcher's Michigan executors, and the administrator with the will annexed of his estate in Massachusetts, are in such privity that the decree is conclusive evidence of debt in this proceeding.

1 Woerner, Am. Law of Administration, § 178; Schouler, Exrs. & Admrs. § 123; 11 Am. & Eng. Enc. Law, 2d ed. p. 1320; 18 Cyc. Law & Proc. pp. 1321, 1322; 23 Am. & Eng. Enc. Law, 2d ed. p. 101; 6 Words & Phrases, pp. 5606–5611; 1 Greenl. Ev. §§ 189, 523; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Williams v. Barkley, 165 N. Y. 48. 58 N. E. 768; Pennington v. Hunt, 20 Fed. 195; Hill v. Tucker, 13 How. 458,

14 L. ed. 223; Goodall v. Tucker, 13 How. 469, 14 L. ed. 227; Turley v. Dreyfus, 33 La Ann. 885; Hopper v. Hopper, 125 N. Y. 400. 12 L.R.A. 237, 26 N. E. 457; Garland v. Garland, 84 Va. 181, 4 S. E. 334; Latine v. Clements, 3 Ga. 426.

Mr. **John Miner** also argued the cause for plaintiff in error.

Mr. **Henry M. Campbell** argued the cause and filed a brief for defendant in error:

The character of the suit against Fletcher was not changed by the agreement of submission under rule of court. The agreement had no independent efficacy, but was only a step in the cause. Any award made under it was not final. A decree was necessary to constitute a final adjudication.

Haskell v. Whitney, 12 Mass. 49; Todd v. Old Colony & F. River R. Co. 3 Allen, 18, 80 Am. Dec. 49; Woodbury v. Proctor, 9 Gray. 19; Seavey v. Beckler, 132 Mass. 203; Willey v. Durgin, 118 Mass. 70.

In the states where this practice prevails, including Massachusetts. it is universally held that the death of the party does not revoke the submission, thus placing the submission upon the same plane as a reference to a master; that the death may be suggested of record, and the cause revived against such persons as the court may be able to bring within its jurisdiction.

Bacon v. Crandon, 15 Pick. 79; Freeborn v. Denman, 8 N. J. L. 116; Moore v. Webb. 6 Heisk. 301; Ruston v. Dunwoody. 1 Binn. 42; Wheatley v. Martin, 6 Leigh, 62.

The death of Fletcher abated the suit, and thereafter it could be revived only against such persons as were subject to the jurisdiction of the court and were lawfully brought before it.

2 Dan. Ch. Pl. & Pr. 1508; Story, Eq. Pl. § 364; 1 Cyc. Law & Proc. pp. 101, 110.

Even if the court had power to make the foreign executors parties, and to summon them to appear, process for that purpose could not run outside of the state.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Scott v. McNeal, 154 U. S. 34–46, 38 L. ed. 896–901, 14 Sup. Ct. Rep. 1108; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 15, 51 L. ed. 348, 27 Sup. Ct. Rep. 236; Wetmore v. Karrick, 205 U. S. 141–148, 51 L. ed. 745–747, 27 Sup. Ct. Rep. 434; Smith v. Woolfolk, 115 U. S. 143, 29 L. ed. 357, 5 Sup. Ct. Rep. 1177; Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; Dewey v. Des Moines, 173 U. S. 203, 43 L. ed. 668, 19 Sup. Ct. Rep. 379; Overby v. Gordon, 177 U. S. 223, 44 L. ed. 745, 20 Sup. Ct. Rep. 603; Felch v. Hooper, 119 Mass. 52; Howard v. Coon, 93 Mich. 443. 53 N. W. 513; McEwan v. Zimmer, 38 Mich. 765.

No estoppel can arise from any agreement made by the decedent. respecting the control or disposition of his property after his death.

Wilcke v. Duross, 144 Mich. 243, 115 Am. St. Rep. 394. 107 N. W. 907.

The administrator with the will annexed, appointed by the probate court of Suffolk county, Massachusetts, at the instance of the plaintiff, was not in privity with the executors appointed by the probate court for the county of Wayne. Michigan, under the will, so that a decree in Massachusetts against the Massachusetts administrator with the will annexed is binding upon the Michigan executors.

Story, Confl. L. §§ 512–514; Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 N. W. 34; American Missionary Asso. v. Hall, 138 Mich. 247, 101 N. W. 535; Low v. Bartlett. 8 Allen, 262; Vaughan v. Northup. 15 Pet. 5, 10 L. ed. 640; Aspden v. Nixon. 4 How. 467, 11 L. ed. 1059; Stacy v. Thrasher. 6 How. 58. 12 L. ed. 342; McLean v. Meek. 18 How. 16. 15 L. ed. 277; Johnson v. Powers, 139 U. S. 156. 35 L. ed. 112. 11 Sup. Ct. Rep. 525; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464. 11 Sup. Ct. Rep. 773; Rio Grande R. Co. v. Gomila (Rio Grande R. Co. v. Vinet) 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; Ingersoll v. Coram, 127 Fed. 434; Noonan v. Bradley, 9 Wall. 394, 400, 19 L. ed. 757, 759; Dixon v. Ramsay, 3 Cranch. 319, 2 L. ed. 453; 18 Cyc. Law & Proc. pp. 1226-1244; Alsop v. Mather. 8 Conn. 584, 21 Am. Dec. 703; Ela v. Edwards, 13 Allen, 49, 90 Am. Dec. 174; Clark v. Blackington, 110 Mass. 369; Ex parte Brown, 2 Bradf. 22; Mellus v. Thompson, 1 Cliff. 133, Fed. Cas. No. 9,405; Vickery v. Beir, 16 Mich. 53; Flandrow v. Hammond, 13 App. Div. 326, 43 N. Y. Supp. 143.

A suit can be revived against only such persons as are lawfully empowered to defend the same within the jurisdiction.

Greer v. Ferguson, 56 Ark. 331, 19 S. W. 966; Judy v. Kelley, 11 Ill. 211, 50 Am. Dec. 455; McGarvey v. Darnall, 32 Ill. App. 226; Rentschler v. Jamison, 6 Mo. App. 135; Reynolds v. McMullen, 55 Mich. 584, 54 Am. Rep. 386, 22 N. W. 41; Woodruff v. Young, 43 Mich. 548, 6 N. W. 85; Sheldon v. Rice, 30 Mich. 296, 18 Am. Rep. 136; Thayer v. Lane, Walk. Ch. (Mich.) 200; Re Crawford, 68 Ohio St. 83, 96 Am. St. Rep. 648, 67 N. E. 156.

The covenants contained in the agreement of submission could not confer upon the Massachusetts court the power, which it did not otherwise possess, to render a judgment against the Michigan executors, over whom it had no authority and who had not been brought within its jurisdiction by legal process.

Woodbury v. Proctor, 9 Gray, 19; Willey v. Durgin, 118 Mass. 64; Seavey v. Beckler, 132 Mass. 203; Morse, Arbitration & Award, 87; Mussina v. Hertzog, 5 Binn. 387; Cooley, Const. Lim. 491; Spear v. Carter, 1 Mich. 23, 48 Am. Dec. 688; Youngblood v. Sexton, 32 Mich. 409, 20 Am. Rep. 654; Allen v. Carpenter, 15 Mich. 32; Thompson v. Michigan Mut. Ben. Asso. 52 Mich. 524, 18 N. W. 247; Kirkwood v. Hoxie, 95 Mich. 62, 35 Am. St. Rep. 549, 54 N. W. 720; Santom v. Ballard, 133 Mass. 465; Batchelder v. Currier, 45 N. H. 463; Dudley v. Mayhew, 3 N. Y. 9; Morrison v. Weaver, 4 Serg. & R. 190; Agee v. Dement, 1 Humph. 332; Judy v. Kelley, supra; Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966; Flandrow v. Hammond, 13 App. Div. 325, 43 N. Y. Supp. 143; Sloan v. Sloan, 21 Fla. 596; Elting v. First Nat. Bank, 173 Ill. 387, 50 N. E. 1095; Freeman, Judgm. § 120; Foster v. Durant, 2 Cush. 544; Hubbell v. Bissell, 15 Gray, 551; 17 Am. & Eng. Enc. Law, 2d ed. p. 1060; Home Ins. Co. v. Morse, 20 Wall. 450, 22 L. ed. 367.

Mr. Justice **Brewer** delivered the opinion of the court:

The Federal question presented is whether the Michigan courts gave force and effect to the 1st section of article 4 of the Federal Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." That this is a Federal question is not open to doubt. Huntington v. Attrill, 146 U. S. 657, 666, 36 L. ed. 1123, 1127, 13 Sup. Ct. Rep. 224, and cases cited.

The constitutional provision does not preclude the courts of a state in which the judgment of a sister state is presented from inquiry as to the jurisdiction of the court by which the judgment was rendered. See the elaborate opinion by Mr. Justice Bradley, speaking for the court, in Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897. That opinion has been followed in many cases, among which may be named Simmons v. Saul, 138 U. S. 439, 448, 34 L. ed. 1054, 1059, 11 Sup. Ct. Rep. 369; Reynolds v. Stockton, 140 U. S. 254, 265, 35 L. ed. 464, 467, 11 Sup. Ct. Rep. 773; Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446. Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts. Knowles v. Logansport Gaslight & Coke Co.
[89] 19 Wall. 58, 61, 22 L. ed. 70, 72; *Pennoyer v. Neff, 95 U. S. 714, 730, 24 L. ed. 565, 571; Cooper v. Newell, 173 U. S. 555, 566, 43 L. ed. 808, 811, 19 Sup. Ct. Rep. 506.

Every state has exclusive jurisdiction over the property within its borders. Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603. We make this extract from the opinion of Mr. Justice White in that case, p. 222:

"To quote the language of Mr. Chief Justice Marshall, in Rose v. Himely, 4 Cranch, 241, 277, 2 L. ed. 608, 619: 'It is repugnant to every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*.'

"As said also in Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. ed. 565, 568: 'Except as restrained and limited by the Constitution, the several states of the Union possess and exercise the authority of independent states; and two well-established principles of public law respecting the jurisdiction of an independent state over persons and property are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L. chap. 2; Wheaton, International Law, pt. 2, chap. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. L. § 539.'"

*Fletcher, at the time of his decease, was [90]
the owner of property, some of it situated in Massachusetts and some in Michigan. Each state had jurisdiction over the property within its limits, and could, in its own courts, in conformity with its laws, provide for the disposition thereof. Massachusetts exercised its jurisdiction over the property within its limits and disposed of it by legal proceedings in its courts. The contention now is that the proceedings in the Massachusetts court can be made operative to control the disposition of the property in

Michigan. In support of this contention, counsel for plaintiff in error state two propositions:

"The supreme judicial court in equity for Suffolk county, Massachusetts, having had jurisdiction in Fletcher's lifetime over the subject-matter and the parties to the suit, and, on his death, the suit having been duly revived, the decree is conclusive evidence of debt in this proceeding.

"Fletcher's Michigan executors and the administrator with the will annexed of his estate in Massachusetts are in such privity that the decree is conclusive evidence of debt in this proceeding."

Considering first the latter proposition, we are of opinion that there is no such relation between the executor and an administrator with the will annexed, appointed in another state, as will make a decree against the latter binding upon the former, or the estate in his possession. While a judgment against a party may be conclusive, not merely against him, but also against those in privity with him, there is no privity between two administrators appointed in different states. Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337. In this latter case, on page 58, it was said:

"Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in [91] contemplation *of law, there is no privity between him and the other administrator. See Story, Confl. L. § 522; Brodie v. Bickley, 2 Rawle, 431."

See also McLean v. Meek, 18 How. 16, 15 L. ed. 277; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525, in which the question is discussed at some length by Mr. Justice Gray. This doctrine was enforced in Massachusetts (Low v. Bartlett, 8 Allen, 259), where a judgment had been recovered in Vermont against an ancillary administrator appointed in that state, whose appointment had been made at the request of the executor under the will probated in Massachusetts, and it was held that the administrator was not in privity with the executor, because the two were administering two separate and distinct estates; the court saying, p. 262:

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it, and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont, he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands; but was simply against the administrator and the testator's goods in his hands. The courts of Vermont had no jurisdiction of the executor or of the goods in his hands, any more than our *courts would have over the [92] administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every state where a deceased person leaves property; and each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled."

The Massachusetts statutes proceed along this line. Secs. 10, 11, and 12, chap. 136, Mass. Rev. Laws 1902, provide for the probate of foreign wills in Massachusetts. Sec. 12 reads:

"After allowing a will under the provisions of the two preceding sections, the probate court shall grant letters testamentary on such will, or letters of administration with the will annexed, and shall proceed in the settlement of the estate which may be found in this commonwealth in the manner provided in chap. 143, relative to such estates."

With reference to the first contention of counsel, we remark that, while the original suit against Fletcher in the Massachusetts court was revived after his death, yet the revivor was operative only against the administrator with the will annexed. Neither the executors nor the residuary legatees were made parties, for it is elementary that service of process outside of the limits of the state is not operative to bring the party served within the jurisdiction of the court ordering the process. Such also is the statutory provision in Massachusetts.

Section 1, chap. 170, Mass. Rev. Laws 1902, reads:

"A personal action shall not be maintained against a person who is not an inhabitant of this commonwealth unless he has been served with process within this commonwealth, or unless an effectual attachment of his property within this commonwealth has been made upon the original writ; and, in case of such attachment without such service, the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise."

The Massachusetts court, therefore, proceeded without any personal jurisdiction [93] over the executors and legatees, who *were all domiciled in Michigan, did not appear, and were not validly served with process.

The argument of plaintiff in error is that, by personal appearance during his lifetime, the Massachusetts court acquired jurisdiction of the suit in equity against Fletcher; this his death prior to a decree did not abate the suit, but only temporarily suspended it until his representative should be made a party; that, if a decree had been rendered against him in his lifetime, it would have established, both against himself, and, after his death, against his estate, whatever of liability was decreed; that, while the suit was pending, the parties entered into a stipulation for an arbitration; that that arbitration did not abate, nor was it outside the suit, but, in terms, made under rule of court, and not to operate as a discontinuance of the suit. Provision was also made in the stipulation for the contingency of death, its terms being "that the decease of any party shall not revoke said submission, but that said arbitration shall continue, and that . . . the legal representatives of said Brown and said Fletcher shall be bound by the final award therein;" so that there is not merely the equity rule that a suit in equity does not abate by the death of the defendant, and that the jurisdiction of the court is only suspended until such time as the proper representatives of the deceased are made parties defendant, but also a special agreement in the submission to arbitration that it shall be made under a rule of court, and that the death of either party shall not terminate the arbitration proceedings, but that they shall continue until the final award. It is urged that, on the death, a revivor was ordered; that the representative of the decedent's estate in Massachusetts, to wit, the administrator, was made a party defendant and appeared to the suit, and notice was given by personal service upon the executors and legatees in Michigan of the fact of the revivor, and that they were called upon to appear and defend.

But it must be borne in mind that this arbitration was made under a rule of court. Not only that, but special provision *was [94] made for the action of the court in deciding questions of law arising upon the report of the arbitrator, so that the arbitration was not an outside and independent proceeding, but simply one had in court, for the purpose of facilitating the disposition of the case. And we may remark in passing that we do not have before us the case of a simple arbitration contract, executed independently of judicial proceedings, and express no opinion as to the rights and remedies of one party thereto in case of the death of the other. The validity of the decree must depend upon the proceedings subsequent to the death of Fletcher. On his death the jurisdiction of the Massachusetts court was not wholly destroyed, but suspended until the proper representative of Fletcher was made a party. The Massachusetts administrator was made a party and did appear, and the decree rendered unquestionably bound him; but the executors, the domiciliary representatives of the decedent's estate, did not appear, and were not brought into court. The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody. If the home estate was to be reached, it had to be reached by proceedings to which the home representatives were parties. The agreement of the parties that the arbitration should continue in case of the death of either, and that the legal representatives of the party should be bound by the final award, was an agreement made in the course of judicial proceedings of the suit in the Massachusetts court. It did not operate to make the home representatives of the decedent parties to the suit on the death of Fletcher. It did not bring his general estate into court. We concur in the views expressed by the supreme court of Michigan in the close of its opinion that—

"It must be held that the proceeding in the Massachusetts court abated with the death of Mr. Fletcher, that its revival was possible only because there was brought into existence, by the exercise of the sovereign power of the state, a representative *of the [95] decedent, clothed with certain powers with respect to the estate of decedent within the state, and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate, who was, in accordance with the law of the place, brought upon the record."

We are of opinion that the Supreme Court of Michigan did not fail to give "full faith and credit" to the decree of the Massachusetts Supreme Court, and therefore the judgment is affirmed.

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†GEORGE DESLIONS, W. C. Perry, Administrator of Kate M. Perry, et al., Petitioners,

v.

LA COMPAGNIE GENERALE TRANSATLANTIQUE, Owner of the Steamship La Bourgogne.

(See S. C. Reporter's ed. 95–141.)

Appeal — finality of judgment.

1. A decree in proceedings in admiralty for limitation of liability, which grants such limitation, determines the question of pending freight to be surrendered, and disallows all claims for loss of life, but refers all other claims to a commissioner to take testimony and report, cannot be regarded as final for the purpose of an appeal, especially where the court below and the parties have treated such decree as a mere interlocutory one.

Appeal — review of facts — concurrent findings below.

2. Concurrent findings of both the courts below as to the density of a fog and the rate of the speed of a steamship at the time of collision will not be disturbed by the Federal Supreme Court on appeal, unless such findings are so unwarranted by the evidence as clearly to be erroneous.

Admiralty — rule of decision — fault of colliding vessels.

3. The international rule as to speed permissible in a fog, as interpreted by the courts of the United States, and not by the practice under that rule prevailing in the French courts, must be applied in a proceeding by the owner of a French vessel lost in a collision with a British ship on the high seas, to obtain, in the courts of the United States, the benefit of the law of the United States for the limitation of liability of shipowners.

Appeal — presumption from suppression of evidence.

4. Privity or knowledge by a steamship company of the fault of its servants in maintaining an excessive rate of speed in a fog is not to be presumed from a failure to comply, in proceedings to limit liability, with an order for the production of certain log books, where the claimant made no attempt to introduce secondary evidence, and did not ask a dismissal of the proceedings or such other action for the alleged contumacy as the case required.

Shipping — limitation of liability — privity or knowledge of owner.

5. Mere negligence, of itself, does not necessarily establish the existence on the part of the owner of a vessel of "privity or knowledge," within the meaning of U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943, according to shipowners a limited exemption from liability.

Shipping — limitation of liability — privity or knowledge of owner.

6. The duty on the part of a steamship company seeking limitation of liability for claims arising out of a collision in a fog, to have made regulations directing that its steamers be not run at an immoderate speed in a fog, in order to negative privity or knowledge of fault, was sufficiently discharged by promulgating regulations which, in terms, reiterated the international rule, and called for compliance with its provisions.

Evidence — burden of proof — privity or knowledge.

7. The claimants in proceedings by a steamship company to limit its liability for claims arising out of a collision are charged with the burden of proving that the regulations promulgated by the steamship company for the conduct of its business, which exacted compliance by the captains of its vessels with the international rules, were not promulgated in good faith, or that a wilful departure from their requirements was indulged in, and was brought home to, or was countenanced by, the company.

Shipping — limitation of liability — owners' privity or knowledge of fault.

8. Privity and knowledge of the habit of running its vessels at an immoderate speed in a fog cannot be imputed to a steamship company so as to defeat its right to limit its liability for claims arising out of a collision in a fog, from the provisions of the contract for subsidy with the French government, which requires vessels, which are only obliged to develop, under forced draft, on their trial, a maximum speed of 17½ knots, to maintain a mean average annual speed of 15 knots, with a premium for exceeding that speed, and a penalty for a failure to maintain it.

Shipping — government control — life-saving equipment.

9. The sufficiency of the equipment of a vessel with lifeboats, life rafts, and boat disengaging apparatus is to be measured by the regulations adopted pursuant to U. S. Rev. Stat. § 4488, U. S. Comp. Stat. 1901, p. 3055, by the board of supervising inspectors, which regulations, under § 4405

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†This case is reported by the Official Reporter under the title of "La Bourgogne."

NOTE.—As to finality of judgment for purpose of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482.

As to limitation of shipowner's liability—see note to The Longfellow, 45 C. C. A. 387.

(U. S. Comp. Stat. 1901, p. 3017), when approved by the Secretary of the Treasury, "have the force of law."

Shipping — inspection — foreign vessels.

10. The failure especially to enumerate U. S. Rev. Stat. § 4405, giving the force of law to regulations of the board of supervising inspectors, in the act of August 7, 1882 (22 Stat. at L. 346, chap. 441, U. S. Comp. Stat. 1901, p. 3015), making applicable to foreign vessels the provisions of certain enumerated sections relating to the inspection of steam vessels, does not render such section inapplicable to foreign vessels.

Shipping — limitation of liability — surrender of pending freight — voyage.

11. Passenger and freight receipts earned by a vessel on her sailing from Havre to New York need not be surrendered as freight then pending for the voyage, within the meaning of U. S. Rev. Stat. §§ 4283, 4284, U. S. Comp. Stat. 1901, p. 2943, in proceedings for the limitation of liability for claims arising out of a collision occurring on the vessel's return trip from New York to Havre.

Shipping — limitation of liability — surrender of prepaid freight.

12. Sums prepaid for freight and passage on the voyage, under an absolute agreement that such sums are, in any event, to belong to the owner of the vessel, must be surrendered as freight then pending on the voyage, within the meaning of U. S. Rev. Stat. §§ 4283, 4284, in proceedings for the limitation of liability for claims arising out of the sinking of the vessels as a result of a collision at sea.

Shipping — limitation of liability — pending freight — government subsidy.

13. No part of the annual subsidy paid to a steamship company by the French government in consideration of the operation of a weekly steamship service between Havre and New York need be surrendered as freight pending for the voyage, within the meaning of U. S. Rev. Stat. §§ 4283, 4284, in proceedings for the limitation of liability for claims arising out of the loss of one of the vessels of such steamship company in a collision on a voyage from New York to Havre.

Admiralty — foreign law as rule of decision — claims for loss of life.

14. The law of France which authorizes a recovery for loss of life against a vessel in fault will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be at fault for a collision in a fog on the high seas, although the French courts, in applying to the facts found the international rule as to the speed of vessels in a fog, might not have held such vessel to be at fault.

Shipping — limitation of liability — failure to surrender pending freight.

15. Failure to surrender pending freight to the trustee does not necessitate a refusal to allow the limitation of liability for claims arising out of a collision at sea, where there is an honest controversy as to whether there was any pending freight to be surrendered, and there is no question as to the solvency of the owner.

[No. 33.]

Argued November 1, 1907. Decided May 18, 1908.

ON WRIT AND CROSS WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review decrees affirming in part a decree of the District Court for the Southern District of New York, granting a limitation of liability for claims arising out of a collision on the high seas. Affirmed.

See same case below, 71 C. C. A. 489, 139 Fed. 433, 75 C. C. A. 647, 144 Fed. 781.

The facts are stated in the opinion.

Mr. **J. Parker Kirlin** argued the cause, and, with Messrs. Robert D. Benedict, Edward G. Benedict, and A. Gordon Murray, filed a brief for petitioners:

Limited liability acts should be strictly construed.

The Main v. Williams, 152 U. S. 122, 38 L. ed. 381, 14 Sup. Ct. Rep. 486.

The petitioner would be in privity with the cause of damage, if it encouraged, consented to, or connived at the kind of navigation that led to the disaster.

Webster's International Dict. "Privity;" Century Dict. "Privity;" Craig v. Continental Ins. Co. 141 U. S. 638, 646, 35 L. ed. 886, 888, 12 Sup. Ct. Rep. 97; Re Myers Excursion & Nav. Co. 57 Fed. 240, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109; Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 117; Parsons v. Empire Transp. Co. 49 C. C. A. 302, 111 Fed. 208; McGill v. Michigan S. S. Co. 75 C. C. A. 518, 144 Fed. 788; Re Pacific Mail S. S. Co. 69 L.R.A. 71, 64 C. C. A. 410, 130 Fed. 76; The Rebecca, 1 Ware, 188, Fed. Cas. No. 11,619.

The petitioner has the burden of proof, and is bound to show, by a fair preponderance of the evidence, that the loss in respect of which the limitation is desired has been "done, occasioned, or incurred without the privity or knowledge of such owner." Unless it has established that condition affirmatively, it cannot have a limitation of its liability.

Quinlan v. Pew, supra; The Colima, 82 Fed. 669; McGill v. Michigan S. S. Co. supra; The Wildcroft (W. J. McCahan Sugar

Ref. Co. v. The Wildcroft) 201 U. S. 378, 50 L. ed. 794, 26 Sup. Ct. Rep. 467.

It is well settled that where accidents happen to railroad employees by the fault of fellow employees, under conditions that would have been prevented by the making and enforcement of reasonable rules for the conduct of the business, the defense of fellow service is not available. The railroad may be held liable because of its failure either to promulgate or to enforce such rules and regulations.

Doing v. New York, O. & W. R. Co. 151 N. Y. 583, 45 N. E. 1028; Abel v. Delaware & H. Canal Co. 103 N. Y. 585, 57 Am. Rep. 773, 9 N. E. 325; Whittaker v. Delaware & H. C. Co. 126 N. Y. 549, 27 N. E. 1042; Cooper v. Central R. Co. 44 Iowa, 134; Chicago & N. W. R. Co. v. Taylor, 69 Ill. 461, 18 Am. Rep. 626; Thomas v. Cincinnati, N. O. & T. P. R. Co. 97 Fed. 251; Northern P. R. Co. v. Nickels, 1 C. C. A. 625, 4 U. S. App. 369, 50 Fed. 718.

However positive and precise a rule may be, it will not avail the person who has prescribed it, if he encourages or sanctions or knowingly tolerates its violation.

Northern P. R. Co. v. Nickels, supra.

Previous collections that arose by reason of the navigation of the petitioner's steamers at immoderate speed in fog were important, first, because they show either that the rule which the petitioner had promulgated for the guidance of its captains in navigating their steamers in fog was insufficient in terms, or, if it be deemed to be sufficient, that it was being disobeyed; and, secondly, because they show that the petitioner had knowledge from time to time of the improper methods of navigation followed by its captains, and did not take any steps to stop them.

The George W. Roby, 49 C. C. A. 481, 111 Fed. 601; District of Columbia v. Armes, 107 U. S. 519, 525, 27 L. ed. 618, 620, 2 Sup. Ct. Rep. 840; Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418; Quinlan v. Utica, 11 Hun, 217, 74 N. Y. 603; Carpenter v. Boston & A. R. Co. 97 N. Y. 494, 49 Am. Rep. 540; Snow v. Fitchburg R. Co. 136 Mass. 552, 49 Am. Rep. 40; Galloway v. Chicago, M. & St. P. R. Co. 56 Minn. 346, 23 L.R.A. 442, 45 Am. St. Rep. 468, 57 N. W. 1058; Shaw v. Chicago & G. T. R. Co. 123 Mich. 629, 49 L.R.A. 308, 81 Am. St. Rep. 230, 82 N. W. 618; Martin v. Webb, 110 U. S. 7, 14, 28 L. ed. 49, 52, 3 Sup. Ct. Rep. 428.

The disobedience of the order of the court requiring the production of the log books of the Bourgogne and of other steamers navigated by Captain Delocle, for two years prior to the collision, creates a presumption adverse to the petitioner, which corroborates the claimants' proof that the petitioner's steamers were habitually run at immoderate speed in fog.

Blatch v. Archer, 1 Cowp. 65, 1 Starkie, Ev. p. 54; Com. v. Webster, 5 Cush. 316, 52 Am. Dec. 711; McDonough v. O'Niel, 113 Mass. 92; People v. McWhorter, 4 Barb. 438; Gulf, C. & S. F. R. Co. v. Ellis, 4 C. C. A. 454, 10 U. S. App. 640, 54 Fed. 481; Clifton v. United States, 4 How. 242, 11 L. ed. 957; Kirby v. Tallmadge, 160 U. S. 379, 383, 40 L. ed. 463, 465, 16 Sup. Ct. Rep. 349; The New York, 175 U. S. 187, 204, 44 L. ed. 126, 133, 20 Sup. Ct. Rep. 67; Wylde v. Northern R. Co. 53 N. Y. 156; A Quantity of Distilled Spirits, 3 Ben. 70, Fed. Cas. No. 11,494; National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co. 19 Fed. 514.

In so far as the supervising inspectors' rules exceed the authority conferred on the inspectors by the statute, they are of no force or validity.

The John King, 1 C. C. A. 319, 1 U. S. App. 70, 49 Fed. 472.

A ruling that a railroad company is bound to furnish a prescribed kind of safety appliance for coupling cars (Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158) is authority for the contention that the petitioner was bound to furnish the boat-disengaging apparatus required by Congress.

The failure to have the Bourgogne equipped with a sufficient number of life boats, and with the required boat-disengaging apparatus, was the personal fault of the petitioner. That fault should lead to a denial of the petition.

Butler v. Boston & S. S. S. Co. 130 U. S. 527, 553, 32 L. ed. 1017, 1023, 9 Sup. Ct. Rep. 612; Re Pacific Mail S. S. Co. 69 L. R.A. 71, 64 C. C. A. 410, 130 Fed. 82.

The freight for the voyage was never transferred to the trustee, nor was any bond for it given. The court below erred in granting the petitioner a limitation of its liability without having secured possession of the fund to which it assumed to limit the rights of the claimants.

Re Morrison (Morrison v. District Court) 147 U. S. 14, 35, 37 L. ed. 60, 68, 13 Sup. Ct. Rep. 246; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 124, 20 L. ed. 585, 592; Ex parte Slayton, 105 U. S. 451, 452, 26 L. ed. 1066, 1067; O'Brien v. Miller, 168 U. S. 287, 303, 306, 307, 42 L. ed. 469, 475–477, 18 Sup. Ct. Rep. 140.

In order to have an ocean steamer or any vessel properly manned, she must be in charge of a competent master.

The Cygnet, 61 C. C. A. 348, 126 Fed. 745; The Guildhall, 58 Fed. 800; The Giles

Loring, 48 Fed. 463; Draper v. Commercial Ins. Co. 4 Duer, 234; 1 Kay, Shipmasters & Seamen, pp. 31, 87; Tait v. Levi, 14 East, 481.

It is not sufficient to establish competency in a master, to prove merely that he has skill in navigation.

Coppins v. New York C. & H. R. R. Co. 122 N. Y. 564, 19 Am. St. Rep. 523, 25 N. E. 915.

The petitioner is under the burden of establishing the competency of the master, or that it used due diligence to have a competent man in charge, by affirmative proof.

The Wildcroft (W. J. McCahan Sugar Ref. Co. v. The Wildcroft) 201 U. S. 378, 50 L. ed. 794, 26 Sup. Ct. Rep. 467; The Cygnet, supra; McGill v. Michigan S. S. Co. 75 C. C. A. 518, 144 Fed. 795.

The petitioner has not offered proof that it exercised due diligence to have and to keep a competent master in charge of the steamer. It was bound to exercise such diligence originally, and to use, in the supervision of the master's conduct, the degree of care necessary to make sure that he was discharging his duties in a competent manner.

Whittaker v. Delaware & H. Canal Co. 126 N. Y. 549, 27 N. E. 1042.

The words "freight then pending," in U. S. Rev. Stat. § 4283, U. S. Comp. Stat. 1901, p. 2943, and the words "freight for the voyage," in § 4284, are synonymous, and include all the earnings of the voyage.

The Main v. Williams, 152 U. S. 122, 131, 38 L. ed. 381, 384, 14 Sup. Ct. Rep. 486.

The voyage here in question was a round voyage from Havre to New York, and back to Havre.

Standard Dict. "Voyage;" Parsons, Shipping & Admiralty, p. 307; Re Moncan, 8 Sawy. 353, 14 Fed. 44; Friend v. Gloucester Mut. Fishing Ins. Co. 113 Mass. 332; Whitcomb v. Emerson, 50 Fed. 129; The Giles Loring, supra; Cohen's Admiralty Law, p. 235; The Martha, Blatchf. & H. 151, Fed. Cas. No. 9,144; Granon v. Hartshorne, Blatchf. & H. 454, Fed. Cas. No. 5,689; The Cadmus, Blatchf. & H. 139, Fed. Cas. No. 2,280; Mitchell v. United States, 96 U. S. 162, 24 L. ed. 702; Steamship Carisbrook Co. v. London & P. M. & General Ins. Co. [1901] 2 K. B. 864, Affirmed in [1902] 2 K. B. 681; Williams v. London Assur. Co. 1 Maule & S. 318, 14 Revised Rep. 441; The Progress, Edw. Adm. 218; Moran v. Jones, 7 El. & Bl. 523; The Mary, 1 Sprague, 17, Fed. Cas. No. 9,188; The Scarsdale [1906] P. 103.

The word "voyage" in the statute should be so construed as to derogate as little as possible, consistently with its phraseology, from the otherwise legal rights of the parties.

The Main v. Williams, 152 U. S. 132, 38 L. ed. 384, 14 Sup. Ct. Rep. 486.

The proportion of the annual mail subsidy paid by the French government to the petitioner for the operation of the mail service in respect of the voyage on which the Bourgogne was lost was freight.

The Main v. Williams, 152 U. S. 122, 129, 38 L. ed. 381, 383, 14 Sup. Ct. Rep. 486; O'Brien v. Miller, 168 U. S. 287, 304, 42 L. ed. 469, 475, 18 Sup. Ct. Rep. 140; 3 Kent, Com. 7th ed. p. 279.

The court should have ordered the payment of one fifty-second part of the yearly allowance of the subsidy to the trustee, as a part of the fund about which the concourse of the claimants is to be had.

Ex parte Slayton, 105 U. S. 452, 26 L. ed. 1066.

Anything less than that is an injustice to these claimants, and a failure to comply with the conditions on which alone a right to a limitation of liability should be granted.

Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 124, 20 L. ed. 592.

The French law gives a right to recover damages for the death of passengers.

Huntington v. Attrill, 146 U. S. 657, 670, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; 1 Valroger Droit Maritime, p. 276; Fremont's Code de l'Abordage, §§ 206, 294, 295; 2 Les Codes Annotes par MM. Dalloz, Paris, 1874, §§ 1382, 1383.

The substantive right only is to be derived from the French law. All matters appertaining to the remedies for enforcing the right in our courts are determinable by the law of the forum.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 197, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978.

The *lexi loci* governed, and that *locus* was a French vessel which constituted a part of the territory of France, on which the French law was in force.

Crapo v. Kelly, 16 Wall. 610, 630, 631, 21 L. ed. 430, 438; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235; McDonald v. Mallory, 77 N. Y. 546, 33 Am. Rep. 664; International Nav. Co. v. Lindstrom, 60 C. C. A. 649, 123 Fed. 475; Ex parte Byers, 32 Fed. 404; Re Moncan, 8 Sawy. 350, 14 Fed. 44; The Lamington, 87 Fed. 752; 1 Le Droit des Gens, Pradier-Fodéré's ed. Paris, 1863, livre 1, chap. 19, § 216; 1 Kent, Com. 27; Dana's Wheaton International Law, p. 169, § 109; Wharton, Confl. L. § 356; Bluntschli, Le Droit International Codifié, livre 4, subd. 4, §§ 317, 318; Heffter, Das Europäische Volkerreicht, 1881, § 78; 1 Martens, French Translation of Leo, p. 496; 1 Calvo, Le Droit International, p. 552; Despagnet, Droit International Public, 3d ed. Paris, 1905, p. 518, chap. 4, subdiv. 2, §§ 427, 428; Bonfils, 3d ed. Paris, 1901, chap. 2, § 607; Hughes, Admiralty, §§ 108–111, pp. 194–199.

Where a decree is entered in which certain matters are referred to a commissioner as a subordinate judicial officer, and further action is required by the court on the coming in of his report, no appeal can be taken except from the final decree entered on the report.

The Palmyra, 10 Wheat. 502, 6 L. ed. 376; Chace v. Vasquez, 11 Wheat. 429, 6 L. ed. 511; Mordecai v. Lindsay, 19 How. 199, 15 L. ed. 624; Beebe v. Russell, 19 How. 283, 285, 15 L. ed. 668, 669; Craighead v. Wilson, 18 How. 199, 15 L. ed. 332; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co. 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. Rep. 551.

Messrs. **William G. Choate** and **Edward K. Jones** argued the cause, and, with Mr. Joseph P. Nolan, filed a brief for respondent:

A decree is final for the purpose of an appeal, if it disposes of all the issues, and determines the rights of the parties on the merits, and leaves nothing to be done but to carry the decree into execution.

Ray v. Law, 3 Cranch, 179, 2 L. ed. 404; Whiting v. Bank of United States, 13 Pet. 14, 10 L. ed. 37; Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Thomson v. Dean (Dean v. Nelson) 7 Wall. 342, 19 L. ed. 94; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 29, 27 L. ed. 638, 639, 2 Sup. Ct. Rep. 6; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington) 7 Wall. 575, 576, 19 L. ed. 274; Bronson v. La Crosse & M. R. Co. 2 Black, 524, 531, 17 L. ed. 359, 360; First Nat. Bank v. Shedd, 121 U. S. 74, 84, 85, 30 L. ed. 877, 881, 7 Sup. Ct. Rep. 807; Hill v. Chicago & E. R. Co. 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; Hoffman v. Knox, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 489; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 184, 185, 27 L. ed. 898–900, 3 Sup. Ct. Rep. 111; Bank of Lewisburg v. Sheffey, 140 U. S. 445, 35 L. ed. 493, 11 Sup. Ct. Rep. 755; Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 863; Long v. Maxwell, 8 C. C. A. 410, 8 U. S. App. 484, 59 Fed. 948; East Coast Cedar Co. v. People's Bank, 49 C. C. A. 422, 111 Fed. 446; Sanders v. Bluefield Waterworks & Improv. Co. 45 C. C. A. 475, 106 Fed. 590; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 544, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170.

A decree sustaining the petition for a limitation of liability has always been considered and treated as a final decree for the purposes of an appeal, irrespective of any further proceedings which may be necessary to distribute the fund.

The Annie Faxon, 66 Fed. 581, 21 C. C. A. 366, 44 U. S. App. 591, 75 Fed. 312; Parsons v. Empire Transp. Co. 49 C. C. A. 302, 111 Fed. 202; Gleason v. Duffy, 54 C. C. A. 100, 116 Fed. 298; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

The limited liability legislation was suggested by the burning of the steamboat "Lexington" in Long Island sound, in January, 1840, and by the decision of this court, holding the owner of the vessel responsible therefor, at the January term, 1848.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465.

Decisions by this court, expounding the meaning and application of the statute, put at rest objections which tend to narrow its scope.

Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; The Benefactor (New York & W. S. S. Co. v. Mount) 103 U. S. 239, 26 L. ed. 351; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001. See also The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; The City of Norwich (Place v. Norwich & N. Y. Transp. Co.) 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; Butler v. Boston & S. S. S. Co. supra.

By the maritime law the shipowners' liability, from time immemorial, for loss or damage by collision, is limited to the value of the ship and freight and the shipowners' interest therein.

Valin, Com. tom. 1, p. 568; 3 Kent, Com. § 218; 4 Phillimore, International Law, 2d ed. 628; 1 Valin, Sur L'ordonnance de la Marine, 2, tit. 8, art. 2; 1 Cours de Droit, Comm. Mar. Boulay-Paty, 263–298; Pardessus, De Droit Commercial, part 4, tit. 2, chap. 3, § 2; Emerigon, Cont. a la Grasse, chap. 4, § 11; The Rebecca, 1 Ware, 198, Fed. Cas. No. 11,619; The Phebe, 1 Ware, 263, Fed. Cas. No. 11,064; The Consolato del Mare, cap. 141; The Mary Ann, L. R. 1 Adm. & Eccl. 11; 1 Grotius, De Jure Belli et Pacis, 2, chap. 11, § 18; Lloyd v. Guibert, L. R. 1 Q. B. 115, 6 Best & S. 100; Bynk, Quest. Jur. Priv. 1, IV. chap. 20.

The test is not negligence, but privity or knowledge of the shipowners in respect to the cause of the loss.

The Republic, 9 C. C. A. 386, 20 U. S. App. 561, 61 Fed. 109; Parsons v. Empire Transp. Co. 49 C. C. A. 302, 111 Fed. 208; Hill Mfg. Co. v. Providence & N. Y. S. S. Co. 113 Mass. 495, 18 Am. Rep. 527.

The word "privity" in this statute implies something more than knowledge,—some participation or actual concurrence on the part of the owner with respect to the cause of the loss,—something analogous to "privity" of a carrier in the embezzlement of goods by his servant.

Quinlan v. Pew, 5 C. C. A. 438, 5 U. S. App. 382, 56 Fed. 117.

It would be unreasonable to hold that the petitioner should pay over as freight money, as to which it is one of the objects of the proceeding to determine whether or not it is freight.

The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 34, 26 L. ed. 1001, 1004.

It is the French law, and the French law only, to which the passengers and freighters on the ship are subject, and which the master is justified in following.

The Gaetano & Maria, L. R. 7 Prob. Div. 146; Lloyd v. Guibert, L. R. 1 Q. B. 127; The Scotia (Sears v. The Scotia) 14 Wall. 170, 184, 20 L. ed. 822, 824; The Belgenland (The Belgenland v. Jensen) 114 U. S. 355, 370, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860.

For the purposes of this case, and in a legal sense, both parties—the shipper and the ship—are of the same nation.

1 Sir Lionel Jenkins' Works, p. 91; Reg. v. Anderson, L. R. 1 C. C. 161.

The finding of the district judge that the petitioner was entitled to a limitation of liability, concurred in by the circuit court of appeals, will not, under the rulings of this court, be disturbed, inasmuch as the same involves essentially a question of fact.

Compania de Navigacion v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12; Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367; The Carib Prince (Wuppermann v. The Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; Morewood v. Enequist, 23 How. 491, 16 L. ed. 516; The Conqueror, 166 U. S. 110, 136, 41 L. ed. 937, 948, 17 Sup. Ct. Rep. 510; Illinois v. Illinois C. R. Co. 184 U. S. 77, 98, 46 L. ed. 440, 449, 22 Sup. Ct. Rep. 300; Towson v. Moore, 173 U. S. 17, 24, 43 L. ed. 597, 600, 19 Sup. Ct. Rep. 332.

The words "freight for the voyage," in § 4284, should be construed to mean the freight for the voyage upon which the loss occurred; the word "voyage," as used in the statute and rule, having the meaning recognized in common parlance.

Barker v. M'Andrew, 18 C. B. N. S. 774; Valente v. Gibbs, 6 C. B. N. S. 284; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 111, 20 L. ed. 585; The Alpena, 10 Biss. 436, 8 Fed. 280; Gokey v. Fort, 44 Fed. 364; The Rose Culkin, 52 Fed. 328; The U. S. Grant, 45 Fed. 642; The Doris Eckhoff, 30 Fed. 140; The Mary Adelaide Randall, 93 Fed. 222; The Giles Loring, 48 Fed. 472.

The term "pending freight" has been generally used in the cases in the sense of freight to be earned by the carriage of the specific goods or passengers on board the vessel at the time of the loss.

The City of Norwich (Place v. Norwich & N. Y. Transp. Co.) 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; The Main v. Williams, 152 U. S. 122, 38 L. ed. 381, 14 Sup. Ct. Rep. 486; The Abbie C. Stubbs, 28 Fed. 720.

Whatever doubt there may be in respect to the enforcement of a liability under the French law in any court, state or Federal, common law or admiralty, in this country, there is no doubt that the nature, extent, and conditions of the liability, wherever enforceable, must be determined by the law of France, and not by the law of the country in which the liability is sought to be enforced.

Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Northern P. R. Co. v. Babcock, 154 U. S. 190, 197, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978; The Harrisburg (The Harrisburg v. Rickards) 119 U. S. 199, 214, 30 L. ed. 358, 362, 7 Sup. Ct. Rep. 140; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581.

Mr. Justice **White** delivered the opinion of the court:

On July 4, 1898, in the Atlantic ocean, about 60 miles off Sable island, as the result of a collision between the British ship Cromartyshire and the French steamship La Bourgogne, bound from New York to Havre, La Bourgogne was hopelessly injured, sank in a short time, and most of her passengers, her captain, other principal officers, and many of the crew, went down with the ship. Numerous suits in admiralty and actions at law were brought in various Federal and state courts against La Bourgogne, or her owners, to recover damages for loss of life, loss of baggage, and other personal effects. These claims aggregated a very large sum. In May, 1900, La Compagnie Generale Transatlantique, a French corporation, the owner of La Bourgogne, petitioned the United States district court for the southern district of New York, seeking to obtain the benefit of the laws of the United States limiting the liability of shipowners. It was averred that the collision was caused solely by the fault of the Cromartyshire, but, even if there was fault on the part of La Bourgogne, it was without the privity or knowledge of the company. [104]The interest of *the company in the steamship and her pending freight was alleged to be only about $100, the value of articles saved from the wreck. A list of the pending suits was annexed. It was prayed that a trustee be appointed, to whom the interest of the company in the steamship and her pending freight might be transferred. A monition warning all persons having claims by reason of the collision to prove the same, within a time to be fixed, was asked, as also that a commissioner be appointed to take such proof, and that the prosecution of all other actions because of the collision be restrained. Finally, it was prayed that the company be decreed not to be liable for the loss of La Bourgogne, or, if responsible, its liability, in conformity to the statute, be limited to the property surrendered.

The court directed the company to transfer to a named trustee its interest in the steamship and her pending freight, and, following this order, a formal transfer was executed. There were, however, actually surrendered to the trustee only certain lifeboats and life rafts. A monition and a preliminary injunction were ordered, and a commissioner was named to take proof of claims within a time fixed. In conformity with a rule of the court relating to the procedure to limit liability, which is in the margin,[†] the commissioner in a short while [105]*reported that claims aggregating more than $2,000,000 had been presented. Most were for losses occasioned by death, and the others were for personal injuries and for loss of baggage or other personal effects.

Disregarding the technical attitude of the parties on this record, we shall speak of La Compagnie Generale Transatlantique, owner of La Bourgogne, as the petitioner and the adverse parties as claimants.

Without stating details, it suffices to say that the petitioner challenged the validity and amount of the claims reported. The claimants traversed the petition for limitation of liability, charging that the collision had been solely caused by the fault of La Bourgogne in going at an immoderate rate of speed in a dense fog, and that such fault was with the privity and knowledge of the petitioner. This latter was based on averments that the petitioner had negligently failed to make and enforce adequate regulations to prevent its steamers being run at an immoderate speed in a fog, that it had knowledge that its steamers were habitually so run, and because La Bourgogne was not fully manned and equipped as required by law, had no watertight bulkheads, and was not furnished with boats or proper disengaging apparatus, as required by the laws of the United States. It was further charged that the petitioner was not entitled to a limitation of liability, because it had not actually surrendered the freight pending, and besides had not surrendered the sum of a subsidy given by the French government for carrying the mails and for other services.

Pending action upon the report, the case proceeded as to the general questions of fault for the collision and the right to a limitation of liability. During the proceedings, in answer *to interrogatories propounded[106] on behalf of certain of the claimants, the petitioner admitted that it had received the following sums:

[†] Rule No. 78 of the district court of the United States for the southern district of New York:

"Proof of claims presented to the commissioner shall be made by or before the return day of the monition by affidavit specifying the nature, grounds, and amount thereof, the particular dates on which the same accrued, and what, if any, credits were given thereon, and what payments, if any, have been made on account; with a bill of particulars giving the respective dates and amounts, if the same consists of several different items. Such proof shall be deemed sufficient, unless, within five days after the return day of the monition, or after interlocutory decree in case of issue joined by answer to the petition, or within such further time as may be granted by the court, the allowance of the claim shall be objected to by the petitioner or by some other creditor filing a claim, who shall give notice in writing of such objection to the commissioner and to the proctors of the claim objected to, if any. Any claim so objected to must be established by further legal prima facie proof on notice to the objecting party, as in ordinary cases; but any creditor desiring to contest the same upon any specific defense must, with this notice of objection, or subsequently, if allowed by the commissioner or the court, state such defense, or be precluded from giving evidence thereof; and the unsuccessful party to such contest may be charged with the costs thereof. The commissioner shall, on the return day of the monition, file in open court a list of all claims presented to him."

From the French government for the carriage of mails, etc., between Havre and New York during the year 1898, being for fifty-two trips between Havre and New York, going and returning....	5,473,400.00	francs
For passage money on the last trip from Havre to New York.............	44,480.70	"
For freight collected on the same sailing...........	14,088.95	"
For passage on the trip from New York to Havre, in which La Bourgogne was lost..............	100,703.08	"
For freight on the same sailing	12,716.43	"

The trustee named by the court thereupon demanded the actual surrender of one fifty-second part of the annual subsidy and all the freight and passage money above referred to. The petitioner refusing to comply, in April, 1901, the trustee and some of the claimants asked an order directing the payment of said amounts with interest from the date of the collision. On May 11, 1901, the court declined to make the order, and reserved the matter for further consideration.

In the autumn following, in October, 1901, the case came on for trial before Townsend, District Judge. After taking testimony in open court for several days an order was entered, directing that any further testimony be taken out of court. This being done, the case in its then stage was heard. The court (Townsend, District Judge) expressed its opinion as to fault for the collision, as to whether an adequate surrender had been made of the interest of the petitioner in the steamship and her pending freight, as to whether the petitioner was entitled to a limitation of its liability, and as to whether claims resulting from loss of life were, under any circumstances, entitled to be established against the fund. No opinion was expressed as to the legal merit of or the [107] amount of the other *claims against the fund. The conclusions of the court were thus by it summed up (117 Fed. 261):

First, that the prayer for limitation should be granted; second, that claims for loss of life should be excluded from consideration in this proceeding; third, that the Bourgogne was to blame for the collision; fourth, that claims other than those for loss of life be referred to the commissioner "to take testimony as to the amount of such claims, and report the same to this court, together with his opinion, with all convenient speed;" fifth, that the petitioner has duly surrendered its interest in the Bourgogne and her pending freight by the transfer made to the trustee, and that the value of such interest extends no further than the value of the lifeboats and life rafts.

A decree was entered conformably to these views. A few weeks thereafter the court permitted the S. S. White Dental Company to file a claim for the value of certain merchandise shipped under a bill of lading, alleged to be of the value of $17,108.40.

The commissioner heard testimony concerning the validity and the amount of the respective claims. On May 9, 1904, the commissioner filed his report. The claim of the S. S. White Dental Company was disallowed on the ground that La Bourgogne was in all respects seaworthy at the time of her sailing on the voyage on which she was lost, and that, in consequence of the provisions of the Harter act, the claim in question being for merchandise shipped as freight under a bill of lading, no recovery could be had. The remaining claims, noted in the margin,† were allowed upon the theory that recovery might be had as for baggage lost by the sinking of the steamship. *In thus deciding [108] the commissioner followed the ruling of the circuit court of appeals for the second circuit made in The Kensington, 36 C. C. A. 533, 94 Fed. 885, in which it was held that the exemption from liability conferred by the Harter act did not embrace baggage when not shipped as cargo. Obviously, also, the commissioner was of the opinion, for like reasons, that Rev. Stat. § 4281, U. S. Comp. Stat. 1901, p. 2942,—exempting a master and the owner of a vessel from liability for the value of precious metals, jewelry, etc., unless written notice of the character of such articles be given and the same be entered on a bill of lading,—was also inapplicable. The petitioner excepted to so much of the report as allowed the claims, and the S. S. White Dental Company excepted to the disallowance of its claim. These exceptions were overruled, and the report was confirmed.

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†To Pauline Henuy, as administratrix of Juliette Cicot, deceased, $2,802, for loss of money and personal effects.

To Henry Hyer Knowles, as administrator of Gertrude Lalla Rookh Knowles, deceased, $2,000, for loss of personal effects.

To William C. Perry, as administrator of Kate M. Perry, deceased, $5,277.50, for loss of money and personal effects.

To William C. Perry, as administrator of Florence Perry, deceased, $1,050, for loss of money and personal effects.

To William C. Perry, as administrator of Sadie Perry, deceased, $1,050, for loss of money and personal effects.

To John Perry, as next of kin of Katherine Perry and Albert Perry, deceased, $350, for loss of personal effects.

To Lewis Delfonti, $432, for loss of personal effects and for damages for personal injuries.

To Henri Cirri, $1,018, for loss of personal effects and as damages for personal injuries.

To George Deslions, $25,000 for loss of property as baggage.

In July, 1904, a decree was signed by District Judge Thomas. It was adjudged that all claims favorably reported upon should be paid out of the fund; and, conformably to this conclusion, a specific decree in favor of each of the claimants was awarded, with interest from the date of the collision to the date of the decree. The adverse action of the commissioner upon the claim of the S. S. White Dental Company was affirmed. Giving effect to the previous ruling made by Judge Townsend, it was adjudged "That all claims which have been filed in this proceeding on behalf of persons for damages for negligence resulting in loss of life caused by said collision be, and the same are hereby, disallowed and excluded from the consideration of the commissioner in this proceeding."

On the main issues,—that is, the fault **[109]**of La Bourgogne, *the right of the petitioner to a limitation of liability, and the amount of the pending freight,—it was decreed as follows:

"That the steamer La Bourgogne . . . was in fault and to blame in reference to the collision in question, in that she was proceeding at an immoderate rate of speed in a fog, contrary to law, and that the petitioner, the Compagnie Generale Transatlantique, is liable for the damages caused by the said collision to each of the claimants whose claims have been reported upon . . . [and which have been] confirmed in the amounts so reported."

It was further recited in the decree:

"That the petitioner is entitled to limit its liability for such damages as are decreed as aforesaid to the amount of the value of the said steamer and her freight for the voyage, and that there is not to be included as going to make up said amount either the freight or passenger money received by the petitioner for the trip of said steamer La Bourgogne from Havre to New York, or for the trip from New York to Havre, during which voyage said collision occurred, or the amount of the money paid to the petitioner by the government of France, under the contract proved between the petitioner and said government for the voyage on which the Bourgogne was lost."

The costs incurred in determining whether the petitioner was at fault were given to the claimants, while the costs incurred in determining whether the petitioner was entitled to a limitation of liability were awarded to it and made "payable, primarily, out of any fund herein that is or may come into the hands of the trustee." The prosecution of other actions and suits was perpetually enjoined. The following indorsement was made on the back of the decree:

"(Indorsed.)—Final decree.—This decree substantially follows the practice of both the eastern and southern districts of New York as regards the question of an interlocutory judgment, and is in other respects deemed correct.—E. B. T., U. S. J."

Those whose claims were allowed appealed from so much *of the decree as granted the **[110]** limitation of liability, and as determined the *quantum* of pending freight to be surrendered. The S. S. White Dental Company and various death claimants appealed from the disallowance of their claims. The petitioner also appealed from so much of the decree as held La Bourgogne at fault and allowed recovery in favor of the various claimants.

These two classes of appeals were heard separately in the circuit court of appeals. Those of the claimants were decided on June 23, 1905. Before passing on the merits, the court was required to consider a motion to dismiss, made by the petitioner on the ground that the claimants had not appealed within the statutory time. This was based on the contention that the final decree was not that entered by Judge Thomas in 1904, from which the appeals were taken, but the one entered by Judge Townsend in 1902. The court held that Judge Townsend's decree of 1902 was but interlocutory, and that of Judge Thomas was final.

On the merits, it was decided that it had been rightly held that La Bourgogne was in fault for going at an immoderate speed in a fog, but that such fault was not committed with the privity or knowledge of the petitioner. In these respects, therefore, the decree below was affirmed. As the Cromartyshire was not present, the court expressly refrained from stating any opinion as to any concurring fault on her part, remarking that her presence was not necessary, as, with the allowance of death claims, even one half of the damage found in this proceeding would greatly exceed the sum transferred to the trustee in limitation of liability. It was further decided that the court below was right in rejecting the claim of the S. S. White Dental Company. It was held, however, that the court erred in excluding the claims for damage caused by loss of life, and therefore it was ordered that proof as to their amount should be taken, to the end that they might participate in the fund. On the question of pending freight it was decided that the court below had correctly held that no part of the *freight and pas-**[111]**sage money collected for the sailing from Havre to New York, or of the subvention paid by the French government, should be surrendered as freight pending, yet that error had been committed in deciding that the freight and passage money collected for the sailing from New York to Havre should not be paid over as a part of the pending freight. 71 C. C. A. 489, 139 Fed. 433.

On December 14, 1905, the appeal on behalf of the petitioner, in so far as not already passed upon, came on for hearing. The claimants objected to the hearing because the petitioner had not actually paid over to the trustee the sum of the freight and passage money for the last sailing from New York to Havre, which the court had held to be pending freight, to be surrendered under the law for limitation of liability. The court, without referring to the subject, passed upon the appeal. In disposing of the merits, while observing that, in view of the large amount of the death claims which the claimants were at liberty to establish as a result of the previous decision, the petitioner was really without any substantial interest to dispute the correctness of the awards in favor of the various claimants, nevertheless, in consequence of the possibility that its ruling on that subject might not be final, the court considered the various awards, and decided that no error had been committed in respect to any of them, Wallace, Circuit Judge, dissenting, however, as to the allowance made to the claimant Deslions 76 C. C. A. 647, 144 Fed. 781.

As the case is before us not only because of the allowance of a writ of certiorari applied for by the claimants, but also on a cross writ, asked on behalf of the petitioner, all the questions presented by the record are open, and, as far as they are essential, must be disposed of. Primarily, the question impliedly passed upon by the circuit court of appeals, concerning the timely taking of the appeals to that court, requires attention. To dispose of the subject we must decide whether the decree entered by Judge Townsend in 1902 or that entered by Judge Thomas in 1904 was the final decree.

[112] *The authorities concerning the distinction between interlocutory and final decrees were cited in the opinion in Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32, and the subject was fully reviewed in McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170. The rule announced in these cases, for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties; and illustrations of the application of the rule are found in the late cases of Clark v. Roller, 199 U. S. 541, 546, 50 L. ed. 300, 302, 26 Sup. Ct. Rep. 141, and Ex parte National Enameling & Stamping Co. 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404. Now, the case in the trial court primarily involved the right to a limitation of liability. The case further involved the nature and amount of the claims which were to be allowed against the fund. When the proceedings were commenced, all the questions concerned in this latter subject were referred to a commissioner, to receive formal proof and make report. When the commissioner reported the aggregate amount of the claims, objections were filed on behalf of the petitioner. No action, however, was immediately taken by the court on these objections, but the case proceeded as to the right to a limitation of liability. When that subject was ready for action, it was impossible to finally dispose of the case as an entirety by passing upon the contests which had arisen concerning the claims, because no other than formal proof in regard thereto had been made. Under these circumstances the court, for the purpose of furthering the progress of the cause, so that a final decree might be reached with reasonable celerity, passed upon the questions which were ripe for its action; that is, whether the petitioner was entitled to the limitation of liability and the sum of the pending freight. It also passed upon the claims for loss of life, because it was deemed that their generic character rendered it impossible to prove them against the fund. All questions concerning the other claims, both as to law and fact, were remitted for proof as an essential prelude to a final decree. Under these conditions the case, we think, may be likened to one where a decree of foreclosure is entered *concerning [113] the sale of mortgaged property, but without a determination as to the amount due by the mortgage debtor; in which case, as pointed out in Keystone Manganese & Iron Co. v. Martin, supra, referring to the case of Ray v. Law, 3 Cranch, 179, 2 L. ed. 404, the decree of foreclosure would be but interlocutory, and not susceptible of being appealed from as a final decree. Besides, as pointed out in the McGourkey Case, if the court below has treated a decree as interlocutory, and there is doubt on the subject, that doubt should be resolved in favor of the correctness of the conceptions of the lower court. It may not be doubted, on the very face of the decree of 1902, especially in view of the indorsement made upon the final decree by Judge Thomas, that it was considered both by Judge Townsend and Judge Thomas, that the decree of 1902 was merely interlocutory. And such was, undoubtedly, the contemporaneous view taken by all the parties, since, except by an inadvertent no-

tice of appeal given by the clerk of a proctor for several claimants, no appeal was taken from the decree of 1902, while all parties treated the decree of 1904 as the final decree, and appealed therefrom.

We are thus brought to the merits of the case, and shall consider separately the various contentions.

1. *Was La Bourgogne at fault for the collision?* For the reasons which caused the circuit court of appeals to decline to consider whether there was fault on the part of the Cromartyshire, we put that question out of view. The district court, after a careful review of the evidence, found that, although the navigation of La Bourgogne was in other respects faultless, that navigation was clearly negligent, because there was a failure to moderate her speed in the dense fog which prevailed at the time of the collision, which undue speed was the sole cause of the collision, it being found that there was no fault on the part of the Cromartyshire. The court found, after making all possible allowances, that the steamship must have been running at about 10 knots an hour when she was struck by the Cromartyshire. While not considering whether there was [114]*fault on the part of the Cromartyshire, the circuit court of appeals concurred in the finding of the district court as to fault on the part of La Bourgogne, because of her immoderate speed. On this subject the court said:

"A careful examination of all the testimony produced here has satisfied us that, although there may have been a reduction, she was certainly not going any slower, and probably was going faster, than 10 knots. It is unnecessary to rehearse the evidence. The statement in the opinion below is sufficient indication of the grounds for this conclusion. The character and extent of the wound received by the Bourgogne are suggestive of a high speed on her part. Undoubtedly the fog was exceedingly dense; that fact is uncontradicted; and the steamer had not 'reduced her speed to such a rate as would enable her to stop in time to avoid collision after an approaching vessel came in sight, provided such approaching vessel were herself going at the moderate speed required by law.' The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. We are emphatically of the opinion that such a speed under the circumstances was excessive; and since it probably prevented an earlier foghorn blast being heard from the Cromartyshire, it cannot be held not to have been a proximate cause of the collision." [71 C. C. A. 495, 139 Fed. 439.]

We may not disturb the concurrent findings of both the courts below as to the density of the fog and the rate of speed of the steamship at the time of the collision, unless we are of opinion that those findings were so unwarranted by the evidence as clearly to be erroneous. The Carib Prince (Wuppermann v. The Carib Prince) 170 U. S. 658, 42 L. ed. 1185, 18 Sup. Ct. Rep. 753; The Wildcroft (W. J. McCahan Sugar Ref. Co. v. The Wildcroft) 201 U. S. 387, 50 L. ed. 796, 26 Sup. Ct. Rep. 467. As our examination of the record does not enable us to reach such a conclusion, we accept the findings below as to fog and speed for the purpose of determining the question of fault of the steamship. That, upon the facts found, both courts were correct in holding La Bourgogne at fault, because she was moving at a rate of speed prohibited by the international rule as interpreted by the decisions of this court, is too clear for anything but statement. This, in effect, is not disputed by the petitioner, since *the conten- [115] tion is not that error was committed in finding the vessel at fault if the conceptions of immoderate speed prevailing in the courts of the United States be applicable, but that the error consisted in not applying the conceptions on the subject entertained by the French courts, which, it is urged, are less rigorous as to what constitutes undue speed in a fog. Thus counsel say:

"It is not claimed by the petitioner that, upon the facts so found, this conclusion would be erroneous, if this question between the claimants and the petitioner [steamship company] is properly to be determined by our rule and by the test which our courts apply as to what constitutes moderate speed in a fog."

From this premise it is argued first, that, as La Bourgogne was a French ship, and as all the claims arose exclusively because of damage done to persons or property on board the steamship, the fault of that vessel should be tested by the theory which would be applied in the courts of France; and, second, that, accepting the conditions as to fog and the rate of speed found by the courts below, if the international rule, as enforced in the French courts, be applied, it would follow that the rate of speed was moderate, and therefore the steamship was not at fault.

It was settled in The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001, that a foreign ship is entitled to obtain in the courts of the United States the benefit of the law for the limitation of liability of shipowners. But it was also decided in the same case (p. 29) that, "if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, prima facie, determine them by its own law, as presumptively expressing the rules of justice; but, if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation, carried under their common flag, and would determine the controversy accordingly. If they belonged [116] to different nations, having *different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum—that is, the maritime law, as received and practised therein—would properly furnish the rule of decision. In all other cases each nation will also administer justice according to its own laws. And it will do this without respect to persons,—to the stranger as well as to the citizen."

The contention we are now considering does not appear to have been made below, as among the errors assigned on behalf of the petitioner in the circuit court of appeals was one to the effect that the district court had erred in not holding that the ship Cromartyshire was solely in fault for the collision,—an alleged error which could not have been based upon the contemplation that the test was to be that of the French law alone. Be this as it may, however, we are of the opinion that we must decide the case before us by the international rule as interpreted in the courts of the United States, and not by the practice under that rule prevailing in the French courts, if there be a difference between the two countries. The petitioner is here seeking the benefits conferred by a statute of the United States, which it could not enjoy under the general maritime law. Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the absence of privity or knowledge, the benefits of the statute should be awarded. It is true that, under the rules promulgated by this court, the petitioner is accorded the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States, to test whether, in virtue of the laws of the United States, it should be relieved, in part, at least, of liability from the consequences of the acts of its agents, and as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to [117] exemption should be *tested by the law as administered in the courts of the United States, and not otherwise.

2. *The colision having been caused by the fault of the servants of the petitioner, was that fault committed with its privity or knowledge?*

As both courts held that there was no privity or knowledge, and as that question primarily is one of fact, the rule which we have hitherto applied as to the effect to be given to the concurrent findings of fact made by two courts might well be adequate to dispose of this subject. But is is elaborately insisted that the cause before us as to this particular subject does not come within the rule, because the courts below, while reaching a like conclusion, did so on different conceptions. As, in any event, the duty would devolve upon us of determining whether the findings of the courts below were clearly unsustained by the proof, and as we think, moreover, it is not clear that the courts below rested their conclusions solely upon common findings of fact, we propose, as briefly as may be, to consider the propositions relied upon to demonstrate that error was committed by both courts in deciding that there was an absence of privity or knowledge. Before doing so, however, we must dispose of a contention, greatly pressed in argument, that whether there was privity or knowledge is not to be tested solely by the proof, but is to be adjudged against the petitioner because of a legal presumption, asserted to arise from a suppression of evidence alleged to have been by it committed.

Without amplification, the circumstances are these: Shortly after the inception of the cause, at various times, the testimony of captains of several of the steamships of petitioner was being taken out of court. In the course of doing so questions were addressed to the witness or witnesses concerning the contents of a log book or books in his or their possession. These questions the witnesses were instructed by the counsel for the petitioner not to answer. The matter was taken to the court, District Judge Brown presiding, and he ordered the questions *to be answered. [118] Some months afterwards, when one of the captains was being examined out of court, there was a refusal to answer certain questions propounded, and the subject was again taken to the court for determination. The court said: "I think he [the witness] ought to answer this question. . . . There is a direction for the production of books, and, in one way or another, the thing is postponed and postponed, and defeated and defeated, under one argument and another argument, so that no progress is made. . . . I cannot understand your proceeding here. While you are contumacious, it does not make much difference whether it is your captain or your company. If you are contumacious I must dismiss the proceeding." Upon the protestation of counsel for the petitioner that no contumacy was intended, and that any book ordered to be produced which could be found would be forthcoming, the proceedings before the commissioner were resumed. In April, 1901, the claimants applied for an order directing the production by the petitioner of certain log books alleged to be in its possession. The court modified the request, and on May 15, 1901, entered the following order:

"That the petitioner produce, on or before the trial of this case, all logs kept on board the steamship La Bourgogne during the period of two years previous to the collision in the petition mentioned, and also all logs kept on any other steamer of the petitioner running between Havre and New York for the same time, of which the same captain who was captain of the Bourgogne at the time of the collision was then master."

As we have stated, in October, 1901, the case came on for trial before Judge Townsend. The counsel for the claimants directed the attention of the court to the fact that the order for the production of the log books had not been complied with. Thereupon the counsel for the petitioner declared, in open court, that he had transmitted the order to the company and had a letter from it, stating that the log books for the period covered by the order had not been [119] preserved and could *not be produced. Objections being made to this letter, the court remarked, concerning it: "That is not evidence. The logs may be lost, and then you have got to prove it. You have got to put somebody on the stand to prove it, to testify." Subsequently, during the examination of an official of the petitioner, a further effort to introduce the letter was made, but the court observed: "It is hearsay. It is simply a letter." In the course of the proceeding consequent upon the order that the further testimony be taken out of court, the letter was offered before the commissioner, and, subject to an objection, was marked as an exhibit. No further direct action of the court on the subject was thereafter invoked by the claimants, and neither the trial court nor the circuit court of appeals referred to the subject in their opinions. Under these circumstances we think the contention here made, that it is our duty to decide the case, not according to the proof, but upon a presumption of wrongdoing and suppression of evidence, is without merit. We say this because we are of opinion that if the claimants deemed that the letter explaining the reason for the nonproduction of the log books was not admissible, or that there had been contumacious suppression of evidence, it was clearly their duty, before or at the hearing, to have made an attempt to offer secondary evidence, or, in the event of the impossibility of so doing, to have asked at the hands of the court a dismissal of the proceedings, if such action was appropriate, or such other action for the alleged contumacy as the case required, and, if necessary, have saved an exception to an adverse ruling.

The fault on the part of La Bourgogne being established, it becomes necessary, before considering the contention that there was privity and knowledge on the part of the petitioner, to develop the nature and character of the acts which would constitute privity and knowledge within the intendment of the law relating to the limitation of liability of shipowners.

The law on the subject is now embodied in §§ 4282 to 4287 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 2943, 2944). Summarily stated, the first of these *sec- [120] tions gives an absolute exemption to a shipowner for losses sustained by fire, unless the fire was caused by the design or neglect of such owner. The 2d section does not give an unlimited exemption, since the exemption which it accords does not embrace "the amount or value of the interest of such owner respectively in such vessel and her freight, then pending," and accords the limited exemption from liability upon the condition that the loss has occurred "without the privity or knowledge" of the owner or owners. The remaining sections we need not now consider, as they relate to the mode of apportionment of the loss where there are joint owners, or concern the administrative features of the law.

These sections are a substantial re-enactment of the act of March 3, 1851. 9 Stat. at L. p. 635, chap. 43, U. S. Comp. Stat. 1901, p. 2943. The purpose of the act of 1851, in according to shipowners the right to limit their liability in whole or in part, and the meaning of that act, as well as the purpose and meaning of the sections of the Revised Statutes embodying the provisions of the act of 1851, have been often before this court and have been conclusively adjudicated. Moore v. American Transp. Co. 24 How. 1, 16 L. ed. 674; Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585; The Benefactor (New York & W. S. S. Co. v. Mount) 103 U. S. 239, 26 L. ed. 351; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 26 L. ed. 1001; The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; The City of Norwich (Place v. Norwich & N. Y. Transp. Co.) 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612.

In Moore v. American Transp. Co. Mr. Justice Nelson, delivering the opinion of the court, thus stated the purpose of the limitation of liability which the act granted (24 How. 39, 16 L. ed. 681): "The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."

In the Hill Case, 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617, after summarizing the various provisions of the act of 1851, and calling attention to the rules previously adopted by this court to enforce the same, concerning the general purpose of the act the court said (p. 588):

[121] *"In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

In that case, briefly, the facts were these: Freight was shipped from Providence to New York by the Oceanus, a steamer belonging to the steamship company. The goods were destroyed by fire while on board the steamer. An action was brought in a state court of Massachusetts against the steamship company to recover the value of the goods burned, on the ground of the negligence of the company. In its answer the steamship company claimed the benefit of the limitation of liability statute, averring that, if the loss was occasioned by negligence, the same was without its privity or knowledge. Pending this action proceedings for limitation of liability were commenced by the steamship company in a district court of the United States. These proceedings were pleaded by an amendment to the answer in the state court. A trial was commenced, but the jury was discharged and the case was reserved to the supreme judicial court of Massachusetts, which held that, if the fire happened through the negligence of the steamship company, it necessarily followed that it had occurred with *its privity or knowledge, and, therefore, [122] the case was not within the act of Congress limiting the liability of shipowners. Subsequently the steamship company set up the final decree of the district court in the limitation of liability proceedings, barring the claim in question. Thereafter a trial was had in the state court, and there was verdict and judgment against the steamship company, and the judgment was affirmed by the supreme judicial court of Massachusetts. This court held that the proceedings for a limitation of liability excluded the jurisdiction of the state court. In determining the case it became necessary to decide whether, if there was negligence of the owner of a vessel in case of fire, within the meaning of the 1st section of the act of 1851, such negligence was the necessary equivalent of privity and knowledge of the owner, as expressed in the 3d section of the act. It was held that the two provisions were not necessarily coterminous, that negligence under the 1st section of the act might exist so as to prevent the unqualified limitation given by that section, and yet the owner of the vessel be entitled to the more limited exemption given by the 3d section, which depended upon the absence of privity or knowledge. In other words, it was decided that although a loss might have happened by the negligence of the owner of the vessel, such loss might yet not have been occasioned with the knowledge or privity of such owner.

Without seeking presently to define the exact scope of the words "privity and knowledge," it is apparent from what has been said that it has been long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute. And nothing to the contrary is properly to be deduced from the case of The Maine v. Williams, 152 U. S. 122, 38 L. ed. 381, 14 Sup. Ct. Rep. 486, so much relied upon in argument, for that case did not purport in the slightest degree to overrule or qualify the previous decisions, and was concerned, not with the meaning of the words "privity and knowledge," but with the rule to be applied in determining *what constituted [123] pending freight within the meaning of the law for the limitation of liability.

And this is also true of the English cases which were cited in the opinion in that case. It may be that there are general expressions found in some cases in the lower Federal courts, decided both before and after the Hill Case, which lend color to the assumption that privity and knowledge, as defined in the statute, is but the equivalent of mere negligence. Such of the cases relied upon, however, as were decided before the authoritative interpretation of the statute in the Hill Case, were necessarily overruled by that decision, and so far as those decided since may be inconsistent with the previous rulings of this court, they are clearly not entitled to weight.

We come to consider the various contentions pressed to sustain the proposition that the fault of immoderate speed which occasioned the collision was committed with the privity and knowledge of the petitioner.

a. It is argued that there was a positive duty on the part of the petitioner to make regulations directing that its steamers be not run at an immoderate rate of speed in a fog, and, as there was a failure to perform this duty, privity and knowledge was established. But both the courts below found the proposition of fact upon which this contention rests to be without foundation, and we think they were clearly right in so finding.

As early as December, 1884, the company made an order as follows:

"Our board of directors, having seriously in mind the numerous collisions which daily occur at this season in the parts frequented by our steamers, we come to beg you to recall to all our captains, individually, the recommendations which we have always made to them, to use the greatest prudence in their navigation, and to never hesitate in certain doubtful cases to adopt the most suitable measures to assure the safety of their steamers, even if a loss of time should result from so doing.

"You will insist upon it with them that, [124] in times of fogs, *the most active watch be kept on board their vessels, and that all the prescriptions indicated in the rule as to collisions be strictly observed, as well by day as by night."

And prior to 1891 the substance of this order was contained in the permanent regulations, which were expressed in the rules prevailing in 1891, as follows:

"Article 293. When the company's vessels are in localities frequented by vessels, especially in foggy weather and during the night, the engineer on watch and the necessary men for maneuvering must be within reach of the apparatus for changing the speed. The order is given by the officer of the watch to the engine room, and mention is made in the ship's log and in that of the engineer of the hour at which that order was given and received."

"Article 394. The company's vessels conform to the international rules for the purpose of preventing collisions. A printed copy of said rule is posted up in a conspicuous place in order that the officers may take notice of it.

"The prescriptions of said rule, relative to phonic signals to be caused to be heard in foggy weather, must be rigorously observed; besides, in said circumstances, a man must be placed aloft on lookout.

"Article 395. In conformity with the rules of international regulations, having for object the prevention of collisions, all vessels under steam which approach each other so that there may be risk of collision, must diminish their speed, or stop or go backwards, if necessary. All vessels under steam must, during foggy weather, preserve a moderate speed.

"The captain, under these circumstances, must diminish the speed of his engines, and, in agreement with the agent of postes, the captain must make known by *procès-verbal* the delays which such maneuver may have occasioned."

While it is true that the proof does not establish that the circular letter of 1881 was brought to the notice of all the captains who were in the service at the time of the collision, nevertheless, the purpose of the company to secure a compliance *with the [125] law is demonstrated by the issuance of the circular. The elaborate argument indulged in to establish that article 395, which in terms stated and commanded compliance with the international regulations, was a subterfuge, intended to enable the captains to violate those regulations, rests upon mere surmise, and, we think, finds no support in the record. The contention that the rules, as promulgated, were not sufficiently explicit, is also without merit. The regulation in terms reiterated the international rule, and called for compliance with its provisions. It could not, in the nature of things, have been made more explicit. This was aptly pointed out by Townsend, District Judge. He said:

"It is not clear that any further precautions than those established by the orders and regulations, quoted above, would have been practicable.

"The question of rate of speed in a fog is one which cannot be determined by set rules, but must be left largely to the discretion of the officers of the ship. They are intrusted with the responsibility of the carriage of mails, freight, and passengers, at the greatest speed which is consistent with safety. Their own lives, as well as those of the passengers and crew, are at stake.

"The determination of the question, therefore, as to what is to be done in all the varying stages between a light haze and a dense fog, rests upon a great variety of circumstances and conditions, all looking toward the question of what is a moderate rate of speed in existing conditions." [117 Fed. 270.]

b. That however full may have been the compliance by the petitioner with the duty to make regulations, it was necessarily in privity and knowledge with the immoderate speed which caused the collision, as it knowingly encouraged or tolerated the violation of its regulations, because it knew of the constant habit on the part of its captains to navigate at an immoderate rate of speed in a fog, and did not prevent the illegal practice. This involves primarily a question of fact, and was adversely found [126] against the claimants by both the *courts below, and from the consideration which we have given to each and all of the arguments urged in many forms of statement to demonstrate that the findings made on the subject were clearly wrong, we are not only not satisfied that such was the case, but, on the contrary, are convinced that the findings of the courts below were clearly right. It is insisted, however, that the record does not show that there were findings on the subject by both the courts below. This is rested upon the assertion that the circuit court of appeals did not, in substance, affirmatively find on the subject, but erroneously rested its conclusion solely upon a presumption in favor of the petitioner, which it deemed to be controlling. This is based upon an isolated passage in the opinion of the circuit court of appeals, where it was said:

"Upon the proof as it stands we cannot find that the petitioner's officers knowingly tolerated or encouraged the running of its steamers at excessive speed in fogs, or were negligent in failing to enforce the rules; certainly they used due diligence in securing officers of experience and ability. We concur in the conclusion that the disaster was 'done, occasioned, or incurred without the privity or knowledge of the owners.'" [71 C. C. A. 499, 139 Fed. 443.]

But the passage thus relied upon was preceded by a reference to the evidence which the claimants asserted tended to establish that the infractions of the moderate-speed rule had been so constant as to bring home knowledge to the petitioner that its rules were being habitually violated, and by a finding that the proof was not adequate to so show. Even, however, if the passage in the opinion sustained the inference sought to be deduced from it, we think no error was committed, especially in view of the meaning of the words "privity and knowledge" as expounded by the previous decisions of this court. The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a wilful departure from *their requirements was indulged in, [127] and was brought home to, or countenanced by, the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence.

And the considerations which we have stated also completely dispose of the contention not referred to in the opinion of either of the courts below, and apparently not brought to the notice of the trial court or assigned as error in the circuit court of appeals, *viz.*, that privity and knowledge as to the fault which caused the collision was necessarily to be inferred from the terms of the contract for subsidy, made by the petitioner with the French government. The contract in question was executed in virtue of a statute authorizing the same. The French government agreed to give to the petitioner a gross annual sum by way of subsidy for the operation of a weekly line "from Havre to New York; that is, fifty-two voyages, going and returning, a year." Among other things, in consideration of the payment of the subsidy, the petitioner engaged "to transport gratuitously all the mails upon the line from Havre to New York," and, "furthermore, to transport gratuitously all gold, silver, and copper coins for the use of the state, and to undertake the carrying of postal packages," upon conditions fixed by law.

The contract was voluminous and minute. To secure the use of steamers of the standard required it exacted that no steamer already built should enter upon the service until it was inspected by officers of the French government, and certified to be, in all respects, completely up to the standard and thoroughly equipped in every particular, as required by the French law; and that the steamers thereafter to be built for the service should come up to the requirements of construction exacted by the contract, and should also, before being permitted to enter the service, be inspected and certified as being properly constructed and equipped in every respect. To maintain the standard of efficiency the contract contained abundant regulations. It established also regulations as to *the manning and op- [128] eration of the steamers, and moreover was replete with provisions tending to secure the safety and comfort of passengers and crew. To secure compliance a governmental commission was created, under the supervision of the Minister of Posts and Telegraphs, full power being conferred upon the commission thus created to take cognizance of the operation of the steamers, to examine their logs and other documents, and to enforce in every particular the performance of the contract requirements. There was a clause, moreover, authorizing the presence on each steamer of an agent of the postal department and a delegation of authority in respect to the operations of the line under the contract to the consul general of France, at New York. The law authorizing the contract also required that the steamers should, at their trial, develop a speed of 17½ knots, with the privilege of forced draught, and should maintain under the contract a mean annual speed "of at least 15 knots an hour at the ordinary rate;" and the requirement as to the 15 knots an hour minimum average speed was expressed in the contract. The payment of the subsidy was stipulated also in article 49, as follows:

"The payment of the subsidy shall be ordered at the end of the term by the Département des Postes et des Telegraphes from month to month and by twelfths, subject to the deduction of the sums retained, which may have been pronounced in the cases provided in these specifications.

"The payments shall take place at Paris or at Havre, at the option of the contractor."

The deductions referred to in this provision evidently contemplated the system of fines and premiums concerning speed, contained in article 45 of the contract, as follows:

"In the case that the mean annual speed fixed in article 20 above shall be exceeded, there shall be allowed to the contractor a premium calculated at the rate of 12 francs a ton, gross gauge, and by the tenth of a knot of increase of speed over the required rate. If the mean annual speed is not obtained, [129] the *contractor shall be subject to a retention calculated at the rate of 8 francs a ton, gross gauge, and by the tenth of a knot under the required rate.

"At the end of each annual period, including an aggregate of fifty voyages, going and returning, there shall be prepared a report of the result of each crossing. The total of these partial results shall establish the figure of the mean speed and consequently of the premium which shall be accorded for employing it to the contractor, or of the retention which ought to be imposed upon him, save an account being kept in this last case of circumstances of *vis major*, duly authenticated.

. . . .

"In no case shall the amount of the premium for the year exceed twelve hundred thousand francs (1,200,000 fr.). Art. 6 of the law of June 24th, 1883.

"When one of the steamers employed in the service shall not attain the mean speed of 15 knots for ten consecutive voyages, going and returning, it shall be rejected as unfit. It may be presented for new trial after modifications, or it shall be replaced by a new boat within a maximum delay of thirty months."

The contention is that, as the steamships were only required to develop under forced draught a maximum speed of 17½ knots, and yet, in operation, were obliged to maintain a mean average annual speed of 15 knots, it must have been known that the contract could not be performed unless the steamers were run at an immoderate speed in a fog; and hence plainly shows that the petitioner must have had privity or knowledge of the habit of running at an immoderate speed. Ultimately considered, the proposition but asserts that the contract on its face manifested a clear purpose on the part of the French government and the petitioner to violate the international rule. We think to state the contention is to demonstrate its want of merit. It invites us, without proof, to conjecture as to the prevalence and duration of the conditions of fog which might be encountered during many ocean *crossings, [130] and from such surmise to decide not only that the petitioner, but the government of France, entered into a contract having for its purpose the violation of the international rule, which it was not only the duty, but, as shown by the contract, was the manifest purpose, of the government, on the one side, to enforce, and of the petitioner, on the other, to obey. It moreover asks us, without proof, to assume that a contract which was evidently carefully drawn to attain the permanency of the service and secure the efficiency and safety of the ships engaged in such service, and of the lives and interests of all those who might take passage on such ships, was in effect intended to accomplish a contrary and disastrous result. But, it is argued, however conclusive these considerations may be as to the purpose of the French government in making the contract, that they are without weight when the privity and knowledge of the petitioner as to immoderate speed is alone considered. This proceeds upon the assumption that, as the contract required an average speed of 15 knots, and gave a reward for exceeding that speed, and imposed a penalty for a failure to maintain it, therefore the petitioner had a direct incentive to operate its steamers at an immoderate speed; and, as the subsidy was earned, the petitioner must have known that its vessels were being operated in fogs in violation of law. This, however, again but invites us into the region of mere conjecture. Besides, it disregards the fact that the contract in terms exempted from the operation of the penalty clause a falling below the average speed caused by *vis major.* It moreover disregards the express terms of the contract, by which complete governmental supervision over the operation of the steamers was provided, and the full power to investigate documents and papers concerning every crossing, which was reserved to the government officials,—a power retained obviously for the purpose of securing not only the speedy, but the safe, operation of the steamers. Besides, the contention presupposes that the incentive which the contract afforded of a comparatively small premium, to [131]be earned in the operation *of a half dozen or more valuable steamships, must, as a matter of legal presumption, be treated as having been a sufficient motive to induce the petitioner to sanction conduct by its captains, which not only was in direct violation of law, but recklessly endangered the lives and property of those on board, as well as hazarded the loss of the great sums invested in the steamships. And these considerations also dispose of the argument based upon the fact that a small part of the premium, if earned, was allowed by the company to the captains of its steamers.

It is insisted that, as it was shown that La Bourgogne was not fully equipped with the lifeboats, life rafts, and disengaging apparatus required by the laws of the United States, therefore the limitation of liability should not have been accorded. We do not stop to consider the deduction drawn from the premise of fact which the proposition assumes, because we think that premise is devoid of foundation. There can be no question that La Bourgogne was fully equipped in every particular as required by the law of France. By Rev. Stat. § 4488, U. S. Comp. Stat. 1901, p. 3055, made applicable to foreign vessels by the act of August 7, 1882 (chap. 441, 22 Stat. at L. 346, U. S. Comp. Stat. 1901, p. 3015), it is required that—

> "Every steamer navigating the ocean . . . shall be provided with such numbers of lifeboats, floats, rafts, life preservers, and drags as will best secure the safety of all persons on board such vessel in case of disaster; and . . . shall have the lifeboats required by law provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging apparatus to be operated by one person, disengaging both ends of the boat, simultaneously from the tackles by which it may be lowered to the water."

And in the same section it is provided that "the board of supervising inspectors shall fix and determine, by their rules and regulations, the kind of lifeboats, floats, rafts, and life preservers, and drags that shall be used on such vessels," etc.

*By Rev. Stat, § 4489, it is provided that—[132]

> "The owner of any such steamer, who neglects or refuses to provide such lifeboats, floats, rafts, life preservers, drags, pumps, or appliances as are, under the provisions of the preceding section, required by the board of supervising inspectors, and approved by the Secretary of the Treasury, shall be fined one thousand dollars."

Rev. Stat. § 4405 (U. S. Comp. Stat. 1901, p. 3017), makes it the duty of the supervising inspectors and the supervising inspector general to meet once a month as a board and to "establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law."

Exercising the authority thus conferred upon them, the board fixed the total capacity of lifeboats and life rafts on steamers navigating the ocean of the tonnage of La Bourgogne at 5,670 cubic feet. It is not questioned that La Bourgogne was equipped with lifeboats and life rafts to the capacity of 6,600 cubic feet, nearly a thousand feet more than the regulations having the force and effect of law required. Nor is it disputed that the vessel was duly inspected under the law, and received the certificate of complete equipment required by the statute. and was certified to be entitled to carry 1,019 passengers,—many more than were on the steamer at the time she was lost. And. indeed, the supervising inspector and assistant testified that La Bourgogne had complied with all the requirements imposed.

The argument is that, although all the things just stated be true, yet, as the statute, when closely considered, required a greater capacity of lifeboats and rafts than was exacted by the regulations, the statute, and not the regulations, must be considered in determining the sufficiency of the equipment. But we think this is completely answered by the context of the statute, and especially by § 4405, which gives to the regulations of the board the effect of law. The contention that the section is inapplicable is without merit. It proceeds upon *the assumption[133] that the act of August 7, 1882, which subjected certain foreign steam vessels to the requirements as to equipment and to the inspection laws of the United States, and brought them under the authority of the board of supervising inspectors, did not cause the rules of the board to be law as to such foreign vessels, although it made them law as to every other vessel subject to the statute.

As originally enacted, the first chapter of title 52 of the Revised Statutes related generally to the subject of inspection of steam vessels. The 2d section (4400) excluded from the operation of the title "vessels of other countries;" and therefore all the sections of that chapter, as well as of the following chapter, relating to the same subject, had no relation to such vessels. When the amending act of 1882 was enacted. its initial words amended and enlarged § 4400 by adding at the end of such section the following words: " . . . And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of" seventeen enumerated sections. When the sections thus enumerated are examined, it becomes apparent that they were particularly designated because the amendment of their context was deemed especially appropriate to the fruition of the general purpose of the statute, which was to bring foreign steam vessels under the sway of the requirements of the laws of the United States as to equipment, inspection, etc., hitherto applicable only to domestic vessels. Because § 4405, which gave to the duly-enacted rules and regulations of the board of supervising inspectors the force and effect of law, was not specially enumerated in the amendatory act, does not support the proposition that it was not intended that the provisions of that section should have application to foreign steam vessels. To so hold would be but to say that, although the regulations were made applicable to foreign vessels, and the owners of such vessels were commanded to obey the same, yet such command was not made obligatory, thus frustrating the very purpose of the amendatory [134]act, and *rendering its requirements entirely nugatory. Aside, however, from this impossible conclusion, the contention is wholy devoid of merit, because both §§ 4488 and 4489 were among the sections especially enumerated in the amendatory act of 1882. The effect of this was to make beyond all peradventure those sections applicable to foreign steam vessels, and, therefore, to subject the owners of such vessels to the duty of complying with the rules and regulations made by the board of supervising inspectors as to lifeboats and other equipment, under the pain of incurring the penalty provided by the statute. And the reasons just given dispose of the contention concerning the boat-disengaging apparatus. There is no question, as found by both courts, that the apparatus in use on La Bourgogne was that required by the board, and the officers of the board testified that the apparatus in use was adopted in compliance with their requirements, and was the best and only apparatus suitable for the purpose. Again, the contention that the regulations of the board are inconsistent with the statute, we think, when the statute is considered as a whole, is without merit. Even, however, if it were otherwise, as compliance on the part of the petitioner with the regulations adopted by the board was compelled by law, it cannot be that upon it was cast the duty of disobeying the regulation at its peril, thus, on the one hand, subjecting it in case of noncompliance to the infliction of penalties, and, on the other hand, if it fully complied with the regulations, imposing a liability upon the assumed theory that there had been a violation of law.

3. Concluding, as we have, that the petitioner was entitled to the benefit of the act limiting liability on making the surrender exacted by the statute, we are brought to consider the controversies as to what constituted the freight then pending within the meaning of the law for limitation of liability.

Both courts below agreed that the petitioner was not obliged to surrender the passenger and freight receipts earned on the sailing from Havre to New York, because such receipts were *not freight then pending[135] within the meaning of the statute. As §§ 4283 and 4284, Revised Statutes (U. S. Comp. Stat. 1901, p. 2943), are *in pari materia*, the two must be considered together, and therefore the freight then pending, referred to in § 4283, is freight then pending for "the same voyage," or "for the voyage," as these words are used in § 4284. The vessels of petitioner made trips from Havre to New York and from New York to Havre without any intermediate stops. It is clear that, in common parlance, each of these trips was a separate voyage. Undoubtedly the word "voyage" may have different meanings under different circumstances, depending on the subject to which it relates or the context of the particular contract in which the word is employed. This is illustrated by the use of that word in the subsidy contract, where the word is used as signifying a sailing from Havre to New York and the return trip to Havre. But we need not now concern ourselves with what may be the meaning of the word "voyage" under all possible circumstances, or what was its significance as used in the subsidy contract, since we are now called upon only to fix the meaning of the word as applicable to the case before us in virtue of the sections of the Revised Statutes referred to. That significance must be ascertained by considering the context of the sections and the remedy which they were intended to afford; in other words, their obvious intent and purpose. The intimate relation between the provisions of the two sections, which were both in the act of 1851, was pointed out in considering that act in Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. 104, 20 L. ed. 585, and, concerning the purpose and intent of the statute, it was observed in that case (p. 111):

"The phrase is added 'on the same voyage' to confine the participation in the apportionment to the freighters of a single voyage, and not to permit the shipowner to bring into the compensation losses sustained on prior or other voyages."

The statute thus confining those who are entitled to participate in the pending freight to be surrendered to the persons whose lives or property were at risk in the common adventure or voyage in which the freight was [136] earned, and excluding those *who may have suffered loss from a previous voyage or trip, it follows that, as applied to the case before us, the then pending freight for the same voyage embraced only the distinct sailing between the definite termini, New York and Havre, and therefore did not include freight earned on the previous sailing from Havre to New York. This leads to the conclusion that both courts were right in not requiring the surrender of the freight earned in the sailing from Havre to New York, and requires us only to consider whether the circuit court of appeals was right in reversing the ruling of the trial court, to the effect that there was no obligation to surrender the sums which had been prepaid for freight and passage on the sailing from New York to Havre, upon which the vessel was lost. As pointed out in Norwich & N. Y. Transp. Co. v. Wright, supra, where a vessel is lost on a voyage, and thereby contracts of transportation are unperformed, it may be that there will be no freight earned and none to be surrendered. But in the case before us it is unquestioned that the freight and passage money which was received by the petitioner for the voyage was paid to it under absolute agreement that the sums so paid were, in any event, to belong to the petitioner, which were tantamount to stipulations that, although such freight and passage moneys might be only partially earned, the right to the whole amount was contractually complete. Under these circumstances, in view of the decision in The Main v. Williams, 152 U. S. 122, 38 L. ed. 381, 14 Sup. Ct. Rep. 486, holding that the duty to surrender pending freight to entitle to a limitation of liability must be liberally construed against the shipowner, we are of opinion that the circuit court of appeals was right in holding that the petitioner was under the obligation to surrender the sums in question. See O'Brien v. Miller, 168 U. S. 287, 303, 42 L. ed. 469, 475, 18 Sup. Ct. Rep. 140; Pacific Coast Co. v. Reynolds, 52 C. C. A. 497, 114 Fed. 877.

And the reasoning just stated disposes of the contention, as to which both courts decided adversely, that there was a duty to surrender as pending freight one fifty-second part of the annual subsidy paid by the French government, covering the period of the voyage during which La Bourgogne was lost, *since if one fifty-second part under the con- [137] tract embraced the round trip from Havre to New York and back, only one half of that sum, at the best, would be applicable on account of the voyage or trip from New York to Havre. But both the courts below were right, we think, in deciding that, in view of the nature and character of the contract of subsidy and the state of the proof, no part of the gross sum paid as subsidy for the year could be properly treated as freight earned and then pending for the voyage in which the vessel was lost. We say, in view of the nature and character of the contract; because, when all the obligations imposed by that instrument are considered, and the power with which it endowed the French government as to deductions for fines and penalties is borne in mind, we think it cannot rightfully be said that a particular portion of the annual subsidy was so dedicated to a particular trip as to cause any portion of the subsidy to become freight earned for that trip, and pending within the meaning of the statute. The provision as to the fifty-two voyages was, in a measure, distributive of the total annual payment. But, when the whole contract is taken into view, we think the annual subsidy was substantially indivisible, and the solidarity begotten by the terms of art. 45 of the contract between all the voyages, and the gross amount of the subsidy, excludes the conception that the result of one trip may be isolated and treated as pending freight for that voyage. We have said, also, in view of the nature of the proof, because the evidence was merely that a certain sum was paid for the year, which was less than the maximum amount of the annual subsidy fixed by the contract, and no means is afforded for determining whether any deduction was made on account of the failure of La Bourgogne to complete the last voyage, or whether such proportionate amount was earned by the substitution of another vessel.

4. The action of the courts below concerning the claims against the fund remain only to be considered.

We first dispose of the claims based upon [138]loss of life which *the trial court disallowed, and which the circuit court of appeals held were entitled to be proved against the fund.

It was settled in The Harrisburg (The Harrisburg v. Rickards) 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140, that no damages can be recovered in admiralty for the death of a human being on the high seas, or on the waters navigable from the seas, caused by negligence, in the absence of an act of Congress or a statute of a state, giving the right of action therefor. As said in Butler v. Boston & S. S. S. Co. 130 U. S. 555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612, the maritime law of this country, at least, gives no such right. But in The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, ante, 264, 28 Sup. Ct. Rep. 133, it was also settled that where the law of a state to which a vessel belonged—in other words, the law of the domicil or flag—gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action given by the law of the domicil or flag will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability. As La Bourgogne was a French vessel, the question is, therefore, Did the law of France give a right of action for wrongful death caused by the collision in question?

Article 1382 of the Napoleon Code provides as follows: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it." The text of this article is found in article 2294 of the Louisiana Code, and in substantially the same form was found in the Spanish law. Hubgh v. New Orleans & C. R. Co. 6 La. Ann. 496, 54 Am. Dec. 565. While, as lucidly shown by Chief Justice Eustis, in delivering the opinion in the case just cited, the provision in question did not, under the law of Spain or Louisiana, in the absence of express statute to that effect, confer a right of action for a wrongful death, it may not be doubted that in France, as also pointed out in the same case, such right of action has been constantly recognized and enforced from the date of the enactment of the Code Napoleon. See the decisions of the French courts, collected under article 1382 of the Code Napoleon, in the Fuzier-Herman annotated edition of that [139]code, Paris, *1896, vol. 3, page 766, No. 688 et seq. Indeed, under the settled interpretation of the article of the Code Napoleon, the right to recovery for wrongful death is not dependent upon heirship or other relationship by consanguinity or affinity, but upon the ability to prove the existence of damage to the claimant, arising from wrongful death. The doctrine is thus stated: "The action brought to repair the damage caused by an accident, especially by an accident which has been followed by death, may be brought, not only by the heir of the victim, but also by anyone, whether heir or not, who has been directly injured by the consequences of the accident." See decisions collected under No. 688, and the immediately following paragraphs in the Annotated Code, just previously cited. Indeed, in controversies in the French courts concerning injuries asserted to have been suffered by loss of life caused by the sinking of La Bourgogne, the right to recover for loss by death was impliedly conceded to exist, although relief was denied in the particular cases, on the ground that the steamer was not, under the proof, at fault for the collision.

Such being the law of France, it follows, under the doctrine of The Hamilton Case, the circuit court of appeals rightly held the claims for loss of life to be provable against the fund created in the limited liability proceeding, unless it be that some exception takes the case out of the general rule. It is insisted that such an exception obtains, even although the French law allows recovery upon claims of that nature, because, under the facts found as to the speed of La Bourgogne, the vessel would not have been held by the French courts to have been negligent, and therefore no recovery could have been had in France. But it is not denied that the international rule governs in the French courts, and hence the same legal duty as to moderate speed in a fog is exacted by law in both this country and France. The proposition then is this: That the right of action allowed by the French law may not, for the purposes of the limitation of liability, be allowed by the courts of the United States, unless such courts abdicate their functions by *declining to draw their own in-[140] ferences from the proof as to negligence, and, to the contrary, make such inferences as they assume would be drawn by a French court if the proof was before such court. The duty to enforce the cause of action given by the French law does not carry with it the obligation to disregard the proof by declining to give it that effect to which it is entitled under the law as administered in the courts of the United States. Moreover, as we have said previously, as the petitioner is here an actor, seeking to avail of the benefits of a statute of the United States, it becomes the duty of the courts of the United States to determine the question of fault by the international rule as they interpret it. And, in the nature of things, it cannot be that the vessel which seeks the benefit of the law of the United States can be held to be in fault and not in fault concerning the same act or acts.

The conclusions hitherto expressed as to the want of privity and knowledge, and the adequacy of the equipment of the steamship, dispose of the contention that the claim of the S. S. White Dental Company was erroneously disallowed. The contentions made to establish that error was committed by both courts in allowing the other claims rest ultimately upon mere questions of fact, and are therefore without merit, since we cannot, in any event, say that the proof clearly shows error. But, passing this, as there is no contest between the claimants, and the sum of the claims enormously exceeds the fund for distribution, we do not think the petitioner's interest is such as to require an investigation of the sufficiency of the reasons which caused the courts below to allow the claims. Finally, we consider the proposition that it was error to have allowed the limitation of liability, because the petitioner had not actually paid over to the trustee the amount of the pending freight. But there was an honest controversy whether there was any pending freight to be surrendered. The trial court, when its attention was called to the failure to surrender any sum as pending freight, refused to direct such surrender, and reserved the subject for future action.

[141] The final decree *which that court made held there was no pending freight, and therefore nothing to be surrendered. While the circuit court of appeals differed with the trial court as to one item,—the freight from New York to Havre,—we do not think that court was required, as a condition for affirming the grant of limitation of liability, to exact the payment of the disputed money into court, or the giving of bond therefor, until the possibility of the review of its action was at an end. Of course, where, in proceedings for limitation of liability, the petitioner contumaciously refuses to put the court in actual or constructive possession of the fund to be distributed, relief might properly be withheld and the petition for limitation of liability be dismissed. But where, as here, a bona fide controversy existed as to whether particular moneys were or were not pending freight, and there also existed no question as to the solvency of the petitioner, the court did not err in declining to impose conditions upon the granting of relief tantamount to an assumption that the claim of the petitioner was untenable, in advance of a final determination of the disputed issue. We have confined the foregoing opinion to those general propositions which we deem essential to dispose of the case. We have hence refrained from expressly noticing many minor points pressed in the voluminous argument submitted at bar. Because we have so done, we have not overlooked, but have considered them all; indeed, have disposed of them all; as the reasons we have given, when ultimately considered, conclude every contention made. As neither party has prevailed in this court, each must pay his own costs in this court.

Affirmed.

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*JAMES FARRELL, Plff. in Err., [142]
v.
JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased.

(See S. C. Reporter's ed. 142–149.)

Evidence — conflicting mining locations — third locator may show senior location.

1. Evidence is admissible on behalf of the third locator of a lode mining claim which tends to establish the existence of a valid and subsisting location prior to the location which such third locator is adversing.

Mines — conflicting lode locations — effect of abandonment of senior location.

2. Ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator.

[No. 170.]

Submitted March 9, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which reversed a judgment of the District Court for Summit County, in that state, in favor of defendant in a suit in support of an adverse mining claim. Reversed.

See same case below, 31 Utah, 155, 86 Pac. 1077.

The facts are stated in the opinion.

Mr. Charles C. Dey submitted the cause for plaintiff in error. **Mr. A. L. Hoppaugh** was on the brief:

This case is governed and controlled by Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716.

NOTE.—As to conflicting locations of mining claims—see notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859, and Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

As to relocation of mining claim as abandoned or forfeited—see note to Wilson v. Freeman, 68 L.R.A. 833.

Mr. **Wilson I. Snyder** submitted the cause for defendant in error. Messrs. George Sutherland and Bismarck Snyder were on the brief:

While the senior location was valid and subsisting, its territory could no more be invaded, for the purpose of attempting a location, than could patented ground be so encroached upon.

Forbes v. Gracey, 94 U. S. 767, 24 L. ed. 314; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735.

The Cliff discovery was located upon a valid and subsisting mining claim, upon ground not then open to appropriation, and therefore, there being no valid discovery, there was no valid location.

Belk v. Meagher, supra; Book v. Justice Min. Co. 58 Fed. 128; Malone v. Jackson, 70 C. C. A. 216, 137 Fed. 878; Hall v. Hale, 8 Colo. 351, 8 Pac. 580; Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529; Slavonian Min. Co. v. Vacavich, 7 Sawy. 217, 7 Fed. 331; Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509; Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197; Nash v. McNamara (Nev.) 93 Pac. 405; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728; Perigo v. Erwin, 85 Fed. 904; Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

Every location, to be valid, must be based upon a valid discovery within the limits of the claim.

Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266; Copper Globe Min. Co. v. Allman, 23 Utah, 418, 64 Pac. 1019; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362; Hayes v. Lavagnino, 17 Utah, 190, 53 Pac. 1029; King v. Amy & S. Consol. Min. Co. 152 U. S. 225, 38 L. ed. 420, 14 Sup. Ct. Rep. 510; Erhardt v. Boaro, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; Perigo v. Erwin, 85 Fed. 904, 35 C. C. A. 482, 93 Fed. 608.

Before there can be a relocation, there must be an end of the previous claim.

Zerres v. Vanina, 134 Fed. 614; Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 448; Little Gunnell Co. v. Kimber, 1 Morrison, Min. Rep. 536, Fed. Cas. No. 8,402; Lakin v. Sierra Buttes Gold Min. Co. 25 Fed. 337; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785; McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395, 64 Pac. 669; North Noonday Min. Co. v. Orient Min. Co. 1 Fed. 522.

Mr. Justice **White** delivered the opinion of the court:

In the month of February, 1905, James Farrell, plaintiff in error, as owner of the Cliff lode mining claim, situated in the Uintah mining district, Summit county, Utah, made application in the United States land office at Salt Lake City for a patent, and published the notice required by law. The defendant in error, as the administrator of the estate of John G. Rhodin, filed an adverse claim based upon the location by Rhodin of the ground as the Divide lode mining claim. Thereafter, *pursuant to **[143]** Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, this action was brought in a court of the state of Utah by the administrator of Rhodin, in support of said adverse claim.

In the complaint filed by the administrator the right of Rhodin to the Divide was asserted to have been initiated by a location duly made on January 2, 1903. Farrell in his answer asserted a paramount right by reason of his ownership of the Cliff claim, averring that it had been initiated by a location made on August 1, 1901, seventeen months prior to the location of the Divide by Rhodin. To the affirmative matter pleaded in the answer of Farrell a general denial was interposed, and it was also averred as follows: Plaintiff "alleges that at the time and date of the attempted location of the said Cliff patented mining claim the ground therein contained was not any part of the open and unclaimed mineral land of the United States, but, on the contrary, the whole thereof, including the point and place of discovery of said alleged Cliff mining claim, was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the possession of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void."

The case was tried by the court, and it was specifically found that the Cliff, the Divide, and the South Mountain claims, as located, covered substantially the same ground, and that the place of discovery of the Cliff was within the boundaries of the alleged South Mountain mining claim. It was further specifically found by the court that, upon the trial of the action, "plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial, and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to show that, during the month of

August, 1900, the ground in controversy [144] herein was *located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made and notice of location posted, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form, and was duly recorded in the office of the county recorder of Summit county, state of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work done thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the 13th day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin."

When it decided the case, the court found that Farrell initiated his ownership of the Cliff claim on August 1, 1901, and performed all the acts required by law in addition to the annual labor required by statute, and that Rhodin initiated on January 2, 1903, his Divide claim. The court decided in favor of the defendant Farrell, and entered a decree adjudging that he was the owner, in possession of the premises in controversy, and entitled to the possession, except as against the paramount title of the United States. The court treated the proof offered on behalf of the plaintiff as to the location of the South Mountain claim for the same ground embraced in the Cliff, made a year prior to the location of the latter claim, as immaterial and irrelevant. Plaintiff duly excepted and appealed to the supreme court of the state. The court, in disposing of the appeal, considered solely what it termed the "decisive question" presented by the record, *viz.*, "whether the appellant, as owner of the Divide claim, who, as such, adversed the application for patent, is in position to show and assert that, at the time of the location of the Cliff claim, the ground located was covered by [145] the South Mountain, a then *valid and subsisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void, not only against the locators of the South Mountain, but all the world." In deciding this question the court deemed that it was called upon to consider and apply the ruling in Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716. Doing so it was recognized that the reasoning in the opinion in that case was broad enough to maintain where, on an adverse claim, the first or senior locator did not appear to oppose the application for a patent made by a second locator, whose rights in the same ground had been initiated prior to the forfeiture of the senior location, for failure to perform the annual labor required by the statute, a third locator could not be heard to complain that the second locator had initiated his claim upon mining ground which was not at the time open to location. While thus conceding, the court considered that the reasoning in question ought to be restricted, because not to do so would cause Lavagnino v. Uhlig to be in conflict with cases decided prior to the decision in that case, and, moreover, would establish a rule in conflict with the practice which had long prevailed in the mining districts, and would therefore create great confusion and uncertainty in respect to mining claims, and unsettle rights of property of great value. The court did not at all doubt that Lavagnino v. Uhlig had been correctly decided in view of the issues in that case; but, for the reasons which we have just stated, it held that the ruling in Lavagnino v. Uhlig must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. Thus applying the ruling in Lavagnino v. Uhlig, the court held that, as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain, and the statutory period for the forfeiture of the South *Mountain [146] claim had not expired, the Cliff claim was not located on ground subject to location, and was void; that, as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah, 155, 86 Pac. 1077. Farrell thereupon sued out this writ of error.

In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining states or in territories of the United States where mining prevails,—Nash v. McNamara (Nev.) 93 Pac. 405, and cases cited,—which, in considering the reasoning of Lavagnino v. Uhlig, also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the Lavagnino Case is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the Lavagnino Case, especially in view of the issue as to long possession and the operation of the bar of the statute of the state of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly reexamine the reasoning expressed in the opinion in Lavagnino v. Uhlig as an original proposition. We say this, because, whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, as also the more recent case of Brown v. Gurney, 201 U. S. 184, 50 L. ed. 717, 26 Sup. Ct. Rep. 509, we think the opinion in the Lavagnino Case [147] should be qualified *so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that, at the time such prior location was made, the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if, at the time of such second location, there had been an actual abandonment of the original senior location. We say this because—taking into view Belk v. Meagher, Lavagnino v. Uhlig, and Brown v. Gurney—we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

In Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, summing up as to the character of the right which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450):

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

*"An easement in real estate may be aban- [148] doned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. Snell v. Levitt, 110 N. Y. 595, 1 L.R.A. 414, 18 N. E. 370, and cases cited at p. 603 of opinion of Earl, J.; White v. Manhattan R. Co. 139 N. Y. 19, 34 N. E. 887. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that, if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances."

It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, *and that no work was ever done on said claim*, and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff, no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the Cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the con-[149]trary, we are of opinion that *the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The supreme court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in entering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy.

The judgment of the Supreme Court of Utah must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

ANNIE KEALOHA and Keoni Williams, Appts.,
v.
WILLIAM R. CASTLE, Trustee.

(See S. C. Reporter's ed. 149-155.)

Federal courts — following construction of local statute by Hawaiian courts — legitimation.

1. The Federal courts will follow the construction given by the courts of the government of Hawaii to a statute first enacted on May 24, 1866, legitimating children born out of wedlock upon the marriage of their parents, as not applicable to the issue of an adulterous relation.

Judgment — res judicata — ex parte direction.

2. An *ex parte* direction to a testamentary trustee to pay over a portion of the income of the trust property to children of the testator, on the theory that they have become legitimate by the subsequent marriage of their parents, is not *res judicata* where no notice was given of the proceedings, and there was no contest or issue made concerning the legitimacy of the children.

[No. 230.]

Submitted April 28, 1908. Decided May 18, 1908.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court of the First Judicial Circuit, in that territory, sustaining a demurrer to, and dismissing, a bill against a testamentary trustee for an accounting. Affirmed.

See same case below, 17 Haw. 45, 415.

Statement by Mr. Justice **White**:

By the last will of Joshua R. Williams, duly admitted to probate by the proper court of the Hawaiian Islands on July 30, 1879, William R. Castle, the appellee, was appointed trustee to collect and manage the estate of said Williams. After the decease of Williams, Castle duly qualified and entered upon the performance of the trust. He was charged with the duty of paying the income of the estate to named beneficiaries during life, and, on the decease of any of such beneficiaries, the share was to be paid to the children, and the distribution of the principal of the estate was postponed to a remote period. One of the named beneficiaries was a son, John. He married, and his wife bore him a son, Othello. While John was living in lawful wedlock another woman bore him two children,—Annie, born in 1879, and a son, Keoni, born in 1883. Some years subsequent to 1883, his first wife having died, John married the mother of his two illegitimate children. John died about 1891, leaving his second wife surviving him, as also the child Othello by the first wife and the two illegitimate children referred to. One of these, Annie, married one Kealoha, and in 1905, after she and her brother Keoni had reached their majority, they filed in the circuit court of the first judicial circuit, territory of Hawaii, a bill against Castle for an accounting, in which substantially the facts above stated were set forth. It was also averred that although, on an application by the trustee, he had, in 1891, been instructed by a justice of the court to make payment to the said Annie and Keoni of their shares, on the theory that they had been legitimated by the marriage of their parents, the trustee had ceased to make said payments, and denied that they were entitled to receive any portion of the income or to share in the principal of the estate. It was prayed that the trustee might be ordered to render an account and be compelled to make payment of the *por-[151]tion of the income to which it might appear the petitioners were entitled. A demurrer was filed to the bill, and the question whether the demurrer should be sustained was reserved to the supreme court of the territory, it being stated in the certificate that the following question of law was raised by the demurrer, upon which the court was in doubt, *viz.:*

"Whether or not said demurrer should be sustained or overruled, which involves the construction of § 2288, Revised Laws of Hawaii, and its application to the facts as alleged in the bill herein; that is to say, were the petitioners made legitimate by the marriage of their parents subsequent to their birth, and thereby rendered capable of inheriting from their father, J. R. Williams, deceased?"

The supreme court held that the demurrer ought to be sustained, and, upon remittitur, the circuit court entered a decree sustaining the demurrer and dismissing the petition with costs. This decree having been affirmed by the supreme court of the territory, the case was brought here by appeal.

17 Haw. 415.

Mrs. **Annie Kealoha** and Mr. **Keoni Williams**, *in propriis personis*, submitted the cause for appellants. Mr. T. M. Harrison was on the brief:

It was error to hold that the decision of Mr. Justice Bickerton, that the income should be paid the appellants on the theory they were legitimate, did not make the question *res judicata.*

9 Enc. Pl. & Pr. pp. 619, 626; Greely v. Smith, 1 Woodb. & M. 181, Fed. Cas. No. 5,749; 24 Am. & Eng. Enc. Law, p. 735; 30 Century Dig. "Judgments," §§ 1181-1183; Thompson v. Hemenway, 218 Ill. 46, 109 Am. St. Rep. 239, 75 N. E. 791; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Tate v. Norton, 94 U. S. 746, 24 L. ed. 222; Sowles v. First Nat. Bank, 54 Fed. 565; Herron v. Dater, 120 U. S. 464, 477, 30 L. ed. 748, 753, 7 Sup. Ct. Rep. 620; Wilson v. Smith, 117 Fed. 707: Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091; Keahi v. Bishop, 3 Haw. 546; Pahau v. Keelikolani, 4 Haw. 295; Rose v. Smith, 5 Haw. 377; 1 Herman, Estoppel & Res Judicata, p. 480, § 410; Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632; May v. Boyd, 97 Me. 398, 94 Am. St. Rep. 509, 54 Atl. 938; Townsend v. Townsend, 60 Mo. 246; Womack v. Womack, 23 La. Ann. 351; Johnson v. Beauchamp, 5 Dana, 70; 24 Am. & Eng. Enc. Law, p. 721.

It was error to hold that the appellants were not made legitimate by the marriage of their parents, although their father was married to a woman other than their mother when they were born.

Hawbecker v. Hawbecker, 43 Md. 516; Ives v. McNicoll, 59 Ohio St. 402, 43 L.R.A. 772, 69 Am. St. Rep. 780, 53 N. E. 60; Sutphin v. Cox, 2 Ohio Dec. Reprint, 90; Carroll v. Carroll, 20 Tex. 732; Monson v. Palmer, 8 Allen, 551; Adams v. Adams, 36 Ga. 236; State v. Lavin, 80 Iowa, 556, 46 N. W. 553; Re Schmidt, 42 Misc. 463, 87 N. Y. Supp. 428; Townsend v. Van Buskirk, 33 Misc. 287, 68 N. Y. Supp. 512; 10 Enc. Pl. & Pr. p. 633; 22 Cyc. Law & Proc. p. 641; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408.

Kekula v. Pioeiwa, 4 Haw. 292, does not constitute a rule of property which should control this case.

Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Paul v. Davis, 100 Ind. 422; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Hall v. Newcomb, 3 Hill, 233; The Madrid, 40 Fed. 677; 26 Am. & Eng. Enc. Law, pp. 167, 181, 183, 184; Kimball v. Grantsville City, 19 Utah, 368, 45 L.R.A. 628, 57 Pac. 1; Hihn v. Courtis, 31 Cal. 399; Frank v. Darst, 14 Ill. 304, 58 Am. Dec. 575; Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773; Duff v. Fisher, 15 Cal. 376; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. 27 Colo. 1, 50 L.R.A. 209, 83 Am. St. Rep. 17, 59 Pac. 607; McFarland v. Pico, 8 Cal. 631; Mallett v. Butcher, 41 Ill. 382; Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691, 13 S. E. 809; Leavitt v. Blatchford, 17 N. Y. 521; Rumsey v. New York & N. E. R. Co. 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654; Callender v. Keystone Mut. L. Ins. Co. 23 Pa. 475; Hart v. Burnett, 15 Cal. 530; Jones v. Madison County, 72 Miss. 778, 18 So. 87; Butler v. Van Wyck, 1 Hill, 438; Wilson v. Ward Lumber Co. 67 Fed. 674; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 482, 483, pp. 901, 902; San Francisco v. Spring Valley Waterworks, 48 Cal. 493; Harvey v. Travelers Ins. Co. 18 Colo. 354, 32 Pac. 935; Jasper County v. Allman, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206; Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159; Stern v. Lee, 115 N. C. 426, 26 L.R.A. 814, 20 S. E. 736; Weston v. Ralston, 48 W. Va. 170, 36 S. E. 446; Judson v. Gray, 11 N. Y. 408; Hibbits v. Jack, 97 Ind. 570, 49 Am. Rep. 478; Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 60 L.R.A. 33, 24 So. 200, 317; Higgins v. Bordages, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803; Jackson County v. State, 155 Ind. 604, 58 N. E. 1037; Young v. Downey, 150 Mo. 317, 51 S. W. 751; Bowers v. Green, 2 Ill. 42; Postal Teleg. Cable Co. v. Farmville & P. R. Co. 96 Va. 661, 32 S. E. 468; Aud v. Magruder, 10 Cal. 283; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; Groesbeck v. Golden (Tex.) 7 S. W. 362.

Messrs. **David L. Withington** and **A. G. M. Robertson** submitted the cause for appellee:

There was no case pending before Justice Bickerton in which any valid order or decree could be entered.

Calderwood v. Peyser, 42 Cal. 115; McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; Christian v. Atlantic & N. C. R. Co. 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; Collins v. Lofftus, 10 Leigh, 10, 34 Am. Dec. 719; Simon v. Ellison, 90 Va. 157, 17 S. E. 836; Gordon v. Green, 113 Mass. 259; Story, Eq. Pl. § 207.

In an action *in personam*, jurisdiction over the person of a defendant is acquired by his voluntary appearance, or by the service upon him of such process as the law provides.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Glass v. Smith, 66 Tex. 548, 2 S. W. 195; Roller v. Ried, 87 Tex. 69, 25 S. W. 624, 26 S. W. 1060; Buckley v. Perrine, 54 N. J. Eq. 285, 34 Atl. 1054; Price v. Schaeffer, 161 Pa. 530, 25 L.R.A. 699, 29 Atl. 279; Furgeson v. Jones, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842.

In controversies between beneficiaries, the trustee is required to stand neutral.

Grimball v. Cruse, 70 Ala. 534; Gordon v. Green, 113 Mass. 259.

Lack of jurisdiction, either of the parties or the subject-matter, will, of course, prevent the judgment from having any binding force, and render it valueless for any purpose of estoppel. A judgment entered under such circumstances does not constitute *res judicata.*

1 Van Fleet, Former Adjudication, § 12; 24 Am. & Eng. Enc. Law, pp. 730, 731; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286; Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; Bethlehem v. Watertown, 51 Conn. 490; Hoosier Stone Co. v. Louisville, N. A. & C. R. Co. 131 Ind. 575, 31 N. E. 365; Walker v. Philadelphia, 195 Pa. 168, 78 Am. St. Rep. 801, 45 Atl. 657; Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226; Biddle & S. Co. v. Burnham, 91 Me. 578, 40 Atl. 669; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Parker v. Moore, 59 N. H. 454; Shipman v. Rollins, 98 N. Y. 311.

The proceeding before Justice Bickerton was not *in rem.* In Hawaii the jurisdiction in probate to decree heirships is confined to proceedings for the distribution of intestate estates, and limited to the distribution of personal property.

Mossman v. Hawaiian Government, 10 Haw. 421; Smith v. Hamakua Mill Co. 13 Haw. 245.

Kekula v. Pioeiwa, 4 Haw. 292, recognized a principle which became, by judicial adoption, a valuable part of the common law of the kingdom.

Kake v. Horton, 2 Haw. 209; Schooner Robert Lewers Co. v. Kekauoha, 52 C. C. A. 483, 114 Fed. 854.

The effect of the decision was to hold that the statute of 1866 was declaratory of the Roman or Civil Law as restored by the Scotch courts.

Schouler, Dom. Rel. pp. 308, 309; 2 Bl. Com. pp. 247, 248.

The decision in the Kekula Case was right, and is good law.

Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222.

The decision in the Kekula Case is a rule of property which this court will not overturn.

Grignon v. Astor, 2 How. 343, 11 L. ed. 292; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Lowndes v. Huntington, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The assignments of error assailing the action of the supreme court of the territory propound two questions for our consideration:

1. Was it error to hold that, as the appellants were the issue of an adulterous relation between their father and mother at a time when the father was the lawful husband of another, they were not made legitimate by the marriage of their father *and mother after the death of their father's first lawful wife, and by force of the statutes of Hawaii?

2. Was it error to hold that the instruction given to the appellee in 1891, to make payment to the appellants of a portion of the income of the trust property, the title to which is in dispute in this suit, on the theory that they had become legitimate by the subsequent intermarriage of their parents, did not make the matters in dispute *res judicata* during the entire administration of the said trust property?

As to the first question. The law in force at the time of the death of the testator, Williams, in 1879, which, on the marriage of the parents, legitimated children born out of lawful wedlock, was passed on May 24, 1866, by the legislative assembly of the Hawaiian Islands, and appears as the first statute in the session laws of 1866–67. It is also contained in Comp. Laws 1884, p.

427, and Civil Laws of 1897, § 1876. The statute was carried into the Revised Laws of 1905 as § 2288, in similar phraseology, and reads as follows:

> "All children born out of wedlock are hereby declared legitimate on the marriage of the parents with each other, and are entitled to the same rights as those born in wedlock."

In the year 1880, in Kekula v. Pioeiwa, 4 Haw. 292, the proper interpretation of the act of 1866 was directly involved. The action below was in ejectment. Plaintiff was the issue of a woman by a man not her husband, he being then married to another. The wife having died, the father married the mother of the plaintiff. The right of the plaintiff to recover depended upon the fact of his constructive legitimacy. It was held, however, that the act of 1866 did not apply to the case of an adulterous intercourse, and that the offspring of such intercourse could not inherit from the father. While it was observed in the opinion that to enforce a contrary doctrine would be opposed to good morals, it is plain that the conclusion reached was that the statute was adopted by the legislative department of the Hawaiian government with the intention that it should have the restrictive effect given to it by the court. In other [153]*words, it was decided that the statute should not be broadly construed, as was claimed on behalf of the plaintiff. The statute was not afterwards modified; the decision in the Kekula Case has never been disapproved or doubted by the court which rendered it; it has undoubtedly become a rule of property, and was followed in the instant case. On the coming of the Hawaiian Islands under the sovereignty of the United States this statute was in force, with the construction given to it by the highest court of the country, and its continued enforcement was in effect ordained by the organic act, which, in § 6, provided: "That the laws of Hawaii, not inconsistent with the Constitution or laws of the United States or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." 31 Stat. at L. 142, chap. 339.

In Kentucky, in 1887 (Sams v. Sams, 85 Ky. 396, 3 S. W. 593, where the facts were somewhat similar to those in the instant case), it was held:

> Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed; and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse.

In other jurisdictions, however, statutes of similar character have been given a broad construction, and, where exceptions have not been stated, none have been implied. Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Hawbecker v. Hawbecker, 43 Md. 516; Ives v. McNicoll, 59 Ohio St. 402, 43 L.R.A. 772, 69 Am. St. Rep. 780, 53 N. E. 60. And see Carroll v. Carroll, 20 Tex. 732; Monson v. Palmer, 8 Allen, 551; Adams v. Adams, 36 Ga. 236; State v. Lavin, 80 Iowa, 556, 46 N. E. 553. But, under the circumstances to which we have hitherto called attention, we do not think we may enter into a consideration of these conflicting decisions. Even in the case of a law adopted by an organized territory of the United States at a time when it was subject to the control of Congress, the rule is that we *will lean towards the interpretation [154] of a local statute adopted by the local court, and that, where a statute of a territory had been in existence for a considerable time, and been construed by the highest court of the territory, even apart from its re-enactment, weight attaches to the construction given by the local court. Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695. The case at bar, however, more cogently calls upon us not to disregard the construction given to the statute by the highest court of Hawaii. Here the law in question was passed while Hawaii was an independent government, and its meaning was declared by the court of last resort of that government; and, as we have said, that law, as thus construed, was given recognition by the organic act. The subject with which the law deals, the rights which may have come into existence during the more than forty years in which the statute has been in force, admonish us that we may not overthrow the meaning given by the court of last resort of Hawaii, and which has prevailed for so many years. Indeed, as the construction affixed to the statute many years before the islands were acquired was final, in effect that construction had entered into the statute at the time of acquisition, and must by us be considered as if written in the law.

As to the question of res judicata. It was averred in the petition in the circuit court as follows:

> "4. That, in the year 1891, the said respondent, being uncertain as to the propriety of paying over to the said children, or to anyone in their behalf, their share or any portion of the income of the estate of said J. R. Williams, deceased, applied to the supreme court in probate, said court

at that time having jurisdiction at chambers in matters of probate, for instructions as to the standing of said children, and that he was instructed and authorized by the Honorable Richard F. Bickerton, one of the justices of said court, to make payment to the said children on the theory that they had become legitimate by the subsequent intermarriage of their parents; and that thereafter said respondent, as [155]trustee, duly made such payments *to said Kahalanaola, the mother of said children, in their behalf, until within a year or two past, since which time respondent has utterly refused to make payments to the said children, or either of them, or to anyone in their behalf, claiming that they were not, and are not now, entitled to receive any portion of the income, or to share in the principal of the said estate of J. R. Williams, deceased."

These averments cannot bear any other construction than that the application referred to was an *ex parte* proceeding. The circuit court of the territory, we think, correctly disposed of the claim of *res judicata* by the following ruling:

"As to the instruction by Mr. Justice Bickerton, it does not appear that any notice was given of the proceedings, or that there was any contest or issue made concerning the legitimacy of children."

Affirmed.

BOSTON & MAINE RAILROAD, Petitioner,
v.
JOHN N. GOKEY.

(See S. C. Reporter's ed. 155-168.)

Error from circuit court of appeals — questions reviewable — jurisdiction below.

1. The question as to jurisdiction below, when in issue, is reviewable in the circuit court of appeals on a writ of error to a circuit court, bringing up the whole case, although the circuit court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, might have certified the sole question of jurisdiction directly to the Supreme Court.

Federal courts — practice — conformity act — return day for process.

2. The conformity requirement of U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, does not necessitate altering a rule of a Federal circuit court as to the return day for process, adopted under the authority of § 918, in conformity with the state practice then existing, so as to conform to a change in such practice made by subsequent state legislation.

Writ and process — service of attachment — known agent of nonresident.

3. The division superintendent of a nonresident railroad company is a "known agent" of such company within the meaning of Vermont Stats. § 1109, providing for the service of attachment, although he may not be a person upon whom, pursuant to § 3948, service of process generally upon such corporation may be made.

[No. 198.]

Argued April 14, 1908. Decided May 18, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Vermont, in favor of plaintiff, in an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. Affirmed.

See same case below, 79 C. C. A. 64, 149 Fed. 42.

Statement by Mr. Justice **Peckham**:

The plaintiff below, who is respondent in this court, was in the service of the railroad company, petitioner, and in November, 1901, was injured by being knocked off a freight car at a place called Lyndon, in the county of Caledonia and district of Vermont. The car was one of a freight train moving in the railroad yard, and the plaintiff was struck, while on his car attending to the brake, by some portion of the iron switch staff, alleged to have been negligently built too high, and too near the railroad track. The injury made it necessary to amputate one of the legs of the plaintiff just above the ankle. He sought to recover damages for the injury and to that end this action was commenced by attachment in the circuit court of the United States for the district of Vermont.

The jurisdiction of the court was founded solely upon the diversity of citizenship, the plaintiff being a citizen of Vermont and the railroad being a citizen of Massachusetts, and operating, as lessee, the Connecticut & Passumpsic Rivers Railroad Company in the state of Vermont, on which road the accident occurred.

The service of the writ was made upon the division superintendent, at his office near Lyndon, in Vermont, and the attach-

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NOTE.—As to who may be served with process in suit against foreign corporation—see note to Foster v. Charles Betcher Lumber Co. 23 L.R.A. 490.

As to who is managing agent of foreign corporation for purpose of service of process —see note to Federal Betterment Co. v. Reeves, 4 L.R.A.(N.S.) 460.

ment was executed by attaching at that place two locomotives, the property of the railroad.

The defendant appeared only for the purpose of filing a motion to dismiss the writ because of its form, and also for the purpose of filing a plea in abatement on account of the alleged defective service of the writ. The defendant's motion to dismiss the writ was denied, and a demurrer to the plaintiff's replication to the defendant's plea in abatement was overruled, the result of the whole being that plaintiff's writ and its service were both allowed to stand.

[157] *The defendant then filed a plea to the merits, on which the parties went to trial, resulting in a verdict of $3,350 for the plaintiff.

The defendant took the case by writ of error to the circuit court of appeals, where the judgment was affirmed; but that court refused to decide the question of jurisdiction of the circuit court, which had been argued before it at the same time with questions upon the merits, on the ground that the circuit court of appeals had no jurisdiction to decide it.

On application, this court granted a writ of certiorari.

Mr. **George B. Young** argued the cause, and, with Mr. John Young, filed a brief for petitioner:

The Boston & Maine Railroad being a foreign corporation and a nonresident of Vermont, the circuit court could not acquire jurisdiction of the original action, or of this petitioner, the defendant therein, except by a valid attachment of property of this petitioner in Vermont and legal service of the original writ in accordance with the laws of the state of Vermont. No such service or attachment was made, and the circuit court for the district of Vermont acquired no jurisdiction of the original action or of the defendant therein, the petitioner here.

Hill v. Warren, 54 Vt. 73; Folsom v. Conner, 49 Vt. 4; Rollins v. Clement, 49 Vt. 98; Clark v. Patterson, 58 Vt. 676, 5 Atl. 564; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Alexandria v. Fairfax, 95 U. S. 774, 24 L. ed. 583; Börs v. Preston, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; Andrews v. Michigan C. R. Co. 99 Mass. 534, 97 Am. Dec. 51; Desper v. Continental Water Meter Co. 137 Mass. 252; Lewis v. Northern R. Co. 139 Mass. 294, 1 N. E. 546; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

The circuit court of appeals had jurisdiction to determine, and it was its duty to determine, the sufficiency of the original writ and service, because upon that depended the jurisdiction of both the circuit court and the circuit court of appeals.

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727; King v. McLean Asylum, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 325; American Sugar Ref. Co. v. Johnson, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503; Texas & P. R. Co. v. Bloom, 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979; Snead v. Sellers, 13 C. C. A. 518, 30 U. S. App. 8, 66 Fed. 371; Coler v. Grainger County, 20 C. C. A. 267, 43 U. S. App. 252, 74 Fed. 16; Baltimore & O. R. Co. v. Meyers, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 367; Rust v. United Waterworks Co. 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769; McCord Lumber Co. v. Doyle, 38 C. C. A. 34, 97 Fed. 22; Kreider v. Cole, 79 C. C. A. 339, 149 Fed. 647; Jones v. Gould, 80 C. C. A. 1, 149 Fed. 153; Jennings v. Johnson, 78 C. C. A. 329, 148 Fed. 337; Scribner v. Straus, 78 C. C. A. 122, 147 Fed. 28.

The circuit court of appeals cannot properly affirm a judgment rendered by a circuit court, when it appears on the record that the circuit court had no jurisdiction of the original action or of the defendant therein.

Kreider v. Cole, 79 C. C. A. 339, 149 Fed. 649; Ryder v. Holt, 128 U. S. 525, 32 L. ed. 529, 9 Sup. Ct. Rep. 145.

Pleading to the merits after our motion to dismiss and plea in abatement to the jurisdiction had been overruled did not waive our rights to insist upon the lack of jurisdiction.

Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, supra.

Mr. **Herbert W. Hovey** argued the cause, and, with Messrs. Edwin A. Cook and Harland B. Howe, filed a brief for respondent:

Folsom was a "known agent" about the property attached, although he may not have been a strictly appointed person for service of the process. An "accredited agent and division superintendent" is certainly a "known agent." Leaving a copy in his hands, he having the custody of the property attached, was leaving it at the place where such goods and chattels were attached, in accordance with the requirements of Vt. Stat. § 1109.

Hill v. Warren, 54 Vt. 73.

The questions relating to the sufficiency of the original writ and service thereof were not before the circuit court of appeals for its determination, and said court had no jurisdiction to determine the same.

Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39.

Mr. Herbert W. Hovey also filed a separate brief for respondent:

It is fair to assume that a copy left with an agent of a corporation is left for the corporation; and it would be a violent presumption to presume that it was left for any other purpose.

Hamilton v. Wilder, 31 Vt. 695.

Reasonable intendments are made in favor of officers' returns. The presumption of the law is in favor of their legality.

Drake v. Mooney, 31 Vt. 619, 76 Am. Dec. 145; Pond v. Baker, 55 Vt. 401, 58 Vt. 293, 2 Atl. 164.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The defendant endeavored in the circuit court to raise the jurisdictional question [161] arising from the alleged defective form *and also from the alleged defective manner of service of the writ. It moved to dismiss the writ on account of its form, and pleaded in abatement that the service of the writ was not sufficient, and that the court obtained no jurisdiction over the defendant by reason of such defective service. When the court denied its motion to dismiss, and overruled its demurrer to the replication to its plea in abatement, defendant then filed its plea to the merits and went to trial, and when the trial ended in a judgment against it, the defendant sought to obtain a review of that judgment by the circuit court of appeals on writ of error, including the question of jurisdiction as well as the other questions existing in the case.

The circuit court did not certify the sole question of jurisdiction directly to this court under § 5 of the court of appeals act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), assuming that it might have done so (Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 97, 99, 49 L. ed. 959, 962, 963, 25 Sup. Ct. Rep. 577; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 434, 49 L. ed. 1111, 1116, 25 Sup. Ct. Rep. 740), but the plaintiff in error brought up the whole case by writ of error before the circuit court of appeals, and contended that it had the right to argue before that court, among the other questions, that of the jurisdiction of the circuit court, and that the circuit court of appeals ought to decide the same.

In this we think the defendant was right. The original jurisdiction of the circuit court was invoked upon the sole ground of diversity of citizenship. The defendant assailed the jurisdiction of that court because of an alleged defective writ, and also because of the alleged defective service of that writ. Such a question of jurisdiction could be brought by writ of error to the circuit court of appeals along with other questions arising upon the trial of the merits of the case. The defendant was not bound to waive the other questions in the case, and come directly to this court from the circuit court upon the sole question of jurisdiction of the character herein presented, the jurisdiction not resting upon the ground that the suit arose under the Constitution, laws, or treaties of the United States, *but it had the right to go to the [162] circuit court of appeals and there argue the jurisdictional question of the character above mentioned, among the others, and it was the duty of the circuit court of appeals to decide the whole case, and its decision of all questions appearing in this record would be final, on account of the jurisdiction of the circuit court resting on diversity of citizenship alone, unless this court should review it by a writ of certiorari. This principle was decided in American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 282, 45 L. ed. 859, 862, 21 Sup Ct. Rep. 646, and cases cited.

As a certiorari was issued in this case, it is now before us on the return to that writ, and we have power to render such judgment as the circuit court of appeals should have rendered, or we might reverse the judgment of affirmance by that court, and send the case back to it to decide the question of jurisdiction, which it had refused to pass upon. We think it would be an unnecessary hardship to the plaintiff to do the latter, because of the further delay that would thereby be caused. The accident occurred in 1901, and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment.

The objections to the jurisdiction of the circuit court, as has been stated, were twofold,—one regarding the form of the writ and the other the sufficiency of its service.

First, as to the form. The writ was one of attachment and was dated twenty-two days before, and made returnable on the first day of the following term, and was served fifteen days before the term by attaching the property, as above stated.

Section 914 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 684) requires that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state.

[163] *By § 918 of those statutes it is provided that the several circuit and district courts may, from time to time, make rules and orders directing the returning of writs and processes, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings."

At the May term of the circuit court of the United States for the district of Vermont, held in 1885, rules 7 and 8 (in accordance with the state practice) were adopted, reading as follows:

"Rule 7. The form of process and declaration shall be the same as is or may be provided by the laws of this state, and, in cases not expressly provided for by such laws, in the form used in the county and supreme courts of the state, so far as they may be applicable to Federal courts.

"Rule 8. All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this state, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specifically ordered by a judge."

Rule 13 provides that suits shall be docketed on the first day of the term to which they are returnable, and rule 14 makes it necessary for defendant to enter his appearance on the first day of the term at which he is required to appear.

At the time of the adoption of these rules, and up to 1893, it was provided by § 868 of the Revised Laws of Vermont that "every writ and process, returnable before the supreme or county court, shall be served at least twelve days before the session of the court to which it is returnable, including the day of service, and excluding the return day. . . . A writ against a town, county, school district, or other corporation, shall be served at least thirty days before the session of the court to which it is made returnable. . . ."

This latter part of the section seems to have been construed as making provision for service upon corporations of a municipal *character, and not private corporations, in [164] regard to which the practice was to serve the writs upon them precisely as against individuals; that is to say, twelve days before the session of the court to which the writs were made returnable. This is said to have been the construction of the trial courts of Vermont, but the supreme court of the state never had occasion to pass upon the question. In 1893 the rule of the state court was altered by statute, and since that time process directed to an officer contains the direction, "Fail not, but service and return make within twenty-one days from the date hereof;" and the writs are to be served within twenty-one days from the date, and the defendant must enter an appearance within forty-two days. The return of the writ to the court at the first day of the ensuing term is no longer necessary.

Judge Wheeler, who had been for many years one of the judges of the supreme court of Vermont, and, from 1877 until his death, in 1906, a judge of the United States district court for the district of Vermont, in deciding the question of jurisdiction in this case, and in speaking of the change of the state law in regard to the time of service of the writ, said: "In the state courts there are but two terms in a year having jurisdiction of such cases; and it appears to have been thought best to have writs returnable oftener; but this court has three regular terms in each year, and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays. Therefore the rule requiring such process to be returnable at the regular terms has been retained without change. That this course is proper seems to appear, not only from the words of the statutes, but from Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, where a summons made returnable according to a rule of the Federal court, and not in conformity with a changed state statute, was, after full examination of the subject, upheld. Upon this view this writ appears to be regular and good; and the defendant's motion to dismiss must be overruled." [130 Fed. 993.]

In accordance with the views expressed in the above extract *from Judge Wheeler's [165] opinion, he, as district judge, had not altered the rule which had been first adopted in 1885, in conformity with the practice of the state court, existing at the time of its adoption. Shepard v. Adams, supra, seems to be a sufficient authority for the refusal of the judge to alter the rule of the circuit court so as to be in conformity with the alteration made by the state statute in 1893.

The writ complied with the requirements of the rule of the Federal court, and was served more than twelve days before the session of the court to which it was returnable, as provided in § 868 of the Revised Laws of Vermont of 1880, and it was served by attaching the property of the defendant. By virtue of the two sections above cited (914 and 918 of the Revised Statutes of the United States), and in accordance with the holding in Shepard v. Adams, supra, the rules of the circuit court were sufficient, and the form of the writ was proper.

It is also urged that while rule 8 remains, which requires that all process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term (which, by rule 13, is the first day of the term), if the process thus returnable must also contain the direction provided for in the statute since 1893, "fail not, but service and return make within twenty-one days from the date hereof," then there would be but a few days in the year in which a writ could be lawfully issued in the circuit court for the district of Vermont; *viz.*, the days between the twenty-first and the twelfth days before each of the three terms of the circuit court.

Such an objection shows, at least, the difficulty attending the matter of service of process on the theory contended for by plaintiff in error, unless the circuit court should abandon altogether the old rule making provision for returning process to any particular term of court, and make a new rule, following the new method provided by the state statute. We think this unnecessary. The Federal judge was justified, by the statutes above quoted and by the decision of this court in Shepard v. Adams, supra, in refusing to alter the rules of the **[166]**circuit court, *which, when made, were in conformity to the state court practice, and the objection to the form of the writ is therefore without merit.

Second, in regard to the service. Section 1109 of the statutes of Vermont, in providing for the service of an attachment, says that a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode; and, if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and, for want thereof, at the place where such goods or chattels were attached. This extends and applies to bodies corporate and public. The service in this case was made by attaching the locomotives, as already stated, and by leaving a true and attested copy of the writ in the hands of H. E. Folsom, agent and division superintendent of the railroad, at his office in Lyndonville, in the district.

It is objected by the defendant that Folsom was not a proper party on whom to serve the writ. Sections 3948 and 3949 of the Vermont statutes are cited to that effect. It is provided by § 3948 that the lessee of a railroad, not resident in that state, shall appoint a person resident in the state upon whom service of process may be made; and, by § 3949, if the lessee do not appoint such agent, then the service may be made by leaving a copy of the process with a station agent or depot master, in the employment of such trustee or lessee. It is therefore contended that if the lessee had failed to appoint, then the service of process could not be made upon any agent other than a station agent or depot master, in the employment of the lessee; and there was no pretense that Folsom, the division superintendent, had been appointed by the railroad as the person upon whom service of process might be made, and there was no averment or proof that he was a station agent or depot master.

Those sections evidently refer to the ordinary cases of service of process without an attachment, and do not refer to the *manner**[167]** of serving an attachment and the process connected therewith. That is provided for by § 1109, supra. Folsom, the division superintendent, was certainly a known agent of the defendant.

Upon this question Judge Wheeler well said:

"The known agent of a noninhabitant with whom the copy of an attachment and a list of the articles attached may be left may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving a copy in the same custody as that of the goods or chattels attached would be leaving it at the place where they were attached, although the custodian may have no other agency. Hill v. Warren, 54 Vt. 78.

"The division superintendent of the railroad of the defendant, designating the locomotives attached as its property, might well be taken to be the known agent, or the accredited agent, as styled by the marshal, of the defendant about the custody of those articles; and leaving a copy of the attachment and a list of them with him would be a leaving with a known agent of the defendant within the meaning of that statute, or at the place where they were attached, within the same meaning.

"The statute provides (Vt. Stat. § 3949) that, on failure to appoint such a person for receiving service of process it 'may be made by leaving a copy of the process with a station agent or depot master in the employment of' the lessee. The plea alleges that the defendant had, at the time of the service, many station agents and depot masters in its employment in this state, to wit, twenty-five, with whom a copy might have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided." [130 Fed. 995.]

The plaintiff, in his replication to the plea [168] in abatement, *averred that the said Folsom, upon whom the process was served, was, on the day of the service of the original writ in this cause, to wit, on the 2d day of May, A. D. 1904, a person residing within the state of Vermont, upon whom service of process issued against the defendant might be legally made; to wit, an agent of this defendant. To this replication the defendant demurred. The demurrer was overruled. Without going into the question whether the motion to dismiss, and also the demurrer, were not waived by pleading to the merits after the motion had been denied and the demurrer overruled, we think the facts sufficiently appear that Folsom, the division superintendent, was an agent within the Vermont statute, upon whom attachment process, such as was issued in this case, might be regularly served. Accordingly, a valid service upon the principal, within the law of Vermont, was duly made, and jurisdiction was acquired by that service.

The judgment of the Circuit Court of Appeals is affirmed.

JARIB L. SANDERSON, Surviving Partner of the Firm of Barlow, Sanderson, & Company, Appt.,

v.

UNITED STATES and Cheyenne Tribe or Nation of Indians.

(See S. C. Reporter's ed. 168-177.)

Court of claims — Indian depredations — new trial.

1. Claims under the Indian depredations act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), are embraced by the provisions of U. S. Rev. Stat. § 1088, U. S. Comp. Stat. 1901, p. 745, giving the court of claims power to grant new trials on motion on behalf of the United States.

Court of claims — new trial — limitation.

2. A limitation applicable to the time for filing the motion, and not to the time for making the decision thereon, is made by the provision of U. S. Rev. Stat. § 1088, that the court of claims, "within two years next after the final disposition" of a claim, may, on motion on behalf of the United States, grant a new trial.

[No. 208.]

Argued April 22, 23, 1908. Decided May 18, 1908.

APPEAL from the Court of Claims to review a judgment in favor of the United States, entered upon a new trial, granted on motion on behalf of the United States, of a claim under the Indian depredations act. Affirmed.

Statement by Mr. Justice **Peckham**:

On the 8th of June, 1891, the appellant herein filed his petition in the court of claims, under the Indian depredations act, approved March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), to recover for losses of property sustained by the firm of which, at the time of filing the petition, he was the surviving partner, from the depredations committed by members of a tribe of Cheyenne Indians in the year 1867, in or near the state of Kansas.

The petition contained the averments that the firm was, at the time of the depredations, engaged in the business of operating the Southern Overland Mail & Express Route, between the then terminus of the Union Pacific Railway and the city of Santa Fé, New Mexico, and was carrying the mails of the United States between those points.

Subsequently to such depredations two of the members of the firm died, and, at the time of the filing of the petition, the petitioner was left as the sole surviving partner.

The depredations were committed by taking unlawfully and by force or stealth from the possession of the firm, and in or near the state of Kansas, some thirty-seven mules and six horses, used by the firm in the operation of its business.

Under certain acts of Congress of March, 1885 [23 Stat. at L. 362, chap. 341], and May, 1886 [24 Stat. at L. 29, chap. 333], the claim of the firm for the recovery of the losses thus sustained was submitted to the investigation of the Secretary of the Interior, and, after investigation, the Secretary reported to Congress on the 7th day of December, 1886, finding that the firm had a just and equitable claim upon the United States for the amount of $7,740, the value of the animals, as ascertained by the Secretary, who recommended the payment of that sum. Congress never appropriated anything for the payment of any part of the sum recommended. The amount awarded was not as large as the firm claimed was [170]the value of the property destroyed, *but, for reasons stated in the petition to the court, it was not attempted to correct the injustice by reopening the question of the value upon the trial of the case before the court of claims.

The petition also contained an allegation that the tribe to which the Indians belonged who committed the depredations was, at the time the loss occurred, in amity with the United States.

After the filing of the petition the parties agreed on the facts, and, among others, it was agreed that the Indians took and destroyed the property belonging to the claimant without just cause or provocation, and that the Indians who took the property were members of the Cheyenne tribe, which was, at the time of the commission of the depredations, in amity and treaty relations with the United States.

The case was submitted to the court on the 30th day of June, 1892, and on the 11th day of October, 1892, judgment was entered in favor of the claimant for the sum of $7,740, being the amount which had theretofore been reported to Congress by the Secretary of the Interior.

On the 6th day of October, 1894, the Assistant Attorney General filed in the clerk's office of the court of claims, while the court was in recess, a motion for a new trial in accordance with the provisions of § 1088 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 745), the ground of such motion being that, in awarding judgment in favor of the claimant, wrong and injustice had been done to the United States, because the defendant, the Cheyenne Indians, were not in amity with the United States at the time of the depredations which form the basis of the suit.

The court of claims, on the 13th day of April, 1896, granted the motion for a new trial, and, upon the new trial which was thereafter had, the court found as a fact that, at the time of the several depredations alleged in the petition, the defendant Indians were hostile, and, as a conclusion of law, the court decided that the petition [171]should be and the same *was dismissed, and judgment upon such finding and conclusion was entered in the court on the 23d day of April, 1906.

The claimant, on the 17th day of September, 1906, moved to vacate the judgment entered upon the new trial, and asked that the original judgment, entered on the 11th of October, 1892, should be reinstated and affirmed. The motion was denied, and on the 24th day of December, 1906, the claimant appealed to this court.

Messrs. **Jackson H. Ralston** and **William E. Richardson** argued the cause, and, with Mr. Frederick L. Siddons, filed a brief for appellant:

By the rule of the common law, the trial court was required to dispose of the motion during the term.

Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183; Buckner v. Conly, 1 T. B. Mon. 3; Truett v. Legg, 32 Md. 149.

Decisions in the several states having similar statutes upon this subject, either requiring the motion to be determined within a fixed number of days, or within the term, or within the next succeeding term after judgment, support the claimant's contention in this case.

Vaughn v. O'Conner, 12 Neb. 478, 11 N. W. 738; Coopwood v. Prewett, 30 Miss. 206; James v. Appel, 192 U. S. 129, 48 L. ed. 377, 24 Sup. Ct. Rep. 222; Ex parte Highland Ave. & Belt R. Co. 105 Ala. 221, 17 So. 182; Hundley v. Yonge, 69 Ala. 89; Fitzpatrick v. Hill, 9 Ala. 783; Hand v. Ruff, 3 Ariz. 175, 24 Pac. 257; Walker v. Jefferson, 5 Ark. 23; Rodman v. Reynolds, 114 Ind. 148, 16 N. E. 516; Crews v. Ross, 44 Ind. 481; Hays v. May, 35 Ind. 427; Ferger v. Wesler, 35 Ind. 53; Buckner v. Conly, supra; England v. Duckworth, 75 N. C. 309; Clements v. Buckner, 35 Tex. Civ. App. 497, 80 S. W. 235; Lightfoot v. Wilson, 11 Tex. Civ. App. 151, 32 S. W. 331; Laird v. State, 15 Tex. 317; McKean v. Ziller, 9 Tex. 58.

The general subject of new trials is not provided for by statute, but the court of claims has always assumed, and with unquestionable propriety, the common-law powers of a court of record to review its acts upon proper motion. It has always, however, maintained the necessity for action to be taken during the term at which judgment is rendered, to preserve its control over the cause, which otherwise would pass beyond its further jurisdiction.

Sampson v. United States, 36 Ct. Cl. 195; Campbell v. United States, 19 Ct. Cl. 426; Wade v. United States, 21 Ct. Cl. 142; Re McKay, 30 Ct. Cl. 1; Murdock v. District of Columbia, 23 Ct. Cl. 43; Russell v. United States, 15 Ct. Cl. 173; Seat v. United States, 18 Ct. Cl. 468.

In holding that, by entertaining a motion for new trial made during the term it might extend its jurisdiction of the cause beyond the term, it but follows the ordinary rule maintained by the courts in the absence of statutory prohibition.

Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797.

It is the practice of the court of claims, on the last day of each term, to enter a general order of continuance of all pending motions; and this is held sufficient to carry jurisdiction to determine such matters over to the next ensuing term.

Campbell v. United States, supra.

Statutes fixing time for decision on motion for new trial before judgment are mandatory.

Clements v. Buckner, supra; Turner v. Davis, 132 N. C. 187, 43 S. E. 637.

Conditions expressed in statutes authorizing allowance of new trial after judgment are limitations on power of the court.

Vaughn v. O'Conner; Ferger v. Wesler; Hays v. May; Crews v. Ross,—supra; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826; McKnight v. Livingston, 46 Wis. 356, 1 N. W. 14; Nicklin v. Robertson, 28 Or. 278, 52 Am. St. Rep. 790, 42 Pac. 993; Gerish v. Johnson, 5 Minn. 23, Gil. 10; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22.

This principle may well be regarded as founded on the well-settled rule that the judgment of a court rendered at any other time or place than that directed by law is absolutely void.

Wicks v. Ludwig, 9 Cal. 173; Lawrence v. Cannavan, 76 Conn. 303, 56 Atl. 556; Orvis v. Curtiss, 8 Misc. 681, 28 N. Y. Supp. 728; Kidd v. Burke, 142 Ala. 625, 38 So. 241; Jackson v. State, 102 Ala. 76, 15 So. 351; Brumley v. State, 20 Ark. 77; Galusha v. Butterfield, 3 Ill. 227; McCool v. State, 7 Ind. 378; White v. Riggs, 27 Me. 114; Holman v. Hogg, 83 Mo. App. 370; American F. Ins. Co. v. Pappe, 4 Okla. 110, 43 Pac. 1085.

A statute need not be held directory because it requires action to be taken by a court within a fixed period of time; and the inaction of the court or its officers may result in the deprivation of the right to proceed further in the litigation.

United States v. Baxter, 2 C. C. A. 410, 10 U. S. App. 241, 51 Fed. 624; Waxahachie v. Coler, 34 C. C. A. 349, 92 Fed. 284.

Assistant Attorney General **Thompson** argued the cause, and, with Mr. Lincoln B. Smith, filed a brief for appellees:

In chancery a petition for rehearing is too late if filed after the term; but a bill of review, based on error of law or newly discovered evidence, may even then be filed.

Clapp v. Thaxter, 7 Gray, 384; Thompson v. Goulding, 5 Allen, 81.

In the common-law courts the rule required a motion for new trial to be filed before the judgment was perfected. This meant, ordinarily, within the first four days of the term succeeding the trial (Birt v. Barlow, 1 Dougl. K. B. 171; Rex v. Hayes, 2 Strange, 843; Rex v. Bell, 2 Strange, 995; Graddy v. Hightower, 1 Ga. 252; Jackson ex dem. Colden v. Chace, 15 Johns. 354); but no limit appears to have been imposed upon the power of the court to hear such motions after the term, or at any time.

In the absence of statutory regulation, the time for filing motion for new trial is fixed by the rule of the court; and it is generally held that a motion is in time if filed at the term when judgment was rendered, although in extraordinary cases the court may allow it to be filed at a later term; and that, when once filed, the court may hear and determine the motion at its pleasure and at the convenience of the parties.

Graddy v. Hightower, supra; Conklin v. Hinds, 16 Minn. 457, Gil. 411; Felton v. Spiro, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 576; Johnston v. Simmons, 77 Ga. 298, 2 S. E. 469; King v. Carey, 5 Ga. 270; Pace v. Mealing, 21 Ga. 464; State v. First Nat. Bank, 4 Nev. 358; Constantine v. Foster, 57 Ill. 36; Hearson v. Graudine, 87 Ill. 115.

In actual practice for a long series of years, the court of claims has followed this rule.

Granthan v. United States, 28 Ct. Cl. 528; Gorham v. United States, 29 Ct. Cl. 97; Graham v. United States, 30 Ct. Cl. 318; Valencia v. United States, 31 Ct. Cl. 388; Coe v. United States, 31 Ct. Cl. 441; Trabing v. United States; 32 Ct. Cl. 440; Litchfield v. United States, 32 Ct. Cl. 585, 33 Ct. Cl. 203; McCollum v. United States, 33 Ct. Cl. 469; Rhine v. United States, 33 Ct. Cl. 481; Jaeger v. United States, 33 Ct. Cl. 214; Coutzen v. United States, 33 Ct. Cl. 475; Potter v. United States, 34 Ct. Cl. 13; Vaughn v. United States, 34 Ct. Cl. 342; Rush v. United States, 35 Ct. Cl. 223, 33 Ct. Cl. 417; Jones v. United States, 35 Ct. Cl. 36; Collins v. United States, 35 Ct. Cl. 122; The Parkman, 35 Ct. Cl. 406; De Baca v. United States, 36 Ct. Cl. 407; Pino v. United States, 38 Ct. Cl. 64; McCoy v. United States, 38 Ct. Cl. 163; Butler v. United States, 38 Ct. Cl. 167; Anthracite Mesa Coal Min. Co. v. United States, 38 Ct. Cl. 56; Summey v. United States, 39 Ct. Cl. 199; Murphy v. United States, 39 Ct. Cl. 178, 38 Ct. Cl. 511; The Lucy, 39 Ct. Cl. 221, 37 Ct. Cl. 97; Le More v. United States, 39 Ct. Cl. 484; The Atlantic, 39 Ct. Cl. 193, 37 Ct. Cl. 17; Burnham v. United States, 40 Ct. Cl. 166; The Juno, 41 Ct. Cl. 106, 36 Ct. Cl. 239; Brown v. United States, 41 Ct. Cl. 275.

The court of claims has power to allow a motion under this statute, after the expiration of more than two years from the date of the judgment, if the motion was filed in time.

Bellocq v. United States, 13 Ct. Cl. 195; Graham v. United States, 30 Ct. Cl. 318; Valencia v. United States, 31 Ct. Cl. 388; Coe v. United States; Trabing v. United States; Litchfield v. United States; and McCollum v. United States,—supra.

The statute should be liberally construed in favor of the government.

Leighton v. United States, 161 U. S. 291, 297, 40 L. ed. 703, 706, 16 Sup. Ct. Rep. 495.

The statute is not mandatory.

Ex parte Highland Ave. & Belt R. Co. 105 Ala. 221, 17 So. 182; Hundley v. Yonge, 69 Ala. 89; Fitzpatrick v. Hill, 9 Ala. 783; Walker v. Jefferson, 5 Ark. 23; Falls v. Hawthorn, 30 Ind. 444; McQuillan v. Donahue, 49 Cal. 157; Vermule v. Shaw, 4 Cal. 214; Broad v. Murray, 44 Cal. 228.

The tendency of the courts is to go to almost any length, rather than permit the inaction of the court to prejudice the rights of a diligent party.

Johnston v. Simmons, 77 Ga. 298, 2 S. E. 469; Hinton v. Coleman, 76 Wis. 221, 45 N. W. 26; Steinhofel v. Chicago, M. & St. P. R. Co. 92 Wis. 123, 65 N. W. 852; Gribble v. Livermore, 64 Minn. 396, 67 N. W. 213; Larson v. Ross, 56 Minn. 74, 57 N. W. 323.

[173] *Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The sole question in this case arises from the action of the court of claims in granting, upon the application of the government, a new trial, April 13, 1896, more than two years subsequent to the entry of judgment in favor of the claimant on the 11th day of October, 1892, although the application for such new trial had been filed October 6, 1894, which was less than two years after the entry of that judgment. The order was made under § 1088 of the Revised Statutes of the United States, which reads as follows:

"Sec. 1088. The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but, until an order is made, staying the payment of a judgment, the same shall be payable and paid as now provided by law."

The motion was made pursuant to instructions contained in the act of Congress, approved August 23, 1894 (28 Stat. at L. 424, 476, chap. 307), which made appropriations to pay the judgments of the court of claims in this case, and 258 other Indian depredation cases. The provision in the last part of § 1 of that act is as follows:

"That no one of the said judgments shall be paid until the Attorney General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the court of claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States, or whether exorbitant sums have been allowed, and finds upon such evidence no grounds *sufficient in his opinion to support [174] a new trial of said case; or until there shall have been filed with said Secretary a duly certified transcript of the proceedings of the court of claims, denying the motion made by the Attorney General for a new trial in any one of said judgments."

The Attorney General examined the evidence theretofore presented to the court of claims, and filed a motion for a new trial in this and many other cases. The motions in this case, and the others, were filed within two years from the dates of the respective judgments; but it is admitted that none of them was acted upon by the court of claims within that period. The court of claims was not in session when the statute of August 23, 1894, was passed, nor when the motions for a new trial were filed in the clerk's office of that court, and it did not convene after the summer vacation until October 22, at which date more than two years had elapsed since the rendition of the judgment in this case.

It has been held by the court of claims (and, as we think, correctly) that § 1088 is applicable to the Indian depredations act of 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758). McCollum v. United States, 33 Ct. Cl. 469, 472.

The appellant contends that the statute must be so construed as to require the decision of the motion for a new trial within two years after the final disposition of the case; and hence, that the motion should have been not only filed in the clerk's office, but decided by the court on or before October 11, 1894. The government contends that, as the motion was filed within the two years subsequent to the entry of the judgment, the court obtained jurisdiction over the motion, and it might be decided after the expiration of the two years. Upon the theory of the appellant the accident of an adjournment of the court some months *before,* and its failure again to meet until a few days *after,* the expiration of the two years subsequent to the entry of the judgment, deprived the court of the jurisdiction to hear and decide the question of the application for a new trial, although such [175] application was *filed in its clerk's office within the two years limited by the statute.

Ordinarily a court has no power to grant a new trial after the adjournment of the term if no application has been made previous to the adjournment and no continuance granted. Belknap v. United States, 150 U. S. 588, 37 L. ed. 1191, 14 Sup. Ct. Rep. 183. This act, however, is a peculiar one. It grants distinct advantages to the United States. United States v. Ayres, 9 Wall. 608, 19 L. ed. 625; Henry v. United States, 15 Ct. Cl. 162. These advantages Congress was competent to grant. The government consents to be sued in regard to claims of this nature, and may attach such conditions to its consent as to it may seem proper. Among other conditions as to the finality of the judgments of the court it has empowered such court to grant a new trial on motion of the United States, pursuant to the section named.

The facts agreed upon on the first trial did not prevent the court from granting a new trial under that section. Indeed, the act of 1894, supra, really directs the court to grant a new trial if the facts are sufficient to bring the case within the provisions of § 1088.

We think the motion for a new trial may be made or filed at any time within the two years, as provided for, and it is not necessary that the court should decide the motion within that time. If the government has the whole two years in which to apply (and there is certainly nothing in the statute which limits the time to less than two years) it could not reasonably be held that an application made near the end of the two years must, nevertheless, be decided within that time. The motion might be filed at the last moment before the expiration of the two years, and, if so, the court should have time to thereafter act upon it, or else the two-year limitation in which to file the motion is practically denied. If the motion must be decided within the two years, it must, of course, be filed sufficiently long before the expiration of that period to allow the court what it may regard as a [176] sufficient time to decide it *intelligently within the limitation. How long that time may be it is impossible to say. It would be for the court to determine in each case. The result of such a construction is that there is no certain and definite time within which the motion for a new trial must be made, but it must be long enough before the expiration of the two years to give the court the time it may require in which to act upon the motion. This uncertainty we do not think was intended, nor is it the proper construction of the statute. When it limits the time to two years it is a limitation of the time for filing the motion, and not a limitation of the time for making a decision, if the motion has been filed within the two years.

There is not much assistance to be obtained by referring to decisions of the state courts in relation to statutes of a somewhat similar nature, applicable to the ordinary law courts of the state. They depend very much upon the special language of the various statutes, all of which differ somewhat from the one under discussion. In addition to that, however, the peculiar nature of the court of claims itself must be considered. Congress created it for the sole purpose of permitting certain classes of claims against the government to be presented to and passed upon by it, under the conditions which Congress might, from time to time, prescribe. The statute must therefore be so construed as to give full effect to such various conditions which Congress imposes upon the claimant for the privileges accorded him. A right on the part of the United States to move for a new trial should be so construed as not to limit the right by any technical or narrow reasoning, but the whole two years should be allowed in which to make the motion. Some states have enacted statutes limiting the time within which applications of this nature may be made, and they have been held complied with if the application is made within the time limited, although the decision is made subsequently. In other states the courts have regarded the time limitation as applicable to the time when the decision of the question submitted is rendered. We do not regard it as necessary *to cite them. The statutes differ. [177] and the reasoning of the courts also.

The question of the construction of this particular act has heretofore been before the court of claims in Bellocq v. United States, 13 Ct. Cl. 195. The court there held that the limitation referred to the time of making the motion, and not to the time of its decision. We think the reasoning of Chief Justice Drake in that case is sound. See also Mitchell v. Overman, 103 U. S. 62, 26 L. ed. 369; McCollum v. United States, 33 Ct. Cl. 469. Having two years in which to file its motion for a new trial, the government was in time in this case when it filed its motion with the clerk of the court, the court itself being then in recess, and it could thereafter hear and decide the case at its convenience.

The judgment of the Court of Claims, dismissing the petition, is affirmed.

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plff. in Err.,

v.

ROBERT L. PORTER, Melvin L. Bowlin, and Chester G. Hadley, Partners, Doing Business under the Firm Name and Style of Porter, Bowlin, & Hadley.

(See S. C. Reporter's ed. 177–186.)

Constitutional law — due process of law — hearing on assessment for street improvement.

1. The hearing accorded to an owner of property lying directly back of property abutting on a street improvement is not insufficient to afford the due process of law guaranteed by U. S. Const., 14th Amend., as giving no opportunity to such owner to be heard as to the amount to be assessed against his property, where the amount of such assessment is the same as the assessment on the abutting property, and measures the contingent liability to which the back-lying property may be subjected if the abutting property, which is made primarily liable, fails to satisfy the assessment.

Constitutional law — due process of law — equal protection — assessment for street improvements.

2. Neither due process of law nor the equal protection of the laws is denied to the owner of property lying directly back of property abutting on a street improvement by legislation creating a taxing district of the property along the line of the improvement and extending back therefrom 150 feet, and providing that property 50 or more feet distant from the street, and within 150 feet therefrom, shall be liable if the abutting 50 feet, which are primarily liable, prove insufficient to pay the cost of the improvements.

Constitutional law — due process of law — assessment for street improvement.

3. An owner of property lying directly back of property abutting on a street improvement cannot claim to be denied the equal protection of the laws guaranteed by U. S. Const., 14th Amend., on the theory that the hearing afforded him does not, as in the case of abutting owners, give him an opportunity to be heard as to the amount of the assessment against his property, where the amount of such assessment is the same as the assessment against the abutting property, and measures the contingent liability to which the back-lying property may be subjected if the abutting property, which is made primarily liable, fails to satisfy the assessment.

[No. 213.]

Argued April 27, 1908. Decided May 18, 1908.

IN ERROR to Division Number Two of the Appellate Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Boon County, in that state, foreclosing the lien of an assessment for a street improvement. Affirmed.

See same case below, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179.

Statement by Mr. Justice **McKenna:**

*This case involves the legality of a tax for [178] street improvements, imposed on the property of plaintiff in error, herein called the railway company.

The tax was imposed under a law of the state called the Barrett law. The law makes the amount of the assessment a lien upon the property improved, and gives to the contractor or his assignees the right to "foreclose such assessment as a mortgage is foreclosed." Successive suits may be brought if the judgment in the first suit fails to satisfy the assessment and costs.

The defendants in error were the contractors for the improvement, and brought this suit in the circuit court of Boon county, Indiana, and alleged in their complaint the adoption under the law, by the common council of the city of Lebanon, where the property proceeded against is situated, of a declaratory resolution providing for the grading and paving Main street and constructing sidewalks and lawns thereon. The complaint alleged the steps taken by the council of the city as prescribed by the law; the assessment against the several lots and parcels of ground abutting on the street; that one Mary Kelly was the owner of a tract of unplatted land abutting on the street, which was assessed the sum of $588.56; her refusal to pay the assessment, and that suit was brought against her and her husband to foreclose the lien of the assessment. And it is alleged that, after proceedings had, a decree was entered for the sum of $650, being the amount of the assessment and costs. That sale of the property was made under the decree for the sum of $75, which was its fair cash value, and that there is still due thereon $581.32, with interest. That the railway company was the owner of a tract of land immediately back of the real estate of Mary Kelly, "from the street so improved,"—that is, that her real estate was situate immediately between the street so improved and the real estate of the railway company, which real estate was within 150 feet of the line of the street. A demand for the amount of the balance due on the assessment was alleged.

[179]Judgment was *demanded for that sum, and the foreclosure of the lien of the assessment against the real estate of the company, and for an order of sale.

A second paragraph of the complaint alleged a like assessment against the property of one John T. Walton, the foreclosure of the lien thereon, and the sale of the property, the balance due, and that the property of the railway was situated immediately back of it. The like judgment was prayed as in the first paragraph.

The only parts of the answer with which we are concerned are the allegations that the land of the railway company did not abut upon the street improvement, but lay back of lands owned by others which abutted upon the street, and "that, in the proceedings of the common council of the city of Lebanon, in an action taken by the civil engineers of said city, in any notice to property owners, in any assessment of property had, given, or done with reference to said improvement, this defendant's said tracts were not named, described, nor referred to, nor was either of them; that neither of said tracts was assessed for said improvement, neither of said tracts was considered with reference to any assessment for said improvement, neither of said tracts was benefited by said improvement; that the defendant did not appear before said council or any committee of said council, either actually or constructively, with reference to either of its said tracts, and the records of the proceedings of the city of Lebanon as to said improvements do not disclose any such appearance by, or notice to, this defendant, or the consideration or assessment of either of said tracts for such improvement."

The third paragraph of the answer is as follows:

"For third and further answer to the amended complaint and each of the paragraphs thereof separately the defendant says that the acts of the general assembly of the state of Indiana, under and by virtue of which it is claimed and assumed that the liens respectively sued upon have accrued and attach to the respective tracts of the de-[180]fendant, is unconstitutional *and void, in that it makes no provision for a notice to or a hearing from the property owner whose property does not abut upon the street to be improved; it denies due process of law, denies the equal protection of the laws, and takes private property for public use without compensation."

Judgment was rendered against the company, which was affirmed by the appellate court on the authority of Voris v. Pittsburg Plate Glass Co. 163 Ind. 599, 70 N. E. 249.

Mr. Frank L. Littleton argued the cause, and, with Mr. Leonard J. Hackney, filed a brief for plaintiff in error:

The statute of the state of Indiana under and pursuant to which the alleged assessment involved in this case was made is unconstitutional for the reason that it does not give, or purport to give, a property owner whose lands are located back of property abutting upon the street improved any hearing, or opportunity to be heard, upon the amount of the assessment levied against his property. There is no hearing as to the special benefits at any stage of the proceedings, and the amount of the assessment against the back-lying property is arbitrarily determined by subtracting from the original assessment against the abutting owner the amount his property sells for on foreclosure. This is a denial of due process of law.

Central R. Co. v. Wright, 207 U. S. 127, ante, 134, 28 Sup. Ct. Rep. 47; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L. ed. 629, 645; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Raymond v. Chicago Union Traction Co. 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7; Beebe v. Magoun, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 986; Lathrop v. Racine, 119 Wis. 461, 97 N. W. 192; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175; McKee v. Pendleton, 154 Ind. 652, 57 N. E. 532; Dexter v. Boston, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; Charles v. Marion, 100 Fed. 538; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474.

The statute is unconstitutional, and denies the back-lying property owner the equal protection of the laws, for the reason that it gives the abutting property owner a hearing, or opportunity to be heard, on the question as to whether the proposed assessment exceeds the special benefits to his property, and denies a hearing, or opportunity to be heard, on such question to the property owner whose property does not abut upon the street improved.

Ex parte Drayton, 153 Fed. 986; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Raymond v. Chicago Union Traction Co. and Beebe v. Magoun, supra; Chicago, R. I. & P. R. Co. v. Swanger, 157 Fed. 783.

Mr. **George H. Gifford** argued the cause, and, with Mr. Glen J. Gifford, filed a brief for defendants in error:

The statute of the state of Indiana, in pursuance of which the assessments herein were made, furnished the plaintiff in error the due process of law and equal protection of law guaranteed by the 14th Amendment to the Constitution of the United States.

Burns's Rev. Stat. (Ind.) 1894, § 4294 (E. S. 818); Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 168, 41 L. ed. 392, 17 Sup. Ct. Rep. 56; Hibben v. Smith, 191 U. S. 321, 48 L. ed. 199, 24 Sup. Ct. Rep. 88; Voris v. Pittsburg Plate Glass Co. 163 Ind. 599, 70 N. E. 249.

Assessments made for the construction of public improvements are in the nature of a tax, and are subject to summary procedures, the same as state, county and municipal taxation; and the law does not contemplate that there should be a decree or order of court to make such assessment valid, but it is sufficient if there is a tribunal or committee created by the statute to hear and determine the correctness of such assessment, and a provision for due notice to the parties of such hearing. This is a full and complete compliance with the 14th Amendment of the Constitution of the United States.

Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

Where the statute of a state has been construed by the highest court of the state, the Supreme Court of the United States will follow such construction; and if the construction is such as to bring the statute and its application into harmony with the Constitution of the United States, such statute will be upheld and sustained.

Hibben v. Smith, supra.

In matters of taxation and assessment for local improvements, where there is a taxing district established by the statute under which such proceedings are being prosecuted, a notice to all interested, without setting out the name of the party owning the real estate, and without setting out the description of the property taxed, is a sufficient notice.

Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Ottawa v. Macy, 20 Ill. 412; Voris v. Pittsburg Plate Glass Co. supra.

It is the province of the legislature to fix the notice to be given in matters of public improvements.

Hyland v. Brazil Block Coal Co. 128 Ind. 340, 26 N. E. 672; Ottawa v. Macy, 20 Ill. 413; Schaefer v. Werling, supra.

Mr. Justice **McKenna** delivered the opinion of the court:

There is no question of the regularity of the proceedings. The controversy, therefore, is over the statute. Does it afford due process of law? A review of it is necessary to the determination of the question. It provides that, upon the petition to the common council of two thirds of the whole line of lots bordering on any street, or alley, consisting of a square between two streets, and if the council deem the improvement necessary, it shall declare by resolution the necessity therefor, describing the work, and shall give two weeks' notice thereof to the property owners in a newspaper of general circulation published in the city, stating the time and place when and where the property owners can make objections to the necessity of the improvement.

If the improvement be ordered, notice is to be given for the reception of bids. When the improvement has been made and completed according to the terms of the contract therefor *made, the common council shall **[183]** cause a final estimate to be made of the total cost thereof by the city engineer, and shall require him to report the full facts, the total cost of the improvements, the average cost per running foot of the whole length of the part of the street improved, the name of each property owner and the number of front feet owned by him, with full description of each lot or parcel of ground bordering on the street improved, the amount due upon each lot, which shall be ascertained and fixed by multiplying the average cost price per running foot by the number of running front feet of the several lots or parcels of ground respectively.

Upon the filing of this report the council is required to give notice of two weeks in a newspaper of the time and place, when and where, a hearing can be had before a committee appointed by the council to consider such reports. The committee is required to report to the council, recommending the adoption or alteration of the report, and the council may adopt, alter, or amend it and the assessments therein. Any person feeling aggrieved by the report shall have the right to appear before the council, and shall be accorded a hearing. The council assesses against the several lots or parcels of land the several amounts which shall be assessed for and on account of the improvement.

It is provided that the owners of lots bordering on the street, or the part thereof to be improved, shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots to the whole improved line of the improvement, and that the assessment shall be upon the ground fronting or immediately abutting on such improvement, back to the distance of 150 feet from such front line, and the city and contractor shall have a lien thereon for the value of such improvements.

It is further provided that where the "land is subdivided or platted, the land lying immediately upon and adjacent to the line of the street and extending back 50 feet shall be primarily liable to and for the whole [184] cost of the improvement, *and should that prove insufficient to pay such cost, then the second parcel and other parcels, in their order, to the rear parcel of said 150 feet, shall be liable in their order."

This statute, as to abutting property owners, was sustained by this court, following the decisions of the supreme court of Indiana. Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88. It was sustained as to "back-lying" property owners in Voris v. Pittsburg Plate Glass Co. 163 Ind. 599, 70 N. E. 249, and upon that case, as we have seen, the judgment in the case at bar is based.

It will be observed, by referring to the statute, that property owners are given notice of the proposed improvement and opportunity to object to its necessity; and, when the improvement is completed, they are also given notice of the filing of the report of the engineer, and an opportunity to be heard upon it before a committee, which the statute requires shall be appointed to consider it. The latter notice, the supreme court, in Voris v. Pittsburg Plate Glass Co., decided, gives the common council complete jurisdiction over the person of every landowner in the taxing district of the improvement, whether the same abuts on the improvement or not, and that they are required to take notice that their real estate in the taxing district will be subject to the lien of special benefits assessed against it. And the court further decided that all such owners of real estate within the taxing district, "whether back-lying or abutting, have the right to . . . a hearing on the question of special benefits, which the law requires said common council or board of trustees to adjust so as to conform to the special benefits accruing to said abutting real estate." The contention, however, of the railway company, is that in no stage of the proceeding has the back-lying owner a hearing, or an opportunity to be heard, as to the amount to be assessed against his property. As we have seen, the opportunity to be heard is given to back-lying owners as to other owners, and the amount of the assessment against the latter is the amount of the assessment against the former. This amount is definitely fixed, and *measures the [185] lien upon the back-lying real estate, and the burden to which it may be subjected if the abutting property fails to satisfy the assessment.

It may be, however, that the railway company means by its contention that the back-lying owner is given no opportunity to be heard by the statute on the amount of the assessment against him, that he is given no opportunity to be heard on special benefits to him from the improvement. This was one of the questions presented in Voris v. Pittsburg Plate Glass Co. Certain cases were cited as sustaining an affirmative answer. The court, however, replied that the question was not involved in those cases, and what was said in one of them (Adams v. Shelbyville, 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114), to the effect that a law which makes no provision for a hearing on the question of special benefits was in violation of the 14th Amendment to the Constitution of the United States, was clearly *obiter dicta.* And the court decided, following French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, and the cases immediately succeeding it, and, quoting from Webster v. Fargo, 181 U. S. 395, 45 L. ed. 914, 21 Sup. Ct. Rep. 624, " 'that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage . . . ' " Other cases were also cited sustaining the conclusion.

It will be observed, therefore, that the supreme court of the state decided that a taxing district is created by the legislature of the property along the line of the improvement, and extending back therefrom 150 feet, and that back-lying property—that is, property 50 feet distant from the street, and within 150 feet—is so far benefited that it shall be made liable if the abutting 50 feet "prove insufficient" to pay the cost of the improvement. In other words, that lands within 150 feet of the improvement are so far benefited by the improvement that they may be made a taxing district, and subject to the cost of *the improvement. We think, [186] under the cited cases, this was within the power of the legislature to provide.

The railway company also contends that the statute is unconstitutional, for the reason that it does not give the back-lying property owner the equal protection of the laws. The ground of this contention is as the one just disposed of,—that the abutting owner is, and the back-lying owner is not, given an opportunity to be heard. To express it differently, and as the counsel express it, that a specific assessment is made against the abutting owner, and he is given an opportunity to challenge the assessment, but the back-lying owner has an assessment made against him years afterwards, and is given no opportunity whatever to challenge it. This, as we have seen, is a misapprehension of the statute. The amount of the assessment is fixed for both owners at the same time. The abutting owner is made primarily liable for it; the back-lying owner contingently so. He may never be called upon to pay. Implied in this contention, however, though not expressed, there may be the element of a hearing upon benefits; but, if so, it is disposed of by what has been said. If it was in the power of the legislature to make the taxing district, as we have decided that it was, it was within its power to classify the property owners, and there is certainly no discrimination between the members of the classes.

Judgment affirmed.

Mr. Justice **Holmes** took no part in the decision.

[187]*MOBILE, JACKSON, & KANSAS CITY RAILROAD COMPANY and Gulf & Chicago Railway Company, Plffs. in Err.,

v.

STATE OF MISSISSIPPI, Mississippi Railroad Commission, et al.

(See S. C. Reporter's ed. 187–206.)

Error to state court — questions reviewable — local law.

1. Questions whose determination depends upon the power of a state railroad commission, upon the petition of certain railway companies for the approval of a consolidation, and upon the order of the commission made on the petition, are local, and not Federal, and cannot be reviewed on a writ of error from the Federal Supreme Court to a state court.

States — power to regulate railroads.

2. Nothing in the Federal Constitution or statutes prevents a state from creating a board of railroad commissioners and prescribing their powers, or from regulating or forbidding the consolidation of railroad corporations, or from prescribing the routes of railroads, and providing that parallel and competing lines shall so remain.

Error to state court — Federal question — decision on non-Federal grounds.

3. A state court, by resting its decision in a suit to require railway companies to construct their railroad through a specified county seat, and to restrain them from abandoning a portion of the road, upon the ground that the petition by the railway companies to the railroad commission for approval of a consolidation, and its order thereon, constituted a binding contract, is not using a mere pretext to avoid the determination of the Federal questions arising in the case under the contract and commerce clauses of the Federal Constitution, where the power of the commission and the effect of its order were necessarily presented by the case.

Commerce — state regulation — railroad route.

4. Interstate commerce is not burdened by requiring railroad companies to operate a particular line which they selected, or represented that they had selected, in a petition to the state railroad commission for approval of a consolidation, although compliance may entail expense, or require the exercise of eminent domain.

Error to state court — questions reviewable — local law.

5. Whether railway companies waive their charter rights to change the line of a narrow-gauge road, and are estopped to revoke such waiver, by obtaining the consent of the state, through its railroad commission, to broaden and standardize that line through its entire length, is a local, and not a Federal, question, and cannot be reviewed on a writ of error from the Supreme Court of the United States to a state court.

Error to state court — Federal question — impairing contract obligations.

6. Only when a judgment of a state court gives effect to subsequent legislation can the Federal Supreme Court review, as presenting a question of the impairment of contract obligations, its decision holding in-

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NOTE.—As to right of Supreme Court of United States on error to state courts to review questions of local or general law—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 540.

As to state control over railroads—see note to Baltimore & O. R. Co. v. Maryland, 22 L. ed. U. S. 678.

As to error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Necessity of decision of Federal question to sustain writ of error to state court—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 42.

valid, under the state Constitution, a state law which is alleged to constitute a contract.

[No. 218.]

Argued April 29, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which, on a second appeal, affirmed, with some modifications, a decree of the Chancery Court of Pontotoc County, in that state. requiring railway companies to broaden and standardize a narrow-gauge road through its entire length. Affirmed.

See same case below on first appeal, 86 Miss. 172, 38 So. 732; on second appeal, 89 Miss. 724, 41 So. 259.

Statement by Mr. Justice **McKenna**:

This is a bill in equity, brought by the state of Mississippi and the railroad commission of that state. to require the railroad companies to construct their railroad through the county seat of Pontotoc county. state of Mississippi, and to restrain them from abandoning a portion of the narrow-gauge railroad formerly operated by the Gulf & Chicago Railroad Company, which ran to the town of Pontotoc.

The following is a summary of the bill: The railroad commission exists under the laws of the state of Mississippi, and is, under the laws. charged with the duty of supervising railroads and other common [188]carriers, and also with the duty of *enforcing the observance of the laws by such companies and other carriers. The Gulf & Chicago Railway Company was organized in 1903, under the laws of Mississippi, with authority to construct a railroad from the town of Decatur, Mississippi, in a general northerly direction, through the county of Pontotoc, and through the state of Mississippi to the Tennessee line. At the time of the organization of such railway company there was in existence from the town of Pontotoc, Mississippi, to the town of Middleton, Tennessee, a narrow-gauge road, which was operated by the Gulf & Chicago Railroad Company, a corporation under the laws of Mississippi. The railroad company was bound to continue and preserve intact throughout its entire length the narrow-gauge road, and the Gulf & Chicago Railway Company and its lessee, the Mobile, Jackson, & Kansas City Railroad Company, hereafter called the Mobile Company, were in turn bound to so continue and preserve intact the said line, "broadened and standardized as was stipulated in the articles of consolidation hereinafter set forth." Prior to the 6th of July, 1903, the Gulf & Chicago Railway Company and the Gulf & Chicago Railroad Company, with other railroad companies, were consolidated under the name of the Gulf & Chicago Railway Company, and on that day a petition was presented to the railroad commission praying the approval of the consolidation. It was stipulated in the petition, and by the granting of it by the commission it was agreed, that the consolidated corporation should broaden and standardize the narrow-gauge road running from the town of Pontotoc, "as it then existed and was being operated," and that, when broadened and standardized, it should be a part of the main line of the Gulf & Chicago Railway Company, extending from Decatur, Mississippi, to Jackson, Tennessee. The petition and order were made part of the bill. On or about the time of the consolidation, approved as aforesaid, the Gulf & Chicago Railway Company leased to the Mobile Company all of its railroad property then constructed and operated, and that thereafter to be constructed, including the narrow-gauge road from Pontotoc *to[189] Middleton, and including its entire proposed line from Decatur to Jackson, and since the execution of the lease the Mobile Company has been in control and operation of the narrow-gauge road. The Gulf & Chicago Railway Company, in violation of the terms and in disregard of the representations contained in its petition to the commission, has broadened and standardized the narrow-gauge road to a point one mile and a half from the end of the line in Pontotoc county, and is operating the same. The remaining part, which is the most important part of the road, extending through a thickly populated district in the principal portion of Pontotoc, has been abandoned. It was a material consideration, in passing on the petition for consolidation, and the consolidation would not have been approved but for the representation that the company would standardize and broaden the line extending into the town.

The narrow-gauge road was constructed in 1887 by the Gulf & Ship Island Railroad Company. When it was extended into Pontotoc a right of way was obtained by purchase, by the exercise of the right of eminent domain and by donations by the community, and when the right of way was selected it was with the view of extending the road south through the town. The town was built and established, and the town has been building for the last twenty years, with reference to the line of railroad then so located. The interests of the public are involved in the change of road; the convenience and comfort of more than 1,000 people are involved; the change of road would disturb established conditions, and practically break up a prosperous community for the benefit of the defendants and a few property owners in another part of the town, recently added thereto, and through which it is proposed to run the new line of railroad. The original town of Pontotoc is the county seat of Pontotoc county, as fixed by the legislature of the state, and § 187 of the Constitution of the state provides that no railroad thereafter constructed in the state "shall pass within 3 miles of any county seat without passing through the [190] same, and establishing *and maintaining a depot therein, unless prevented by natural obstacles; Provided such town or city shall grant the right of way through its limits and sufficient ground for ordinary depot purposes." The Gulf & Chicago Railway Company is constructing its new line within 3 miles of Pontotoc without passing through the same. There are no natural obstacles in the way. The citizens stand ready to grant the right of way through the limits of the town and sufficient grounds for depot purposes. In fact, the company owns a right of way through a large part of the town and sufficient grounds for depot purposes. The conduct of the company is in violation of the Constitution, and in wilful disregard of the law and of the order of the commission and the rights of the public.

The inadequacy of the remedy at law is alleged.

The injunction prayed was against the construction of the line of road proposed, and to command the defendant to broaden and standardize the line of road extending through the town of Pontotoc, and to compel its operation into the said county seat as a part of the line built and to be built from Decatur, Mississippi, to Jackson, Tennessee, and to extend the said line on through to the said county seat, as required by said § 187 of the Constitution of the state of Mississippi, and as required by law and by the order of the complainant, the Mississippi railroad commission. General relief was also prayed.

The answer of the defendant companies, in addition to traversing the allegations of fact of the bill, alleges the following: Prior to the filing of the petition, seeking the approval of the railroad commission of the state to the consolidation of the railroads, the officers of the companies had caused surveys to be made through the town of Pontotoc, with the view to best serve the interest of the people of that community in the location of the line of railroad and the establishing of its depot in the town, and it became apparent that it would be impossible to utilize that portion of the narrow-gauge line extending north about one mile from the [191] depot. This was submitted to the *people of the town prior to the application for consolidation, in a meeting called for that purpose, and, by an overwhelming majority, the position taken by the officers of the companies was acquiesced in and approved. Before the filing of the bill the companies had located and constructed their line as proposed at such public meeting, had purchased a depot site, and erected a handsome and commodious depot on the site, into which it is now operating a standard-gauge road. And all of this done before the filing of the bill.

The railroad commission made an order in the month of June, 1904, requiring the companies to build a depot on that part of the line of the narrow-gauge road since abandoned, and upon the old site of the depot used by that road, and outside of the original town of Pontotoc, the enforcement of which was enjoined by the United States circuit court for the southern district of Mississippi, which suit is now pending. The commission is still insisting upon the order and resisting the efforts of the companies to enjoin its enforcement. Such order, it is alleged, is inconsistent with the bill in this case.

The line of road now being constructed by the Gulf & Chicago Railway Company from Decatur to Jackson is being constructed upon a different scheme of grades from that upon which the narrow-gauge line was constructed, and necessarily adopted to enable the company to transact its business with the least expense, and with the view of enabling it to successfully meet the competition of other lines. If the grades of the narrow-gauge road had been adopted it would have been practically impossible for the railway company to operate successfully, because of the heavy grades, and would have caused an additional cost of construction of $90,000: would have lengthened the road, increased the fixed charges of maintaining the property, increased the cost of operation, and the cost to the company of transacting all interstate commerce business from Mobile, Alabama, to Tennessee.

By amendments subsequently made to the answer it was alleged that when the consolidation of the companies was had *it was [192] the purpose (which was well known to the railroad commission) of making the consolidated company a through trunk line of railroad for interstate commerce and the transmission of the mails, and that one of the vital objects to be attained was to shorten the line in every way possible. It is further alleged that a refusal to permit the execution of such purpose "will impose unnecessary and unreasonable burdens upon the interstate commerce, and will violate in letter and spirit § 8, article 1, of the Constitution of the United States. And it is alleged that the southern end of the old narrow-gauge road line runs into deep hollows and ends in a cluster of big hills, which, to cut through, would cause great expense and entail long delay; that the line would thereby be lengthened, and it would be hampered and prevented from doing an interstate business in successful competition with other lines."

The case, on the petition of the railroads, was removed to the circuit court of the United States for the eastern division of the northern district of Mississippi, and was subsequently remanded to the state court on motion of the defendants in error.

A temporary injunction was granted, enjoining and commanding the Mobile Company and the Gulf & Chicago Railway Company to "absolutely refrain from constructing and operating a certain line of railroad from Decatur, Mississippi, to Middleton, Tennessee, or any other line of railroad from any point whatsoever to any other point passing within 3 miles of the county seat of Pontotoc county, Mississippi, as the said county seat was originally laid out, marked, and established, without passing through the said county seat."

Upon motion of the companies, and after proofs submitted, a decree was entered, dissolving the injunction, the decree reciting that all of the relief prayed for by the bill could be obtained by a mandatory injunction if the allegations of the bill should be sustained upon the final hearing; and further reciting that "the public interests of the county north and south of the town of Pontotoc, along the line of said railroad, [193] as well as the *interests of the railroad, will suffer by reason of the continuance of the temporary injunction." All other questions were reserved until the final hearing.

The supreme court of the state reversed the decree, reinstated the injunction, and remanded the case to the chancery court. 86 Miss. 172, 38 So. 732.

After a trial upon the merits, the chancery court entered a decree, making the injunction perpetual. The decree was affirmed by the supreme court. 89 Miss. 724, 41 So. 259. Other facts will appear in the opinion.

Mr. William Hepburn Russell argued the cause and filed a brief for plaintiffs in error:

This court has jurisdiction to review the decision of the supreme court of Mississippi in this case, because the record clearly shows claims of constitutional rights under the Constitution of the United States, expressly made by the plaintiffs in error to the court below, any one of which, if sustained, would have required the supreme court of Mississippi to reverse the decree of the chancery court of Pontotoc county in this case.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 142, 17 L. ed. 571, 575; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 15, 45 L. ed. 395, 404, 21 Sup. Ct. Rep. 240; Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; Otis Co. v. Ludlow Mfg. Co. 201 U. S. 140, 150, 50 L. ed. 696, 704, 26 Sup. Ct. Rep. 353.

The original bill of complaint filed by the defendants in error in the chancery court of Pontotoc county, and the amended answer filed to said bill by the plaintiffs in error, cleary set up questions of constitutional rights arising under the Constitution of the United States, and therefore this court has jurisdiction to review the decision of the supreme court of Mississippi, even though the latter court in its opinion failed to recognize the existence of the Federal rights claimed, and sought to rest the decision of the case on some ground of general or local law. Such a decision necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 581, 50 L. ed. 596, 604, 605, 26 Sup. Ct. Rep. 341; Bridge Proprs. v. Hoboken Land & Improv. Co. supra.

The railroad commission of the state of Mississippi is a mere administrative agency of the state.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 341, 51 L. ed. 209, 213, 27 Sup. Ct. Rep. 90.

The commission has no powers beyond those given it by statute, and is strictly limited in its exercise of power by the laws creating it.

Railroad Comrs. v. Oregon R. & Nav. R. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401.

The orders of railroad commissioners are not contracts.

New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. ed. 629.

Hence the order of the state railroad commission of Mississippi, permitting the consolidation of the narrow-gauge line with the Gulf & Chicago Railway Company, was not a contract. That such order might be revoked if obtained upon false representations or for improper purposes is possible, but the order itself cannot be transmuted into a contract, and the contract enforced by confiscating the property of the plaintiffs in error, and upon the mere opinion of the supreme court of Mississippi that such order is a contract requiring the Gulf & Chicago Railway Company to abandon its line of railway as legally located through the town of Pontotoc, and to acquire new rights of way, and build a new line of railway along a different route. This is not due process of law, but is a denial of the equal protection of the laws. Surely, confiscation is not control, and robbery is not regulation.

The provisions of the 14th Amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities.

Blake v. McClung, 172 U. S. 239, 260, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234. 235, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581.

The Stegall bill was and is in limitation and qualification of the laws conferring authority and jurisdiction upon the railroad commission of the state of Mississippi, and was and is a contract between the state of Mississippi and the plaintiff in error,—the Gulf & Chicago Railway Company, and was and is a grant of franchises and contract rights for a sufficient consideration to the said plaintiff in error; and under said legislative contract the judgment and decree of the supreme court of Mississippi in this case is erroneous and should be reversed.

Douglass v. Pike County, 101 U. S. 677, 686, 687, 25 L. ed. 968, 971, 972; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

All the decisions in this court are consistent with the principle that no state court decision affecting the validity of a contract, made after the contract was entered into, is conclusive upon the Federal courts.

Gelpcke v. Dubuque, 1 Wall. 175, 206, 207, 17 L. ed. 520, 525, 526; Rowan v. Runnels, 5 How. 134, 139, 12 L. ed. 85, 87; Olcott v. Fond du Lac County, 16 Wall. 678, 682, 21 L. ed. 382.

Besides, the question whether a general law could be made applicable to the subject-matter of this special act was a matter for legislative, not judicial, determination.

Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 533, 43 L. ed. 796, 798, 19 Sup. Ct. Rep. 513.

The decrees of the Mississippi courts here complained of will compel the plaintiffs in error to acquire new rights of way, either by purchase or by the exercise of the right of eminent domain; will materially increase the length of their line through the town of Pontotoc; cause an increase of curvature and grades upon the line, making it impracticable to operate trains as at present through such town, except by the use of an additional or "pusher" locomotive; and will thus greatly hamper, burden, and permanently oppress plaintiffs in error in the operation of their through trains and in the carriage of interstate freight, passengers, and traffic. This is an interference with interstate commerce.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 522, 44 L. ed. 868, 871, 20 Sup. Ct. Rep. 722.

The case is not different in principle from the case of New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. ed. 629.

Messrs. **Hannis Taylor** and **Robert V. Fletcher** argued the cause and filed a brief for defendants in error:

This court will not notice a Federal question not relied upon in the state court, but mentioned for the first time after final judgment in the state court.

Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281. See also Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; Osborne v. Clark, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319.

Since the supreme court of Mississippi has declined to consider the assignment of error based on the contract clause, solely upon the ground that it was not relied on in the chancery court, this court will respect the rules of practice in vogue in the state of Mississippi, and will hold with the Mississippi court that the point was raised too late.

Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Eastern Bldg. & L. Asso. v. Welling, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531.

But if this is a mistake, it is well settled that the prohibition of the Federal Constitution extends to such judgments only as give effect to statutes.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 338, 46 L. ed. 937, 22 Sup. Ct. Rep. 691; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Winona & St. P. R. Co. v. Plainview, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

If the judgment rests on two grounds, one involving a Federal question, and the other not involving it; or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it,—this court will not take jurisdiction.

Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111.

Especially will this court decline to interfere when the sole question is as to whether a party has been given or refused the benefit of the law of estoppel, since that involves no Federal question.

Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485.

A decision by a state court that a corporation is estopped by the action of its board of directors to set up the invalidity of a statute, even if it is unconstitutional, cannot be reviewed on writ of error from the Supreme Court of the United States to the state court, since the non-Federal ground is broad enough to support the judgment.

Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677. See also Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

So, conceding that the judgment interferes with interstate commerce, or impairs the obligation of a contract, or violates the 14th Amendment, this court can grant no relief, since plaintiffs in error have estopped themselves to plead any of these defenses to escape from the consequences of their solemn agreement.

Electric Co. v. Dow. 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; Clay v. Smith, 3 Pet. 411, 7 L. ed. 723; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; Eustis v. Bolles, supra; Luther v. Borden, 7 How. 40, 12 L. ed. 598; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; Miller v. Swann (Miller v. Anderson) 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52.

The commerce clause of the Federal Constitution cannot be applied to the question of the location of a line of railway.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

Mr. Justice **McKenna** delivered the opinion of the court:

The defendant railroad companies, in their motion to dissolve the temporary injunction, urged as grounds thereof, among others, that the injunction imposed a direct and unnecessary burden upon, and was an interference with, interstate commerce, and an interference with the carrying of United States mail. To those grounds the court did not apparently respond, and the supreme court did not refer to them in either of its opinions.

Counter contentions are urged. Plaintiffs in error contend that the Federal questions set up by them were evaded. Defendants in error contend that such questions were not involved and are not now presented for consideration.

The opinion of the supreme court on the first appeal was very elaborate, and we can only give a brief summary of the propositions decided. The court gives a summary of the facts of the bill, the averments of the petition to the commission, and the terms of its order, and says that, "waiving minor considerations not sufficiently developed by the proof," and "passing at once to the very heart of the matter," the case divided into two main branches:

"1. What is the true interpretation to be given § 187 of our Constitution, and has it any application to the facts of this litigation? 2. What are the legal rights of the citizens of the town of Pontotoc and the duties of the appellees as to the narrow-gauge road which was in use and active operation before and at the consolidation hereinbefore referred to and at the date of the leasing of its property by one appellee to the other?"

*Under the first branch the court decided **[198]** that appellants (defendants in error here) could, under the facts of the record, be "afforded no relief by the language or intendment of § 187 of the Constitution." This branch of the case, therefore, needs no further consideration.

As elements in the discussion and decision of the second branch of the case, the court said that had there been no consolidation between the Gulf & Chicago Railroad Company and the Gulf & Chicago Railway Company, and the latter company had constructed its road over the route and in the direction specified in its application for incorporation, it would inevitably have been a parallel and competing line with the narrow-gauge line then in existence, and the consolidation of the roads would not have been permitted. "More than this," it was said, "an express grant of power by the legislature for the two companies to consolidate . . . would have been void, as being in contravention of the general statutory inhibition against consolidation or purchase of competing lines of railroads, which cannot, without violating § 87 of the Constitution [of the state], be suspended 'for the benefit of any individual or private corporation or association.'" And to sustain this proposition Yazoo & M. Valley R. Co. v. Southern R. Co. 83 Miss. 746, 36 So. 74. was cited. It was deduced from § 3587 of the Code of the state of 1892, that the statement in the petition that the roads were "in no way parallel or competing lines" were statements of jurisdictional facts, "upon the existence of which depended the power of the corporations to consolidate." And following Lusby v. Kansas City, M. & B. R. Co. 73 Miss. 364, 36 L.R.A. 510, 19 So. 239, the court held that the Gulf & Chicago Railroad Company was without power to abandon or relocate any portion of its line, "except on the score of 'imperious necessity.'" An exception, it was said, not suggested by the facts of this record. These restraints and duties, it was further said, came to the consolidated corporation.

On the return of the case to the chancery court, and after a hearing on the merits, [199] that court entered a decree making the *injunction perpetual. The decree recited that the court found "as a fact" that a valid contract existed between the Gulf & Chicago Railroad Company and the citizens of Pontotoc, which provided that the line of the railway of the company should be established and maintained where the same was established and maintained before the consolidation of that company with the other companies, and that the town had not given its assent to the abandonment of that line. The court further found "that no natural obstacles or imperious necessity prevents the said defendant companies from broadening and standardizing" the narrow-gauge road "and making it a part of the main line of the proposed railroad, and no such obstacles or necessity exist to prevent the said companies from extending their said line from the southern terminus of the said original line . . . and that the allegations of the bill have been sustained by the proof, and that the complainants are entitled to the relief prayed for." The supreme court affirmed the decree of the chancery court, repeating, with some modifications, the principles which it expressed on the first appeal of the case. It said that in a former opinion the court expressly held that "the consolidation was conditioned upon the broadening and standardizing the then-existing narrow-gauge railroad, and make it a part of the main line of railroad operated by the consolidated corporation." And it was alone, it was further said, upon the compliance with those conditions, that the railroad commission consented to the consolidation, and without which the commission would have had no power to authorize the consolidation, and without which the consolidation would not have been effected. So insistent was the condition, the court held, in view of the fact that the roads would otherwise be parallel and competing roads, that the legislature could not relieve from it without violating § 87 of the Constitution of the state.

The court expressed the law of the state to be that parallel and competing roads could not consolidate, and that other roads could only consolidate with the consent of the railroad commission. And it was also said that the roads, recognizing *the law, [200] stated in their petition to the commission "that the railroads were 'in no way parallel or competing lines,' and expressly pledged themselves to broaden and standardize the then-existing narrow-gauge railroad, and to make it a part of the main line operated by the consolidated corporation. . . . And it is upon this ground, and this ground alone, that we now hold that the decree of the chancellor should be affirmed." The court took pains to repeat this limitation. And, excluding other questions, the court said that it had nothing to do with the location of the depot, and that it dealt alone with the "obligation entered into" by the companies with the commission; "that only," to quote the words of the court, "is the core of this contention, and that, and *that precisely*, is what we deal with and decide in this case; to wit, that these appellants [plaintiffs in error here] are bound by their solemn obligation, deliberately entered into, as stated above, to broaden and standardize the narrow-gauge railroad and to make it a part of the main line."

We have made these full quotations from the opinions and decrees of the state courts to clearly show what facts were found and what principles of law laid down, that we might estimate the Federal questions which it is contended are involved in the case. We have seen that the Federal grounds invoked in the motion to dissolve the temporary injunction were that the injunction imposed a direct and unnecessary burden upon, and was an interference with. interstate commerce, and was an interference with the carrying of the United States mails. In the amended answer the same grounds were repeated with more circumstantiality, and § 8, article 1, of the Constitution of the United States, was invoked.

The same grounds were practically repeated in the assignment of errors on the appeal to the supreme court of the state, and, in addition, the provision of § 10, article 1, which prohibits any state from impairing the obligation of a contract, was invoked on the ground that the decree of the chancery court impaired "the obligation [201] of the contract right *to change the location of the narrow-gauge road, embodied in § 8 of the charter of the Ripley Railroad, and in the articles of organization of the Gulf & Chicago Railroad Company."

In the assignments of error in this court the plaintiffs in error have, for the first time, invoked the 14th Amendment to the Constitution of the United States. To sustain this assignment it is contended that the supreme court of the state, by directing the consolidated company "to operate the spur track as soon as completed, connecting the main line on the north with the town of Pontotoc," deprives plaintiffs in error of their property without due process of law. And a like result is produced, it is also contended, by the decision of the court holding the "Stegall bill," so called, to be invalid. The latter ground will be referred to hereafter. Of the other, it is said, it arose for the first time upon the decree and opinion of the supreme court, as it is further said that the decree of the chancery court did not deny the rights of the companies under the 14th Amendment. It is difficult to appreciate the contention. The decree of the chancery court recited, among other things, that no natural obstacles existed to prevent the companies from extending their line "from the southern terminus" of the original line, and enjoined the companies from building and operating any line that "did not include or comprise the original line of the Gulf & Chicago Railroad Company, as originally constructed and maintained," required them to broaden and standardize the entire line of the original narrow-gauge railroad, and to construct their line of railway in such a way as to include as part of the main line "all of the line of the narrow-gauge line." And it was commanded that the work commence within thirty days and be finished within sixty days. The supreme court, in its opinion, said: "In view of the various interests here involved, we direct the appellant to operate *the spur* track as soon as completed, connecting the main line on the north with the town of Pontotoc." The court therefore accepted and approved what was already done, and modified the decree of the [202] chancery court in the interest of *the companies. And it besides extended the time for compliance with the decree from sixty days to six months. But aside from this, all of the contentions of the companies (except that based on the "Stegall bill," which will be presently considered) depend upon the power of the commission, the petition of the companies, and the order of the commission upon the petition. And these, we think, were all local questions the decision of which we have no power to review. There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend upon the law creating them, of which the courts of the state are the absolute interpreters. Whether corporations shall remain separate or be permitted to consolidate is a matter of state regulation and provision. It is competent also for a state to prescribe the route of the railroad it creates, and to provide that parallel and competing lines shall remain so. And this power was exercised by the state of Mississippi. It is not exactly clear whether this is disputed by the companies. It is, however, contended that the commission is a mere administrative agency, and that its only real power or duty in the matter of consenting to consolidations is to determine that such consolidations are not of parallel or competing roads, and that the commission has nothing whatever to do with the terms of the consolidation. And it is further contended that there was no agreement or contract of any kind between the companies and the commission, that the order of the commission was "merely an official finding that the two roads came within the necessary statutory requirements," and that the attempt of the supreme court to base its decision and decree upon the ground that the petition and order constituted a contract binding upon the plaintiffs in error was a "mere pretext, intended to avoid the determination of the Federal questions arising in the case, and to place its decision on a non-Federal ground." We cannot assent to this view. The power of the commission and the effect of its order were necessarily presented by the case. *They were grounds of suit. They [203] became, therefore, the immediate and primary questions to be decided. The power of the commission, and the effect of its order, depended upon the statutes of the state, and of them, as we have said, the supreme court is the absolute interpreter. The matter is exceedingly simple and is best explained by the reference to the opinion of the supreme court of the state. The court declared that the roads, but for their consolidation, would have been parallel and competing roads, and, in order to make their consolidation,—in order to give the commission power to consent to their consolidation,—the companies represented that the roads were not parallel and competing. Of course, they would not be if they were made parts of one line. And it was represented that they would be made parts of one line,—to be made so by the broadening of the narrow-gauge road, not by its abandonment in whole or in part. Upon this representation,— upon this condition,—the consent of the commission was invoked and secured.

Much more discussion is unnecessary. It is enough to add to that which we have said, that the decree of the supreme court does not work an interference with, or cast a direct burden upon, interstate commerce. The case of the Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; and Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, though local needs had been adequately supplied. In the case at bar there is the insistence of the operation of a particular road, which the companies themselves selected or represented that they had selected. That compliance will entail expense or require the exercise of eminent domain will not make it a burden upon interstate commerce. Wisconsin. M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. Besides, the comparative expense of roads we must assume was considered when the petition to the commission was made.

[204] *It is further contended by the companies that they had the right, under § 8 of the charter of the Ripley Railroad Company, to change the location of its line through the town of Pontotoc, and that the charter constitutes a contract which is impaired, it is further urged, by the laws creating the railroad commission, as interpreted by the supreme court of the state. Section 8 of the charter provides that, for the purpose of making the railroad provided for in § 2, *"or repairing or changing it afterwards,"* the railroad shall have rights of entering upon adjoining land, etc., upon making compensation to the owners. What power this section confers may be open to dispute. It may be said that the right of "repairing or changing" the railroad does not give the power to abandon it. However, the supreme court did not pass upon the meaning of § 8. The court said if that section gave the companies the power to change the line of the narrow-gauge road as they desired, they waived it, and are estopped to revoke it by their obtaining the consent of the state through its railroad commission to broaden and standardize that line through its entire length. This was a question for the supreme court to decide. It was fairly presented to the court. We cannot question the motives of its judgment; indeed we cannot say that we dissent from it. At any rate, it is not reviewable. Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Hale v. Lewis, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

The final contention of plaintiffs in error is based on the act of the legislature of the state, called the "Stegall bill." This act was passed after the decree of the chancery court, and it is contended that it is an express legislative enactment which approved the location by the Gulf & Chicago Railway Company, as consolidated, of its railway through the town of Pontotoc, and authorized a continuance of the same on condition that it should broaden and standardize the track into the old town and to the site of the old station. These conditions, it is asserted, were performed, and a contract was hence entered into between the state and the railroad company, and that the *decision of the supreme court [205] "denying the obligation of this contract, is either (a) a law impairing the obligation of a contract; or (b) a denial to the plaintiffs in error of the equal protection of the laws; or (c) the taking of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States."

The supreme court decided that the bill was unconstitutional, saying: "So far as the Stegall bill is concerned, it is perfectly obvious, as already held in the former opinion, that this special act, which was in substance for the benefit of this particular corporation, was, under the general statute laws which we have just referred to with respect to consolidation, palpably and manifestly violative of § 87 of the Constitution, and plainly null and void." This conclusion is attacked, and our construction is invoked of the constitutional provision against that made by the supreme court of the state.

We are unable to yield to the appeal. It is only when the judgment of a state court gives effect to a law subsequent to that (or it may be a constitution) which it is alleged constitutes a contract, that we may review the judgment and decide the question of contract. And this would involve the construction of the law. But the record presents no such case. The "Stegall bill," it is true, is claimed to be a contract, but its validity is not asserted against a subsequent law. It is asserted against prior laws and the Constitution. The decision of the court, therefore, was of that kind that a court is often called to make under the laws and Constitution of its state. To assert error in the decision, or even to be able to demonstrate it, does not invest us with power of review. Nor do the other supposed consequences of the decision of the supreme court give us jurisdiction to review it. That it denies the companies the equal protection of the law, we may say, is without any foundation. No discrimination against them is pointed out, and to say that the decision takes their property without due process of law is only another way of saying that they had a contract, the obligation of which is impaired. Of course, [206]*they assert rights under the "Stegall bill," but in that they present a very common case, within the exclusive jurisdiction of the state court.

Judgment affirmed.

OLD DOMINION COPPER MINING & SMELTING COMPANY, Petitioner,
v.
FREDERICK LEWISOHN et al.

(See S. C. Reporter's ed. 206–217.)

Corporations — promoters — sales to corporation.

A corporation cannot avoid in equity a purchase of property sold to it by its promoters, at a large profit, while they owned all the stock, in contemplation of a large issue to the public, since the corporation thus had full knowledge of the facts, and remained unchanged and unaffected in its identity by the changes in its members due to purchases of the stock by the innocent public, and for the further reason that, if the corporation succeeds, all the stockholders, guilty as well as innocent, will profit.

[No. 206.]

Argued April 16, 20, 1908. Decided May 18, 1908.

ON WRIT of Certiorari to the United State Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, sustaining a demurrer to, and dismissing, a bill brought by a corporation to rescind a sale of property to it by its promoters. Affirmed.

See same case below, 79 C. C. A. 534, 148 Fed. 1020.

The facts are stated in the opinion.

Messrs. **Edward F. McClennen** and **Louis D. Brandeis** argued the cause, and, with Mr. William H. Dunbar, filed a brief for petitioner:

The rule is universal that if a vendor stands in a fiduciary relation to his vendee the sale is voidable, unless independently acquiesced in by the latter with full knowledge of all material facts.

Wardell v. Union P. R. Co. 103 U. S. 651, 658, 26 L. ed. 509, 511; Thomas v. Peoria & R. I. R. Co. 36 Fed. 808; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Aberdeen R. Co. v. Blaikie, 1 Macq. H. L. Cas. 461.

A promoter stands in a fiduciary relation to the corporation he promotes, and is subject to this rule.

Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340; Hayward v. Leeson, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653; Central Trust Co. v. East Tennessee Land Co. 116 Fed. 743; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; Chandler v. Bacon, 30 Fed. 538; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; The Telegraph v. Loetscher, 127 Iowa, 383, 101 N. W. 773; Hinkley v. Sac Oil & Pipe Line Co. 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629; Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523; Fred Macey Co. v. Macey, 143 Mich. 138, 5 L.R.A.(N.S.) 1036, 106 N. W. 722; South Joplin Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78, 35 Atl. 436, 56 N. J. Eq. 411, 41 Atl. 1115, 58 N. J. Eq. 556, 43 Atl. 671; First Ave. Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753; Hebgen v. Koeffler, 97 Wis. 313, 72 N. W. 745; Hitchcock v. Hustace, 14 Haw. 232; Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218; Gluckstein v. Barnes [1900] A. C. 240.

The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out.

Marsh v. Whitmore, 21 Wall. 178, 183, 184, 22 L. ed. 482, 484, 485; Gilman, C. & S. R. Co. v. Kelly, 77 Ill. 435; Dutton v. Willner, 52 N. Y. 312; Gluckstein v. Barnes; Erlanger v. New Sombrero Phosphate Co.; Hayward v. Leeson; and Old Dominion Copper Min. & Smelting Co. v. Bigelow,—supra.

The duty of the promoters extends to all persons whom they bring in as original

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Note.—As to sales by promoter to corporation—see note to Yale Gas Stove Co. v. Wilcox, 25 L.R.A. 90.

subscribers for stock, whether before or after the transaction complained of.

1 Morawetz, Priv. Corp. 2d ed. §§ 292, 294; Dickerman v. Northern Trust Co. supra; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 348; Chandler v. Bacon, 30 Fed. 540; Hayward v. Leeson, 176 Mass. 320, 49 L.R.A. 725, 57 N. E. 656; South Joplin Land Co. v. Case, 104 Mo. 579, 16 S. W. 390; Erlanger v. New Sombrero Phosphate Co. supra; Gluckstein v. Barnes [1900] A. C. 257; Re Leeds & H. Theatres [1902] 2 Ch. 809; Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467.

It is not enough that all persons who have formally joined the corporation at the time of the transaction assent, if others are in fact interested, and join as part of the original plan.

Dickerman v. Northern Trust Co. and Yeiser v. United States Board & Paper Co. supra; Hayward v. Leeson, 176 Mass. 310, 49 L.R.A. 725, 57 N. E. 656; Old Dominion Copper Min. & Smelting Co. v. Bigelow; Erlanger v. New Sombrero Phosphate Co.; Re British Seamless Paper Box Co.; and Re Leeds & H. Theatres,—supra.

The case at bar is entirely different from those cases in which the promoters take all the stock and subsequently sell part to other persons.

1 Morawetz, Priv. Corp. 2d ed. § 292.

Mr. **Eugene Treadwell** argued the cause, and, with Mr. Edward Lauterbach, filed a brief for respondents:

There was no fraud upon the company.

Foster v. Seymour, 23 Blatchf. 107, 23 Fed. 65; McCracken v. Robison, 6 C. C. A. 400, 14 U. S. App. 602, 57 Fed. 375; Stewart v. St. Louis, Ft. S. & W. R. Co. 41 Fed. 738; Du Pont v. Tilden, 42 Fed. 87; Wood v. Corry Waterworks Co. 12 L.R.A. 168, 44 Fed. 149; Bank of Ft. Madison v. Alden, 129 U. S. 373, 378, 32 L. ed. 725, 727, 9 Sup. Ct. Rep. 332; Barr v. New York, L. E. & W. R. Co. 125 N. Y. 273, 26 N. E. 145; Seymour v. Spring Forest Cemetery Asso. 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365; Thornton v. Wabash R. Co. 81 N. Y. 467; Parsons v. Hayes, 14 Abb. N. C. 434; King v. Barnes, 109 N. Y. 268, 16 N. E. 332; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 472, 93 N. Y. Supp. 134; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Higgins v. Lansingh, 154 Ill. 336, 40 N. E. 362; Spaulding v. North Milwaukee Town Site Co. 106 Wis. 489, 81 N. W. 1064; Garretson v. Pacific Crude Oil Co. 146 Cal. 184, 79 Pac. 838; St. Louis, Ft. S. & W. R. Co v. Tiernan, 37 Kan. 633, 15 Pac. 544; Walburn v. Chenault, 43 Kan. 361, 23 Pac. 657; Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co. 13 Colo. 587, 22 Pac. 954; Tompkins v. Sperry, J. & Co. 96 Md. 583, 54 Atl. 254; Swift v. Smith, 65 Md. 435, 57 Am. Rep. 336, 5 Atl. 534; Merchants & M. Sav. Bank v. Belington Coal & Coke Co. 51 W. Va. 60, 41 S. E. 398; Clark v. American Coal Co. 86 Iowa, 436, 17 L.R.A. 557, 53 N. W. 291; Divine v. Universal Sewing Mach. Motor Attachment Co. (Tenn. Ch. App.) 38 S. W. 98; Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 399; Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467; Salomon v. Salomon & Co. [1897] A. C. 22; Cook, Corp. 5th ed. §§ 46, 47, 649, pp. 125, 135, 139, 1461, 1462; 1 Morawetz, Priv. Corp. 2d ed. § 290; 3 Pom. Eq. Jur. 3d ed. § 1092, p. 2116.

No cause of action in the right of an associate, based upon secret profits, can arise where the associates themselves not only shared, but covenanted to share, in those profits, as alleged in the present case.

Cook, Corp. 5th ed. § 730, p. 1848; Brown v. Duluth, M. & N. R. Co. 53 Fed. 889; Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co. supra.

No cause of action in favor of the syndicate members can be based on stock (the other 40,000 shares) which they bought from Bigelow and Lewisohn, not from the company. The syndicate took this stock subject to all disabilities of Bigelow and Lewisohn.

Brown v. Duluth, M. & N. R. Co. 53 Fed. 892; Kent v. Quicksilver Min. Co. 78 N. Y. 188; Parsons v. Hayes, 14 Abb. N. C. 433; Cook, Corp. 5th ed. § 735, p. 1883; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 323, 108 Am. St. Rep. 479, 74 N. E. 653.

The syndicate stood in the same relation to the company as Bigelow and Lewisohn.

Blum v. Whitney, supra.

The remedy for any fraud upon the syndicate associates is by suit brought by them individually.

Getty v. Devlin, 54 N. Y. 403; Franey v. Warner, 96 Wis. 236, 71 N. W. 81; Burbank v. Dennis, 101 Cal. 102, 35 Pac. 444; Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 222; Thornton v. Wabash R. Co. supra; Woods Motor Vehicle Co. v. Brady, 181 N. Y. 152, 73 N. E. 674.

The syndicate agreement affords no basis of claim on the part of the company.

Hutchinson v. Simpson, 92 App. Div. 382, 87 N. Y. Supp. 369; Blum v. Whitney, 185 N. Y. 241, 77 N. E. 1159.

If any liability arose, it could only be enforced by the individual subscribers defrauded.

3 Pom. Eq. Jur. 3d ed. § 1092, p. 2116; 1 Morawetz, Priv. Corp. 2d ed. §§ 291, 292; Flagler Engraving Mach. Co. v. Flagler, 19

Fed. 468; Langdon v. Fogg, 21 Blatchf. 392, 18 Fed. 8.

Complainant's claim is grossly inequitable.

Home F. Ins. Co. v. Barber, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

The corporation is being used to obviate the want of equity in the stockholders.

As stockholders they would be unable to meet the requirements of equity rule 94 as to time of ownership of stock.

Home F. Ins. Co. v. Barber, 67 Neb. 658, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 211, 28 L. ed. 121, 122, 3 Sup. Ct. Rep. 573.

The corporation may not be used to work an injustice.

Seymour v. Spring Forest Cemetery Asso. 144 N. Y. 340, 26 L.R.A. 859, 39 N. E. 365; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 254.

The subscribers are not complaining; they have acquiesced. There is no allegation in the bill that they would not have subscribed had they known of the alleged profits. New parties coming in long after cannot substitute their construction or inference as to what the subscribers themselves would or would not have done.

Flagler Engraving Mach Co. v. Flagler, supra.

In equity the corporation assented.

Tompkins v. Sperry, J. & Co. supra; Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co. 13 Colo. 598, 22 Pac. 954; Home F. Ins. Co. v. Barber, 67 Neb. 665, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

Courts disregard the notion of the legal entity of a corporation, when put forward either to protect fraud or to work an injustice.

United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 255.

From all the cases cited by petitioner as imposing liability on promoters, the rule to be deduced is that, before any liability arises, either—

(1) Such promoter must have purchased the property with the funds of the company.

Or (2) having previously purchased the property with his own funds, he must have reimbursed himself from the funds of the company subscribed by others through his inducement.

Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1235.

Or, (3) such promoter must have issued a prospectus containing inducements, false representations, or concealments which tend to create a false impression and which amount to misrepresentation.

Gluckstein v. Barnes [1900] A. C. 240; Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 347.

The cases cited by petitioner have been considered in recent cases in support of like contentions, and have been held inapplicable.

Blum v. Whitney and Hutchinson v. Simpson, supra.

The established rule as to the liability of a promoter upon a sale to the company is as follows: (1) To the corporation, for rescission or for a recovery of secret profits, at the election of the corporation, where the property has been acquired by the promoter with the means furnished by the subscribers to the corporation, and the promoter has failed to disclose to subscribers any profit resulting to him in the transaction.

Chandler v. Bacon, 30 Fed. 538; Loudenslager v. Woodbury Heights Land Co. 58 N. J. Eq. 561, 43 Atl. 671.

(2) To the company, for rescission, where the property has been acquired by the promoter with means independent of the corporation or of the subscribers, the promoter, having induced the subscriptions, takes the subscribers' money in payment, fails to disclose his intended profit, and there has been no conscious assent of all the existing interests in the corporation; but in such case the sole relief is rescission, and the company may not retain the property and recover the secret profits of the promoter, or damages based upon the difference between the value of the stock paid for the property, and tne actual value of the property.

New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 83; L. R. 3 App. Cas. 1235; Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 390; Re Cape Breton Co. L. R. 26 Ch. Div. 221, L. R. 29 Ch. Div. 795; Burland v. Earle [1902] A. C. 83; Insurance Press v. Montauk Fire Detecting Wire Co. 103 App. Div. 476, 93 N. Y. Supp. 134.

(3) To the company for damages where the promoter, although acquiring the property by his independent means, makes false representations to the subscribers of the stock of the company as to the cost of the property to himself.

Gluckstein v. Barnes and Yeiser v. United States Board & Paper Co. supra; Hayward v. Leeson, 176 Mass. 321, 49 L.R.A. 725, 57 N. E. 656.

The term "promoter" is ambiguous, and in each case what the so-called promoter did must be ascertained before liability can be inferred.

Lindley, Companies, 5th ed. 349; Lydney & W. Iron Ore Co. v. Bird, L. R. 33 Ch. Div. 93; Hutchinson v. Simpson, 92 App. Div. 398, 87 N. Y. Supp. 369.

No fiduciary relation existed between the organizers and the technical corporation.

Blum v. Whitney, 185 N. Y. 242, 77 N. E. 1159.

The fiduciary relation must result, if at all, from some agreement to that end, express or implied, between two or more persons.

Re Ambrose Lake Tin & Copper Min. Co. supra; Re Coal Economising Gas Co. L. R. 1 Ch. Div. 187; Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218; Spaulding v. North Milwaukee Town Site Co. 106 Wis. 491, 81 N. W. 1064; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 322, 108 Am. St. Rep. 479, 74 N. E. 653; Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505.

Authorities cited by appellant are to the effect that where stock is sold to obtain the means with which to purchase the properties transferred to the company, relief may be had, at the instance of the company, in behalf of purchasers of such stock. In those cases, prospectuses were issued, and the money of the subscribers was used to acquire the properties. This distinction has been clearly pointed out and followed.

Tompkins v. Sperry, J. & Co. 96 Md. 581, 54 Atl. 254; Salomon v. Salomon & Co. [1897] A. C. 33; Re British Seamless Paper Box Co. L. R. 17 Ch. Div. 467; Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 321, 108 Am. St. Rep. 479, 74 N. E. 653.

If misrepresentations had been made, Bigelow and Lewisohn would have been personally liable, not to the company, but to the subscribers for the damages sustained by each.

Tompkins v. Sperry, J. & Co. supra; 3 Pom. Eq. Jur. 3d ed. § 1099, p. 2116.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or, in the alternative, to recover damages for the sale. The bill was demurred to and the demurrer was sustained. 136 Fed. 915. Then the bill was amended and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the circuit court of appeals. 79 C. C. A. 534, 148 Fed. 1020. The ground of the petitioner's case is that Lewisohn, the deceased, and one Bigelow, as promoters, formed the petitioner that they might sell certain properties to it at a profit; that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure of their profit, and that such an issue in fact was made. The supreme judicial court of Massachusetts has held the plaintiff entitled to recover from Bigelow upon a substantially similar bill. 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653.

The facts alleged are as follows: The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land *now in question, the latter[210 being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who, with Keyser, owned the stock of the Baltimore company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash or in stock of the new corporation the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of $25 each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18 the 100,000 and 30,000 *shares were issued, and it was voted[211 to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was not less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property, and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner, received by Bigelow and Lewisohn or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311, were *obiter*, and do not dispose of the case. Without spending time upon the many *dicta* that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at [212]the outset is that *it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed," or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn, and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18, to offer stock to the public, had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. Salomon v. A. Salomon & Co. [1897] A. C. 22; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Tompkins v. Sperry, 96 Md. 560, 54 Atl. 254. If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation *nunc pro tunc*, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to *come in, and it [213] did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that, from a business point of view, the agreement was not made merely to bind the corporation as it then was, with only 40 shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature. The nominal capital of the corporation was the same when the contract was made and after the public had subscribed. Therefore, what must be meant is, as we have said, that the corporation got a new right from the fact that new men, who did not know what it had done, had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side, and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. Old Dominion Copper Min. & Smelting Co. v. Bigelow, 188 Mass. 315, 327, 108 Am. St. Rep. 479, 74 N. E. 653. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and [214] even might not be a sufficient *reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. Stockton v. Anderson, 40 N. J. Eq. 486, 4 Atl. 642. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate, along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner, along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that 2/15 of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that *will inure to the benefit of 13/15 [215] of the stock that are totally without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that, in the latter case, the innocent purchasers would have no claim against anyone. If we are to seek what is called substantial justice, in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise, and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course, it is competent for legislators, but not, we think, for judges, except by a quasi legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists. *When, as here, after it [216] really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it,—the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 273, ante, 481, 28 Sup. Ct. Rep. 288 Salomon v. A. Salomon & Co. [1897] A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which 13/15 of its stock were parties, for the benefit of the guilty, if there was guilt in anyone, and the innocent alike. We decide only what is necessary. We express no opinion as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, Erlanger v. New Sombrero Phosphate Co. L. R. 3 App. Cas. 1218, Affirming L. R. 5 Ch. Div. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed. (P. 1239.) There never was a moment when the company had assented with knowledge [217] of the facts. *The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts (L. R. 5 Ch. Div. 113), and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Priv. Corp. 2d ed. § 292, there was really no company till the shares were issued.' Here, 13/15 of the stock had been taken by the syndicate, the corporation was in full life, and had assented to the sale with knowledge of the facts before an outsider joined. There, most of the syndicate were strangers to the corporation, yet all were joined as defendants. (P. 1222.) Here, the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. Gluckstein v. Barnes [1900] A. C. 240, certainly is no stronger for the plaintiff, and in Yeiser v. United States Board & Paper Co. 52 L.R.A. 724, 46 C. C. A. 567, 107 Fed. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

Decree affirmed.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY et al., Plffs. in Err.,

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 217–230.)

Commerce — state taxation of railway gross receipts.

The state cannot impose the tax levied by Texas act of April 17, 1905, upon railway companies whose lines lie wholly within the state, "equal to 1 per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, or destined to, points without the state.

[No. 207.]

Argued April 21, 22, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which reversed a judgment of the Court of Civil Appeals of that state, reversing a judgment of the District Court of Travis County, in favor of the state, in an action to recover a tax on the gross receipts of railway companies. Reversed.

See same case below (Tex.) 97 S. W. 71.

The facts are stated in the opinion.

Messrs. **Hiram M. Garwood** and **Maxwell Evarts** argued the cause, and, with Mr. Robert S. Lovett and Messrs. Baker, Botts, Parker, & Garwood, filed a brief for plaintiffs in error:

The act of April 17th, 1905, levies a tax directly upon the receipts of plaintiffs in error from both interstate and foreign commerce.

NOTE.—On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

The tax to be levied directly upon the receipts from interstate and foreign transportation is a regulation of interstate and foreign commerce.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Western U. Teleg. Co. v. Pennsylvania, 128 P. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Com. v. Smith, 92 Ky. 38, 36 Am. St. Rep. 578, 17 S. W. 187.

To tax the occupation of an importer is to tax the import.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

To tax the income of United States securities is to tax the securities themselves.

Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481.

To tax an income from an official position is to tax the office itself.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022.

To tax a bill of lading is to tax the thing transported and the receipts therefrom.

Almy v. California, 24 How. 169, 16 L. ed. 644.

A tax upon the interest is a tax upon the bond.

Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88.

A tax upon the auctioneer is a tax upon the goods sold.

Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

To tax the income of personal property and the rental of lands is to tax the property from which the income is derived.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

To compel the carrier to give information relative to an interstate transit is to burden and regulate interstate commerce.

Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218.

The power of Congress to regulate commerce among the states is exclusive.

Passenger Cases, 7 How. 397, 12 L. ed. 749.

The Federal authority absolutely controls the instrumentalities of interstate commerce.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The Gross Receipts Tax Case, except in so far as it held a tax upon the value of a franchise authorized, has been continuously treated as abandoned.

Delaware & H. Canal Co. v. Com. 1 Monaghan (Pa.) 36, 1 L.R.A. 232. 2 Inters. Com. Rep. 222, 17 Atl. 175; Vermont & C. R. Co. v. Vermont C. R. Co. 63 Vt. 1. 10 L.R.A. 562, 3 Inters. Com. Rep 488. 21 Atl. 262, 731; Northern P. R. Co. v. Raymond, 5 Dak. 356, 1 L.R.A. 732, 2 Inters. Com. Rep. 321, 40 N. W. 538.

The Supreme Court of the United States considers the tax involved in State Tax on Railway Gross Receipts, 15 Wall. 284. 21 L. ed. 164, to be a property tax, and not an occupation tax.

Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 247, 30 L. ed. 888, 895. 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326. 347, 30 L. ed. 1200, 1205. 1 Inters. Com. Rep. 308. 7 Sup. Ct. Rep. 1118; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995. 23 Sup. Ct. Rep. 817; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994. 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

In Maine v. Grand Trunk R. Co. supra. the tax was like that considered in the Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311. 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. and McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614. 18 Sup. Ct. Rep. 242; that is to say. it was what this court calls a commutation tax levied in lieu of all other taxes; and therefore, in its essential nature. a property tax. or a means resorted to by the state for ascertaining the entire value of the property situated in the state and not otherwise taxed. In the case at bar the state has already assessed and equalized for purposes of taxation the properties of plaintiffs in error, and at the time of the levy of this tax. and for long years prior thereto. they had paid taxes. and were paying taxes. to the state upon their full value thus ascertained.

It is contended that Philadelphia & S. Mail S. S. Co. v. Pennsylvania. 122 U. S. 326, 30 L. ed. 1200. 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, is not strictly applicable here for the reason that in that case all of the receipts were interstate and foreign, while here part of the receipts are domestic. That this variance in the facts does not affect the principle or the result is manifest from the uniform line of cases in this court holding that a tax on interstate receipts cannot be sustained because the same tax is levied at the same time upon state receipts.

State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Pickard v. Pullman Southern Car. Co. supra; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 477, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Allen v. Pullman's Palace Car Co. 191 U. S. 171. 48 L. ed. 134, 24 Sup. Ct. Rep. 39; Leloup v. Mobile, 127 U. S. 648, 32 L. ed. 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229: Brennan v. Titusville, 153 U. S. 302, 38 L. ed. 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Asher v. Texas, 128 U. S. 132, 32 L. ed. 369, 2 Inters. Com. Rep. 241. 9 Sup. Ct. Rep. 1; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Stockard v. Morgan, 185 U. S. 37, 46 L. ed. 794, 22 Sup. Ct. Rep. 576.

If a state can be permitted to tax interstate commerce, it can thereby just as effectually regulate such commerce as though it had the direct power so to do.

Southern S. S. Co. v. Portwardens, 6 Wall. 31, 18 L. ed. 749; Welton v. Missouri, 91 U. S. 281, 23 L. ed. 349; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 346, 30 L. ed. 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The name given the tax by the state authority can have no logical weight in determining its validity. The sole question to be determined by the court is, Does the tax directly and immediately interfere with, burden, or regulate interstate commerce?

New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Robbins v. Taxing District, 120 U. S. 496, 30 L. ed. 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

It is held that a state cannot levy a tax of so much per person on interstate passengers (Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; New York v. Compagnie Générale Transatlantique, supra; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Passenger Cases, 7 How. 283, 12 L. ed. 702), a tax of so much per ton on interstate freight (State Freight Tax Case, supra) or on the receipts derived from interstate transportation (Fargo v. Michigan [Fargo v. Stevens] 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra). because such taxation adds to the cost of interstate transportation, and therefore amounts to an obstruction thereof; and if the power of the state be admitted to obstruct interstate commerce by a tax in any degree, there is no limit to the extent to which the state may go.

A state may not ascertain the amount of an occupation tax by reference to interstate business, or to other subjects which the state may not tax directly.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Robbins v. Taxing District, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472. 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785. 6 Sup. Ct. Rep. 635; Miller & Co. v. Goodman, 91 Tex. 43, 40 S. W. 718; Gulf, C. & S. F. R. Co. v. Dwyer, 75 Tex. 579, 7 L.R.A. 478; 16 Am. St. Rep. 926, 12 S. W. 1001; Harman v. Chicago, 147 U. S. 396. 37 L. ed. 216. 13 Sup. Ct. Rep. 306; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557. 575, 30 L. ed. 244. 250, 1 Inters. Com. Rep. 31. 7 Sup. Ct. Rep. 4; State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co. 114 Ind. 155, 1 Inters. Com. Rep. 798, 15 N. E. 814; Southern R. Co. v. Asheville, 69 Fed. 361; Louisville & N. R. Co. v. Eubank, 184 U. S. 27. 46 L. ed. 416. 22 Sup. Ct. Rep. 277; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557. 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

It never was the intention of the justices who concurred in the decision in Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994. 3 Inters. Com. Rep. 807. 12 Sup. Ct. Rep. 163, to hold that a state could levy an occupation tax on a corporation engaged in the transportation of interstate commerce, or could levy a so-called state occupation tax on such corporation, and ascertain the amount thereof by a percentage on the gross receipts of the interstate and foreign commerce; but in fact the tax was there sustained as a property or commutation tax in lieu of all other taxation.

Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Income Tax Cases (Pollock

v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Pacific Exp. Co. v. Seibert, 142 U. S. 349, 35 L. ed. 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Michigan C. R. Co. v. Powers, 201 U. S. 296, 50 L. ed. 762, 26 Sup. Ct. Rep. 459; McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Beale, Foreign Corp. § 758, p. 925.

If it should be held that the tax herein involved is an occupation or privilege tax for doing an intrastate business, and the carrier is not at liberty to withdraw from the intrastate business, it is, under the decision of this court, a burden upon interstate commerce.

Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39.

Where the property of a railway company engaged in interstate commerce has been assessed, valued, equalized, and taxed in the same way as other property situated within the state has been assessed, valued, equalized, and taxed, any occupation tax, or tax under any name, whether levied upon the carrier's right to do business in the state, or levied against it generally without limitation, and whether taking the form of a certain specific amount, or a certain per cent of the receipts derived from its business,—is void under the Constitution and laws of the United States, because it imposes an unjust burden upon an instrumentality of interstate commerce.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 589, 41 L. ed. 274, 16 Sup. Ct. Rep. 1173; Judson, Interstate Commerce, 51; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 445, 38 L. ed. 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Postal Teleg. Cable Co. v. Adams, supra.

Messrs. **William Edward Hawkins** and **Robert Vance Davidson** argued the cause and filed a brief for defendant in error:

The tax prescribed by chapter 141 of the Acts of the Twenty-Ninth Legislature of Texas is an occupation tax.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; State Railroad Tax Cases, 92 U. S. 603, 23 L. ed. 669; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Osborne v. Mobile, 16 Wall. 479, 21 L. ed. 470; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Tex. Const. art. 8, §§ 1, 2, 9, 17; State v. Galveston, H. & S. A. R. Co. (Tex.) 97 S. W. 71; Albrecht v. State, 8 Tex. App. 217, 34 Am. Dec. 737; Languille v. State, 4 Tex. App. 322; State v. Stephens, 4 Tex. 137; Aulanier v. Governor, 1 Tex. 664; State v. Bock, 9 Tex. 369; Thompson v. State, 17 Tex. App. 258; Texas Bkg. & Ins. Co. v. State, 42 Tex. 637; Galveston County v. Gorham, 49 Tex. 289; Blessing v. Galveston, 42 Tex. 660; Fahey v. State, 27 Tex. App. 161, 11 Am. St. Rep. 182, 11 S. W. 108; Higgins v. Rinker, 47 Tex. 396; Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758; Cumberland & P. R. Co. v. State. 92 Md. 668, 52 L.R.A. 766, 48 Atl. 503; Capital City Water Co. v. Board of Revenue, 117 Ala. 303, 23 So. 970; Cooley, Taxn. 3d ed. 1094 et seq.

There is not, in the caption or in the body of the act, one word that squints at the idea of a property tax. To hold that it is a property tax would do violence to all known rules of construction, and ignore the presumption that the legislature intended to pass a constitutional measure.

If possible, an act must be so construed as to uphold it.

Kehrer v. Stewart, 197 U. S. 60, 68, 49 L. ed. 663, 667, 25 Sup. Ct. Rep. 403; Osborne v. Florida, 164 U. S. 654, 41 L. ed. 587, 17 Sup. Ct. Rep. 214; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Sutherland v. De Leon, 1 Tex. 305, 46 Am. Dec. 100; State v. Galveston, H. & S. A. R. Co. supra; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 682, 67 N. E. 69; Gibson County v. Pullman Southern Car Co. 42 Fed. 572; Price Co. v. Atlanta, 105 Ga. 358, 31 S. E. 619.

The mileage basis of apportionment, as applied by the Texas statute to the gross receipts of lines of railroads lying partly within and partly without the state of Texas, is constitutional, valid, and fair, and correctly and justly determines what proportion of the entire receipts of such line of railroad results from business done within the state of Texas.

Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 180, 41 L. ed. 960, 963, 17 Sup. Ct. Rep. 527; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 552, 31 L. ed. 794, 8 Sup. Ct. Rep. 961; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Cooley, Taxn. 3d ed. pp. 163, 164.

A statute may affect interstate commerce without amounting to a regulation thereof.

New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 50, 51 L. ed. 86, 27 Sup. Ct. Rep. 1; Ficklen v. Taxing District, 145 U. S. 21, 36 L. ed. 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; State Tax on Railway Gross Receipts, 15 Wall. 293, 21 L. ed. 167; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Western U. Teleg. Co. v. James, 162 U. S. 656, 40 L. ed. 1107, 16 Sup. Ct. Rep. 934; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Hopkins v. United States, 171 U. S. 594, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 209; Delaware Railroad Tax, 18 Wall. 232, 21 L. ed. 896; Munn v. Illinois, 94 U. S. 135, 24 L. ed. 87; Gulf, C. & S. F. R. Co. v. Dwyer, 75 Tex. 578, 7 L.R.A. 478, 16 Am. St. Rep. 926, 12 S. W. 1001; St. Louis Southwestern R. Co. v. Smith, 20 Tex. Civ. App. 451, 49 S. W. 631; Western Paper Bag Co. v. Johnson (Tex. Civ. App.) 38 S. W. 365; Cook v. Marshall County, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372; Connell v. Western U. Teleg. Co. 108 Mo. 459, 18 S. W. 883; Lumberville Delaware Bridge Co. v. State Assessors (State, Lumberville Delaware Bridge Co., Prosecutors, v. State Assessors) 55 N. J. L. 529, 25 L.R.A. 136, 26 Atl. 711.

The tax is not upon articles of or receipts from interstate commerce, and such receipts are immaterial except in so far as they enter into and become a part of the measure by which the amount of the tax is determined.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Wisconsin & M. R. Co. v. Powers, 191 U. S. 387, 48 L. ed. 231, 24 Sup. Ct. Rep. 107; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 669; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Horn Silver Min. Co. v. New York, 143 U. S. 315, 36 L. ed. 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; New York v. Roberts, 171 U. S. 664, 43 L. ed. 326, 19 Sup. Ct. Rep. 58; Pacific Exp. Co. v. Seibert, 142 U. S. 350, 35 L. ed. 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Cumberland & P. R. Co. v. State, 92 Md. 668, 52 L.R.A. 764, 48 Atl. 503.

"Equal" implies not identity, but duality; the use of one thing as the measure of another. It is so understood in the plain language of the people; it is so interpreted by the courts of the country.

Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 400; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 624; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775.

The question of the validity of a tax on railroads measured by gross receipts from interstate, as well as intrastate, traffic, has been presented to the Supreme Court of the United States seven times in the history of that court, and the validity of the tax has been sustained each time the question has been considered by the court.

Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896;

McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; Wisconsin & M. R. Co. v. Powers, 191 U. S. 387, 48 L. ed. 231, 24 Sup. Ct. Rep. 107.

The fact that railroad companies which are subject to the tax carry United States mail does not render the tax invalid.

Thomson v. Union P. R. Co. 9 Wall. 579, 19 L. ed. 792; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Huntington v. Central P. R. Co. 2 Sawy. 503, Fed. Cas. No. 6,911.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action against certain railroads to recover taxes and penalties. The supreme court of the state held the penalties [224]*to be void under the state Constitution, but upheld the tax. 97 S. W. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the states.

The act in question is entitled, "An Act Imposing a Tax upon Railroad Corporations . . . and Other Persons . . . Owning . . . or Controlling Any Line of Railroad in This State . . . Equal to 1 Per Cent of Their Gross Receipts, . . . and Repealing the Existing Tax on the Gross Passenger Earnings of Railroads." It proceeds in § 1 to impose upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 per centum of its gross receipts, if such line of railroad lies wholly within the state." In § 2 a report, under oath, of "the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th day of June last preceding," and immediate payment of the tax, "calculated on the gross receipts so reported," are required. The comptroller is given power to call for other reports, and is to "estimate such tax on the true gross receipts thereby disclosed," etc. The lines of the railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. The counsel for the state rely upon Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, and maintain, if necessary, that the later overrules the earlier case.

In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites *the earlier[225] cases to the same effect. Later ones are Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161. See also Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 25, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595. 11 Sup. Ct. Rep. 876; Ficklen v. Taxing District, 145 U. S. 1, 22, 36 L. ed. 601, 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 39 L. ed. 1043, 1045, 15 Sup. Ct. Rep. 896; McHenry v. Alford, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 162, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817. In Maine v. Grand Trunk R. Co. supra, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; Fargo v. Hart, 193 U. S. 490, 499, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498. So it has been held that a tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

[226] *Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & M. R. Co. v. Powers, supra, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk R. Co. supra, "an annual excise tax for the privilege of exercising its franchise" was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District, 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep 810; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; McHenry v. Alford, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242.

*"By whatever name the exaction may be [227] called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." Postal Teleg. Cable Co. v. Adams, supra. See New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard v. Morgan, 185 U. S. 27, 37, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; Asbell v. Kansas, 209 U. S. 251, 254, 256, ante, 778, 780, 781, 28 Sup. Ct. Rep. 485.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax "equal to" 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself.

On the contrary, we rather infer from the judgment of the state court and from the [228] argument on behalf of the state *that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state. We are of opinion that the judgments should be reversed.

Judgment reversed.

Mr. Justice **Harlan**, dissenting:

In my opinion the court ought to accept the interpretation which the supreme court of Texas places upon the statute in question. In other words, it should be assumed that, by imposing upon railroads and corporations owning, operating, managing, or controlling any line of railroad in the state, for the transportation of passengers, freight, or baggage, an annual tax "*equal* to 1 per centum of its gross receipts, if such line of railroad lies wholly within the state, and, if such line of railroad lies partly within and partly without the state, it shall pay a tax *equal* to such proportion of the said 1 per centum of its gross receipts as the length of the portion of such line within the state bears to the whole length of such line,"—the state intended to impose only an occupation tax. Such is the construction which the state court places on the statute, and that construction is justified by the words used. We have the authority of the supreme court of Texas for saying that the Constitution of that state authorizes the imposition of occupation taxes upon natural persons and upon corporations, other than municipal, doing business in that state. The plaintiff in error is a Texas corporation, and it cannot be doubted that the state may impose an occupation tax on one of its own corpora- [229] tions, *provided such tax does not interfere with the exercise of some power belonging to the United States.

But it is said that the tax in question, even if regarded as an occupation tax, is invalid, as constituting a direct burden on interstate commerce, the regulation of which belongs to Congress. It is not, in my opinion, to be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct. A state, in the regulation of its internal affairs, often prescribes rules which, in their operation, remotely or incidentally, affect interstate commerce. But such rules have never been held as in themselves imposing direct burdens upon such commerce, and, on that ground, invalid. The state, in the present case, ascertains the extent of business done by the corporation in the state, and requires an annual occupation tax "equal" to a named per centum of the amount of such business. It does not lay any tax directly upon the gross receipts as such, as was the case in Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. In that case the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights, for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce." Here there is no levying upon receipts, as such, from interstate commerce. The state only measures the occupation tax by looking at the entire amount of the business done within its limits, without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the state. Suppose the state, as, under its Constitution, it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the state, equal to a given per cent of all income received by the corporation from its business,—would *the corporation be entitled [230] to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view.

If it did not delay an announcement of the court's decision longer, perhaps, than is desirable, I should be glad to go into this subject at large, and present such a review of the adjudged cases as would show that the views expressed by me are in harmony with previous cases in this court. The present decision, I fear, will seriously affect the taxing laws of many states, and so impair the powers of the several states, in matters of taxation, that they cannot compel their own corporations to bear their just proportion of such public burden as can be met only by taxation.

I dissent from the opinion and judgment of the court.

Mr. Chief Justice **Fuller**, Mr. Justice **White**, and Mr. Justice **McKenna** concur in this dissent.

THOMAS T. FAUNTLEROY, Plff. in Err.,
v.
J. J. LUM.

(See S. C. Reporter's ed. 230–246.)

Courts — jurisdiction — suit to enforce gambling contract.

1. The Mississippi courts are not without jurisdiction of causes of action arising out of gambling transactions in futures because of the provision of Miss. Ann. Code 1892, § 2117, that contracts of that character "shall not be enforced by any court," since such statute only lays down a rule of decision.

Constitutional law — full faith and credit — judgment of sister state.

2. The Mississippi courts cannot deny to a judgment of a Missouri court, based upon an award in arbitration proceedings in Mississippi, the full faith and credit secured by U. S. Const. art. 4, § 1, to the judgments of sister states, because the original controversy grew out of a gambling transaction in futures in Mississippi, which is made a misdemeanor by Miss. Ann. Code 1892, §§ 1120, 1121, 2117, which further provide that contracts of that character shall not be enforced by any court.

[No. 215.]

Argued and submitted April 27, 28, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Warren County, in that state, in favor of defendant in an action upon a judgment of a court of another state. Reversed.

See same case below on first appeal, 80 Miss. 757, 92 Am. St. Rep. 620, 32 So. 290.

The facts are stated in the opinion.

Mr. **Shepard Barclay** argued the cause and filed a brief for plaintiff in error:

The plea of "want of jurisdiction" is supposed by defendant in error to have efficacy sufficient to get behind not merely the final judgment of the Missouri court (which adjudicated the very question again mooted here), but to get behind the prior award of arbitrators voluntarily chosen by the parties concerned, who were not asked to pass upon the illegality of the original contract, and whose decision is an "extinguishment" of the prior matters submitted.

Jones v. Harris, 58 Miss. 298.

The prior question of indebtedness was merged in the award, which partakes of the nature of a judgment.

Searles v. Lum, 81 Mo. App. 607, 89 Mo. App. 235.

The Missouri law in this particular is not different from that prevailing elsewhere.

Jenkins v. Meagher, 46 Miss. 94; Jones v. Harris, supra; Memphis & C. R. Co. v. Scruggs, 50 Miss. 294.

The Missouri court adjudged that the award in Mississippi was valid, and ultimately rendered judgment accordingly.

Searles v. Lum, supra.

There was no want of jurisdiction in the Missouri court; and that issue is surely a Federal question in an action on the judgment of a sister state.

Rogers v. Alabama, 192 U. S. 231, 48 L. ed. 419, 24 Sup. Ct. Rep. 257.

No penal law, as in view in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, is involved in this litiation. The Missouri court adjudicated the issues of civil liability which the pleadings and evidence disclosed, and gave judgment thereon. That judgment is, we respectfully submit, entitled to the same conclusive effect in Mississippi which it had in Missouri. This we consider settled by decisions of this court already cited, as well as by the following:

Huntington v. Attrill, 146 U. S. 684, 36 L. ed. 1133, 13 Sup. Ct. Rep. 224; Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614.

The effect of the Missouri judgment by the law in that state is to merge the original claim in the award, and the award in the judgment, precluding any such inquiry as the plea of defendant seeks to open in this cause.

Wilkerson v. Whitney, 7 Mo. 295; Pitts v. Fugate, 41 Mo. 405; State ex rel. Wilson v. Rainey, 74 Mo. 229; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; Re Copenhaver, 118 Mo. 377, 40 Am. St. Rep. 382, 24 S. W. 161; Julian v. Calkins, 85 Mo. 202; Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210; Hamilton v. McLean, 169 Mo. 51, 68 S. W. 930; Field v. Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

There is no claim of fraud in the procurement of this judgment at bar, or of any other substantial irregularity in the pro-

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NOTE.—As to full faith and credit to be given judgments of courts of another state—see notes to Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; Huntington v. Attrill, 36 L. ed. U. S. 1123; and Bailey v. Mosher, 11 C. C. A. 318.

cedure in Missouri. Illegality in the original claim is not as strong a taint or blemish as fraud would be in the inception of the judgment. Yet this court has held that such fraud could not be used as a defense to an action in one state upon a judgment in another.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Vanfleet, Collateral Attack, 1st ed. 1892, § 558, p. 586, note 5.

The Missouri judgment should have "full faith and credit," under the Constitution, as a direct adjudication of the very issue of illegality advanced herein.

Vaught v. Meador, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; McGilvray v. Avery, 30 Vt. 538; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982; Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711; Indiana ex rel. Stone v. Helmer, 21 Iowa, 370.

Messrs. Robert L. McLaurin, Amos A. Armistead, E. L. Brien, Garner Wynn Green, and Marcellus Green also filed a brief for plaintiff in error:

By allowing a plea to be interposed in the Mississippi courts, in an action upon a Missouri judgment, which was not allowable, in the courts of Missouri, both (a) the Federal Constitution, art. 4, sec. 1, and (b) U. S. Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677, were violated, in that full faith and credit to it were denied, and the faith and credit to which it was entitled in Missouri were not given to it in Mississippi.

Hampton v. M'Connel, 3 Wheat. 235, 4 L. ed. 379; Mills v. Duryee, 7 Cranch, 483, 3 L. ed. 412; M'Elmoyle v. Cohen, 13 Pet. 324, 10 L. ed. 183; Christmas v. Russell, 5 Wall. 301, 18 L. ed. 478; Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679; Haddock v. Haddock, 201 U. S. 567, 50 L. ed. 868, 26 Sup. Ct. Rep. 525.

In Missouri, only judgments by confession shall be void when based on a gambling transaction; and when rendered by default, or upon issue joined and fought as bitterly as was the instant case, there can be no second trial of that which was interposed in the first trial and decided adversely.

Wilkerson v. Whitney, 7 Mo. 296.

The same effect as exists in Missouri under the laws and decisions thereof—the domicil of the rendition of the judgment—must, under the supreme law of the land, be given to it in Mississippi.

Draper v. Gorman, 8 Leigh, 628.

Messrs. **T. C. Catchings** and **O. W. Catchings** submitted the cause for defendant in error:

It is now the settled law in this court that the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and that the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it.

Wisconsin v. Pelican Ins. Co. 127 U. S. 286, 32 L. ed. 242, 8 Sup. Ct. Rep. 1370.

The Constitution does not require a state to give jurisdiction against its will; it does not require a state to provide a court in which all causes of action may be tried; and it is only where the plaintiff can find a court in which he has a right to come that the effect of the judgment is fixed by the Constitution and the act in pursuance of it, which Congress passed.

Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92.

The supreme court of Mississippi has expressly construed the Mississippi statute as denying jurisdiction to the courts of this state to enforce contracts of the character described in Mr. Lum's Plea.

Lemonius v. Mayer, 71 Miss. 514, 14 So. 33.

The construction placed by the supreme court of the state upon its Constitution and laws is binding upon this court.

Anglo-American Provision Co. v. Davis Provision Co. 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587.

The full faith and credit clause of the Federal Constitution was not violated by the court below.

Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Wisconsin v. Pelican Ins. Co. 127 U. S. 266, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

The Federal Constitution can no more be availed of to compel a state to enforce a contract made in violation of its criminal statutes, and which in the proper exercise of its police power its courts are prohibited from enforcing, than the contract clause of the Constitution can be availed of to deprive a state of the authority to save society from destruction. It was expressly held in Stone v. Mississippi, supra, that the contract clause cannot be availed of for such purpose.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the illegality [234]*of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. (The plaintiff in error is an assignee of the judgment, but nothing turns upon that.) The plea was demurred to on constitutional grounds, and the demurrer was overruled, subject to exception. Thereupon replications were filed, again setting up the Constitution of the United States (art. 4, § 1), and were demurred to. The supreme court of Mississippi held the plea good and the replications bad, and judgment was entered for the defendant. Thereupon the case was brought here.

The main argument urged by the defendant to sustain the judgment below is addressed to the jurisdiction of the Mississippi courts.

The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price. "shall not be enforced by any court." Annotated Code of 1892, §§ 1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. There the New York statutes refused to provide a court into which a foreign corporation could come, except upon causes of action arising within the state, etc.; and it was held that the state of New York was under no constitutional obligation to give jurisdiction to its supreme court against its will. One question is whether that decision is in point.

No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to *merits, but [235] the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.

The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words "shall not be enforced by any court" are simply another, possibly less emphatic, way of saying that an action shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would say that the words of the Mississippi statute of frauds, "An action shall not be brought whereby to charge a defendant," Code 1892, § 4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt. See 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. A stronger case than the present is General Oil Co. v. Crain, 209 U. S. 211, 216, ante, 754, 758, 28 Sup. Ct. Rep. 475. We regard this question as open under the decisions below, and we have expressed our opinion upon it independent of the effect of the judgment, although it might be that, even if jurisdiction of the original cause of action *was withdrawn, it [236] remained with regard to a suit upon a judgment based upon an award, whether the judgment or award was conclusive or not.

But it might be held that the law as to jurisdiction in one case followed the law in the other, and therefore we proceed at once to the further question, whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another state.

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Hampton v. M'Connel, 3 Wheat. 234, 4 L. ed. 378. There is no doubt that this quotation was supposed to be an accurate statement of the law as late as Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475, where an attempt of Mississippi, by statute, to go behind judgments recovered in other states, was declared void, and it was held that such judgments could not be impeached even for fraud.

But the law is supposed to have been changed by the decision in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. That was a suit brought in this court by the state of Wisconsin upon a Wisconsin judgment against a foreign corporation. The judgment was for a fine or penalty imposed by the Wisconsin statutes upon such corporations doing business in the state and failing to make certain returns, and the ground of decision was that the jurisdiction given to this court by art. 3, § 2, as rightly interpreted by the judiciary act, now Rev. Stat. § 687, U. S. Comp. Stat. 1901, p. 565, was confined to "controversies of a civil nature," which the judgment in suit was not. The case was not within the words of art. 1, § 1, and, if it had been, still it would not have, and could not have, decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim [237] upon which a judgment is based *may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court "cannot go behind the judgment for the purpose of examining into the validity of the claim." 127 U. S. 293. However, the whole passage was only a *dictum* and it is not worth while to spend much time upon it.

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the act of May 26, 1790, chap. 11, 1 Stat. at L. 122 (Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677), providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." See further Tilt v. Kelsey, 207 U. S. 43, 57, ante, 95, 28 Sup. Ct. Rep. 1. Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. Pitts v. Fugate, 41 Mo. 405; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; Re Copenhaver, 118 Mo. 377, 40 Am. St. Rep. 382, 24 S. W. 161. A judgment is conclusive as to all the *media concludendi* (United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266): and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown. Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873. But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See Godard v. Gray, L. R. 6 Q. B. 139; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982; Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711.

We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes *will be [238] rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides.

Judgment reversed.

Mr. Justice **White**, with whom concurs Mr. Justice **Harlan**, Mr. Justice **McKenna**, and Mr. Justice **Day**, dissenting:

Admonished that the considerations which control me are presumptively faulty, as the court holds them to be without merit, yet so strong is my belief that the decision now made unduly expands the due faith and credit clause of the Constitution, I state the reasons for my dissent.

By law the state of Mississippi prohibited certain forms of gambling in futures, and inhibited its courts from giving effect to any contract or dealing made in violation of the prohibitive statute. In addition, it was made criminal to do any of the forbidden acts. With the statutes in force, two citizens and residents of Mississippi made contracts in that state which were performed therein, and which were in violation of both the civil and criminal statutes referred to. One of the parties asserting that the other was indebted to him because of the contracts, both parties, in the state of Mississippi, submitted their differences to arbitration, and, on an award being made in that state, the one in whose favor it was made sued in a state court in Mississippi to recover thereon. In that suit, on the attention of the court being called to the prohibited and criminal nature of the transactions, the plaintiff dismissed the case. Subsequently, in a court of the state of Missouri, the citizen of Mississippi, in whose favor the award had been made, brought an action on the award, and succeeded in getting personal [239] *service upon the other citizen of Mississippi, the latter being temporarily in the state of Missouri. The action was put at issue. Rejecting evidence offered by the defendant to show the nature of the transactions, and that, under the laws of Mississippi the same were illegal and criminal, the Missouri court submitted the cause to a jury, with an instruction to find for the plaintiff if they believed that the award had been made as alleged. A verdict and judgment went in favor of the plaintiff. Thereupon the judgment so obtained was assigned by the plaintiff to his attorney, who sued upon the same in a court of Mississippi, where the facts upon which the transaction depended were set up and the prohibitory statutes of the state were pleaded as a defense. Ultimately the case went to the supreme court of the state of Mississippi, where it was decided that the Missouri judgment was not required, under the due faith and credit clause, to be enforced in Mississippi, as it concerned transactions which had taken place exclusively in Mississippi, between residents of that state, which were in violation of laws embodying the public policy of that state, and to give effect to which would be enforcing transactions which the courts of Mississippi had no authority to enforce. The court now reverses on the ground that the due faith and credit clause obliged the courts of Mississippi, in consequence of the action of the Missouri court, to give efficacy to transactions in Mississippi which were criminal, and which were against the public policy of that state. Although not wishing in the slightest degree to weaken the operation of the due faith and credit clause as interpreted and applied from the beginning, it to me seems that this ruling so enlarges that clause as to cause it to obliterate all state lines, since the effect will be to endow each state with authority to overthrow the public policy and criminal statutes of the others, thereby depriving all of their lawful authority. Moreover, the ruling now made, in my opinion, is contrary to the conceptions which caused the due faith and credit clause to be placed in the Constitution, and substantially overrules the previous decisions of this court *interpreting that clause. My purpose is to [240] briefly state the reasons which lead me to these conclusions.

The foundation upon which our system of government rests is the possession by the states of the right, except as restricted by the Constitution, to exert their police powers as they may deem best for the happiness and welfare of those subject to their authority. The whole theory upon which the Constitution was framed, and by which alone, it seems to me, it can continue, is the recognition of the fact that different conditions may exist in the different states, rendering necessary the enactment of regulations of a particular subject in one state when such subject may not in another be deemed to require regulation; in other words, that in Massachusetts, owing to conditions which may there prevail, the legislature may deem it necessary to make police regulations on a particular subject, although like regulations may not obtain in other states. And, of course, such also may be the case in Louisiana or any other state. If it be that the ruling now made deprives the states of powers admittedly theirs, it follows that the ruling must be wrong. The inquiry whether the ruling does so becomes, therefore, directly pertinent, not merely from considerations of inconvenience, but as a matter of substantial demonstration. The due faith and credit clause it is now decided means that residents of a state may, within such state, do acts which are violative of public policy, and yet that a judgment may be rendered in another state giving effect to such transactions, which judgment it becomes the duty of the state whose laws have been set at defiance to enforce. It must follow, if one state, by the mere form of a judgment, has this power, that no state has in effect the authority to make police regulations; or, what is tantamount to the same thing, is without power to enforce them. If this be true the doctrine now upheld comes to this,—that no state, generally speaking, possesses police power concerning acts done within its borders if any of the results of such acts may be the subject of civil actions, since the enforcement by the state of its po-[241]lice *regulations as to such acts may be nullified by an exertion of the judicial power of another state. Indeed, the principle, as understood by me, goes further than this, since it not only gives to each of the states in the cases suggested the power to render possible an evasion of the police laws of all the other states, but it gives to each state the authority to compel the other states, through their courts, to give effect to illegal transactions done within their borders. It may not be denied that a state which has lawfully prohibited the enforcement of a particular character of transaction, and made the same criminal, has an interest in seeing that its laws are enforced and will be subjected to the gravest humiliation if it be compelled to give effect to acts done within its borders which are in violation of its valid police or criminal laws. And the consciousness of the enforced debasement to which it would be subjected if compelled to enter a decree giving effect to acts of residents of Mississippi, done within that state, which were violative of the public policy of the state and which were criminal, was clearly shown in the opinion of the supreme court of the state in this case.

When the Constitution was adopted the principles of comity by which the decrees of the courts of one state were entitled to be enforced in another were generally known; but the enforcement of those principles by the several states had no absolute sanction, since they rested but in comity. Now, it cannot be denied that, under the rules of comity recognized at the time of the adoption of the Constitution, and which, at this time, universally prevail, no sovereignty was or is under the slightest moral obligation to give effect to a judgment of a of another sovereignty, when to do so would compel the state in which the judgment was sought to be executed to enforce an illegal and prohibited contract, when both the contract and all the acts done in connection with its performance had taken place in the latter state. This seems to me conclusive of this case, since, both in treatises of authoritative writers (Story, Confl. L. § 609), and by repeated adjudications of *this[242] court, it has been settled that the purpose of the due faith and credit clause was not to confer any new power, but simply to make obligatory that duty which, when the Constitution was adopted, rested, as has been said, in comity alone. Without citing the numerous decisions which so hold, reference is made to a few of the leading cases in which the prior rulings of this court were reviewed, the foregoing principle was stated, and the scope of the due faith and credit clause was fully expounded: Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. A more particular review of those cases will demonstrate why my conviction is that the decision in this case overrules the cases cited.

In Thompson v. Whitman it was directly held that when a judgment of one state is presented for enforcement in another the due faith and credit clause does not deprive the courts of the state in which it is sought to make the judgment effectual from inquiring into the jurisdiction of the court in which the judgment was rendered.

In Wisconsin v. Pelican Ins. Co. a judgment was rendered in Wisconsin against an insurance company for a large amount of money. An original suit was brought in this court upon the judgment. Elaborately considering the authorities, it was held that the due faith and credit clause did not deprive of the right to go behind the face of the money judgment and ascertain the cause of action upon which it had been rendered. In other words, it was expressly decided that there was power to ascertain whether the cause of action was such as to give the Wisconsin court jurisdiction to render a judgment entitled to enforcement in other states. This having been determined, as the proof established that the judgment for money rendered in Wisconsin was for a penalty imposed by the statutes of that state, it was held that the judgment was not entitled to be enforced, because, when the Constitution was framed, no state ever enforced the penal laws of another state. Speaking of the grant of jurisdiction over *"controversies between a state and citizens[243] of another state," it was said (p. 289):

"The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

Certainly, if such was the purpose of the framers in regard to the clause referred to, a like purpose must have been intended with reference to the due faith and credit clause. If a judgment for a penalty in money, rendered in one state, may not be enforced in another, by the same principles a judgment rendered in one state, giving to the party the results of prohibited and criminal acts done in another state, is not entitled to be enforced in the state whose laws have been violated.

Nor do I think that the ruling in the Pelican Case is at all qualified by a sentence quoted in the opinion of the court now announced, taken from page 293 of the report of the Pelican Case. On the contrary, when that sentence is read in connection with its context, in my opinion, it has a directly contrary effect to that for which it is now cited. The passage in full is as follows, the sentence referred to in the opinion in this case being the part embraced in brackets, as found in the original:

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a judgment is presented for affirmative action [while it cannot go behind the judgment for the purpose of examining into the validity of the claim] from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

It seems to me that the words "validity of the claim," used in the sentence in brackets, but pointed out the absence of power, when a judgment is one which is entitled to [244] be enforced, *to relitigate the mere question of liability; and that the language which follows the bracketed sentence, declaring that the court is empowered "to ascertain whether the claim is really one of such a nature that the court is entitled to enforce it," leaves no room for the implication that the bracketed sentence was intended to destroy the very doctrine upon which the decision in the Pelican Case was necessarily based, and without which the decision must have been otherwise.

The decision in the Pelican Case has never been overruled or qualified; on the contrary, that decision has been affirmed and reaffirmed and approvingly cited in many cases. It was expressly approved in the review which was made of the doctrine in Cole v. Cunningham,—an instructive case on the power of a state to restrain its citizens from prosecuting actions in other jurisdictions, when prosecuting such actions was a violation of the laws of the state of the domicil. So, also, the Pelican Case was approvingly cited and commented upon in Andrews v. Andrews, supra, where the doctrine now under consideration was involved. And the authoritative nature of the decision in the Pelican Case was recognized in Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92.

None of the cases to which I have referred conflict with the opinion of Mr. Chief Justice Marshall in Hampton v. M'Connel, 3 Wheat. 234, 4 L. ed. 378, since that case but determined the degree of effect which was to be given to a judgment which was entitled to be enforced, and therefore did not possibly concern the question here presented. It is by me conceded that if the judgment whose enforcement is here in question is one which the courts of Mississippi were bound to enforce under the due faith and credit clause, the courts of that state are obliged to give to the judgment, as declared by Chief Justice Marshall in Hampton v. M'Connel, the same effect and credit which it was entitled to receive in the state where rendered. But, in my opinion, the concession just stated does not in any way influence the question here involved, which solely is whether the judgment was such an one as to be entitled to any credit at all. In other *words, I do not see how the question [245] whether a judgment is without the due faith and credit clause may be controlled by a decision pointing out the extent of the credit to be given to a judgment if it be within that clause.

In addition to the considerations just stated, in my opinion this case is controlled by Anglo-American Provision Co. v. Davis Provision Co. supra, cited in the opinion of the court. In that case it was held that a judgment rendered in the state of Illinois in favor of one corporation against another corporation, both foreign to New York, was not entitled to be enforced in the courts of New York under the due faith and credit clause, because the statutes of New York enumerating the cases in which jurisdiction might be exercised over actions between foreign corporations did not give jurisdiction of such action as was before the court. Now, in this case, in considering the very language found in the statute here in question as contained in a prior statute of the same nature, the supreme court of the state held (Lemonius v. Mayer, 71 Miss. 514, 14 So. 33) "that, by the 2d section of the act of 1882, the complainants were denied access to the courts of this state to enforce their demand . . . for the money advanced for the purchase of the 'futures' in cotton." The want of power in the courts of Mississippi under the local statute is therefore foreclosed in this court by the construction given to the statute by the state court of last resort. At all events, that construction should not be departed from in order to compel the courts of Mississippi to enforce obligations which took origin in that state as the result of the intentional violation of a prohibitory law manifesting the public policy of the state.

No special reference has been made by me to the arbitration, because that is assumed by me to be negligible. If the cause of action was open for inquiry for the purpose of deciding whether the Missouri court had jurisdiction to render a judgment entitled to be enforced in another state, the arbitration is of no consequence. The violation of law in Mississippi could not be cured by seeking [246] to arbitrate in that state in order to fix *the sum of the fruits of the illegal acts. The ancient maxims that something cannot be made out of nothing, and that which is void for reasons of public policy cannot be made valid by confirmation or acquiescence, seem to my mind decisive.

I therefore dissent.

RE JAMES B. WOOD and Jethro P. Henderson, Petitioners.

(See S. C. Reporter's ed. 246-265.)

Bankruptcy — jurisdiction — examining and reducing counsel fees.

1. Jurisdiction of a court of bankruptcy under the bankrupt act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3446), § 60d, to re-examine and reduce, on petition of the trustee, payments and transfers made by a bankrupt to counsel, in contemplation of bankruptcy, for services to be rendered, extends to a case where such counsel are nonresidents of the state and district, and where the transactions occurred and the notice of the proceeding was served outside the district.

Bankruptcy — examining and reducing counsel fees — notice.

2. Such notice, by mail or otherwise, as the court shall direct, of the proceeding taken under the bankrupt act of July 1, 1898, § 60d, to re-examine and reduce payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, is sufficient, provided that an opportunity is given to appear and contest the reasonableness of the charges.

Bankruptcy — jurisdiction — recovering excessive counsel fees — plenary suit.

3. A trustee in bankruptcy cannot maintain a plenary suit in a court of bankruptcy to recover in another jurisdiction excessive payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, where that court has made no order in the proceeding authorized by the bankrupt act of July 1, 1898, § 60d, to re-examine and reduce such payments or transfers.

Jury — constitutional right to jury trial — bankruptcy proceedings.

4. The right to trial by jury in suits at common law, secured by U. S. Const., 7th Amend., is not infringed by the proceeding authorized by the bankrupt act of July 1, 1898, § 60d, to re-examine and reduce payments and transfers of property to counsel, made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered.

[No. 167.]

Submitted March 6, 1908. Decided May 18, 1908.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting three questions for determination: First, as to the jurisdiction of a court of bankruptcy of a proceeding to re-examine and reduce payments and transfers of property to counsel, made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered; second, as to the sufficiency of the notice given outside of the jurisdiction; third, as to whether a trustee in bankruptcy may maintain a plenary suit to recover excessive charges in another jurisdiction. First and second questions answered in the affirmative and the third in the negative.

The facts are stated in the opinion.

Messrs. **W. Scott Bicksler** and **Edmon G. Bennett** submitted the cause for petitioners. Mr. George L. Nye was on the brief.

Mr. **Harvey Riddell** submitted the cause for respondent.

*Mr. Justice **Day** delivered the opinion of [247] the court:

This case is here upon certificate from the circuit court of appeals for the eighth circuit.

The facts certified are: R. H. Williams had been adjudicated a bankrupt on January 13, 1904, in the district court of the United States for Colorado. On the 17th

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NOTE.—As to constitutional right to jury trial—see notes to Supreme Justices v. United States, 19 L. ed. U. S. 658; Eilenbecker v. District Court, 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727.

of May, 1905, it appears that the trustee in bankruptcy (following § 60d) petitioned the court, representing that the bankrupt, in contemplation of filing the petition in bankruptcy, did pay to certain counsel, the petitioners in this case, at Hot Springs, Arkansas, $5,000 in cash, and transfer to them a certificate of deposit for $3,000, and a certificate of deposit for $1,795; that said money and property were transferred to said counsel, Wood and Henderson, by said Williams, in contemplation of the filing of a petition in bankruptcy against him, within four months of the filing thereof, for legal services to be rendered thereafter by said Wood and Henderson. They were thereupon ordered to appear at the office of the referee, in the city of Colorado Springs in the state of Colorado, on June 20, 1905, and show cause, if any they had, why an order should not be made determining and adjudicating the reasonable value of the services rendered by the said attorneys for the said bankrupt, and that, in default of their appearance, the referee would proceed to hear and determine the matter on the evidence presented. It was ordered that a copy of the citation, together with a copy of the petition, be served on Wood and Henderson at Hot Springs, Arkansas, at least twenty days before the day set for the hearing. On the first day of August, 1905, the referee in bankruptcy, holding a court of bankruptcy, made the following order:

"It appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause, issued thereon, returnable on the 20th day of June, A. D. 1905, was duly served on said J. B. Wood and Jethro P. Henderson on [248] the 26th day of May, 1905; and that *the said J. B. Wood and J. P. Henderson, not having appeared on the said 20th day of June, 1905, herein, or shown to this court any cause why this court should not proceed to re-examine the said transaction. And it further appearing to this court that the matter of the said hearing has been duly continued from the said 20th day of June until this 1st day of August, 1905, and that due notice of such continuance has been served upon the said J. B. Wood and Jethro P. Henderson, and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing would be duly had on this day; and the said J. B. Wood and Jethro P. Henderson, not having shown cause against the said application, and the court having heard the evidence on the part of the said trustee, in support of the said application, and the arguments of counsel thereon, and the court being fully advised as to all matters of law and fact arising herein, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him, did, on the 5th day of December, 1902, transfer to said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of $5,000, lawful money of the United States, and one certificate of deposit for the sum of $3,000, issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams for the sum of $1,795, the said two certificates of deposits having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find, on re-examination of the said transaction, that the sum of $800 is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which said money and property were transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only, which the court determines and adjudges to be the reasonable value for said services."

It was thereupon ordered and adjudged that the transaction *was valid as to the [249] sum of $800, found to be the reasonable value of the services, and the trustee was ordered to proceed to recover the excess, being the sum of $8,995, from the said Wood and Henderson. Thereupon, and after this order, Wood and Henderson appeared before the referee for the sole purpose of challenging his jurisdiction to make the foregoing order, upon the ground that neither the parties nor the subject-matter was within the jurisdiction of the district court of Colorado. Thereafter the case was certified to the district court, and in that court Wood and Henderson renewed their objection to the jurisdiction of the district court, and that court affirmed the ruling of the referee; thereupon Wood and Henderson filed their petition in the circuit court of appeals for a review of the order of the district court, and challenged the jurisdiction of that court and the referee to make the order aforesaid, because they were citizens and residents of Arkansas; that the service of the notice of proceedings was made upon them at Hot Springs, in that state; that they had not appeared or submitted to the jurisdiction of the district court except to raise the jurisdictional questions; that the subject-matter of the proceedings was certain transactions which took place wholly within the state of Arkansas. Thereupon the circuit court of appeals certified three questions to this court, as follows:

"1. Has a district court of the United

States, sitting in bankruptcy, in which the proceedings in bankruptcy are pending, or its referee, jurisdiction under § 60d of the bankrupt act to re-examine, on petition of the trustee in bankruptcy, the validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counselor at law, for services to be rendered to him by such attorney or counselor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services, and to direct that the excess may be recovered by the trustee for the [250] benefit of the estate, in the instance where *such attorney or counselor, at the time of receiving such payment or property and at the time of the proceedings in question, was a nonresident of the state or of the district in which the bankrupt court instituting such inquiry is located, and where the money or property was so paid to, and is held by, such attorney or counselor outside of the district in which such court of bankruptcy sits, and the order to show cause, citation, or notice of the proposed hearing is served upon him without, and not within, the district in which such court of bankruptcy sits?

"2. If a district court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counselor outside of the district of the court of bankruptcy, such attorney or counselor being nonresident of the district in which the proceedings in bankruptcy are pending?

"3. May a plenary suit instituted by the trustee in bankruptcy against such attorney or counselor in the district court where the estate in bankruptcy is being administered be maintained upon service of process upon the attorney or counselor, who is a nonresident of the district, outside of that district?"

An answer to these questions involves the construction of § 60d of the bankruptcy act of 1898, which reads:

"60d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on the petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3446.]

This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate, with a view to permitting only a *reasonable amount thereof [251] to be deducted from it because of payments of money or transfers of property to attorneys or counselors in contemplation of bankruptcy proceedings. There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to re-examine the transaction. No other court has authority to determine the reasonable amount for which the transaction can stand. Swartz v. Frank, 183 Mo. 439, 82 S. W. 60.

Section 60d added a feature to the bankruptcy act not found in former acts regulating practice and procedure in bankruptcy; therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States, have no binding effect in the construction of this section.

This is not a case of preference, where part of the estate is transferred to a creditor so as to give to him more of the estate than to others of the same class, under § 60 of the bankruptcy act, nor is it a case of fraudulent conveyance under § 67. It is a transfer in consideration of future services, to be reduced if found unreasonable in amount. In Furth v. Stahl, 205 Pa. 439, 55 Atl. 29, the opinion is by Mr. Justice Mitchell, and, speaking for the supreme court of Pennsylvania, the learned justice, after quoting § 60d, says:

"A pledge or payment for a consideration given in the present, or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or for other reason, among a debtor's creditors who ought in fairness to stand on the same footing. A transaction by which the debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60 therefore expressly recognizes this class of transactions; but, as it is capable of abuse, provides for a re-examination and reduction, *if necessary, to a reasonable [252] amount by the court on petition of the trustee or a creditor."

The same statute was before the court of appeals for the sixth circuit in the case of Pratt v. Bothe, 65 C. C. A. 48, 130 Fed. 670. In that case, in speaking of the provisions of § 60d, Judge Severens, speaking for the court, said:

"It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought, without unnecessary expenditure, to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount,—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors, and proctors in no worse position that it did some other classes of those having business with the debtor."

And the court reached the conclusion that there having been no petition of the trustee or any creditor to inquire into the reasonableness of the compensation to be paid attorneys in contemplation of bankruptcy, his claim should be allowed; and the learned judge adds: "As the rights of the parties are governed by the specific provision of the statute relating to the subject, no question of preference by reason of the payments arises."

The bankrupt act itself leaves no doubt as to what is a preference which can be sued for in another jurisdiction, for the section (60a) provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing [253] *of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property; and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445, as amended by 32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1031.]

To undertake to bring within this definition of a preference, requiring a plenary action for its recovery, the protection given a bankrupt's estate because of a transfer of property or money to an attorney or counselor for services to be rendered in contemplation of filing a petition in bankruptcy, is to add to the clearly-defined preferences contemplated by the act, and is to include entirely different transactions, not embraced in the statutory definition of a preference as Congress has defined that term.

Section 60d is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness.

The section makes no provision for the service of process, and, in that view, such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be heard.

We see no reason why notice of the proceedings under § 60d may not be by mail or otherwise, as the court shall direct, so that an opportunity is given to appear in the court where the *estate is to be administered [254] and contest the reasonableness of the charges in question.

Congress has the right to establish a uniform system of bankruptcy throughout the United States; and, having given jurisdiction to a particular district court to administer and distribute the property, it may, in some proper way, in such a case as this, call upon all interested to appear and assert their rights.

Our attention is called to other cases in which this view has been taken of this section of the bankruptcy act. In Re Lewin, 103 Fed. 850, it was held that a proceeding upon the petition of a trustee under this section is one administrative in its character, and that jurisdiction was not dependent upon service of regular process, as in a suit, but is expressly given by statute, and that a notice of the hearing before the referee, given by mail to the attorneys in interest, a reasonable time before the hearing, was sufficient. In speaking of this section Judge Wheeler says:

"This is not a suit such as is mentioned in that clause of § 23, but is an administrative proceeding, of which the bankruptcy court has express jurisdiction, given by this clause 'd' of § 60, if it would not have any by the general grant of jurisdiction over the bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems to have been rather intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in Re Rosser, cited. He says, at page 502, 41 C. C. A. page 159, 4 Am. Bankr. Rep. and page 567, 101 Fed.:

"'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or [255]judgment sought. The notice *must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.'"

Jurisdiction to re-examine the transfer to counsel was certainly not conferred upon any state court. When the statute says that if the transfer in contemplation of filing a petition in bankruptcy shall be found to be excessive it may be reduced by "the court," is it possible that it was intended to give the state courts jurisdiction of that much of the administration of the estate, and oust the district court of the United States, and perhaps delay the settlement of the estate until the state courts of original and appellate jurisdiction shall determine the reasonableness of the counsel fee provided for in contemplation of bankruptcy? The answer to this question is obvious, and clearly against a construction which has this effect upon the system of bankruptcy to be administered in the district courts of the United States, established by the act of Congress.

It is true that the state courts, under the bankruptcy act as it stood before the amendment of February, 1903, were given jurisdiction to entertain suits to recover preferences, to the exclusion of the Federal courts, unless the defendant consented to be sued in the Federal court. Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. The district courts had jurisdiction only over proceedings in bankruptcy, as distinct from plenary suits against third persons having possession of transferred property, to be exercised when the district court had acquired jurisdiction of the bankrupt's property. Bardes v. First Nat. Bank, supra; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778.

Section 60d is a part of the original bankruptcy act of 1898, and intended by Congress to be a part of a uniform system of bankruptcy, to be consistently administered by the courts given jurisdiction. Suppose, then, instead of obtaining the order in the district court, administering the property, the trustee, because he could not get personal service upon the attorneys, had gone to any court within the limits of the state of Arkansas, *state or Federal, upon the theory[256] of a preference, and obtained jurisdiction by valid service of process,—it was in the power of the defendants to end this suit by refusing to consent to the jurisdiction of such court. If suit was begun in the state court of Arkansas, that court would have answered, as did the supreme court of Missouri in Swartz v. Frank, 183 Mo. 439, 82 S. W. 60,—the bankruptcy act confers no jurisdiction upon a state court to entertain an application of the trustee, or of a creditor, to reduce the provision made for counsel; that jurisdiction is given alone to the district court of the United States administering the property. If the action had been brought in the United States court it would have made the same answer; and, in addition thereto, the jurisdiction of the circuit or district court of the United States could have been ousted, prior to the amendment of 1903, by the defendants withholding their consent to the jurisdiction of the Federal court. It is true that by the amendment referred to (the act of February, 1903) concurrent jurisdiction with the state courts is now given to the Federal courts, of suits for the recovery of property under § 60, subdivision b, and § 67, subdivision e. These last-named sections have reference to suits to recover preferences or fraudulent conveyances. No attempt has been made to change the exercise of jurisdiction under § 60d. The transfer to counsel may be wholly sustained; it is certainly valid to the extent that it is reasonable. It is neither a preference nor a fraudulent conveyance, as defined by §§ 60b or 67e of the act.

It is to be noted that in this case, as the statement of the certificate shows, the district court rendered no judgment against the defendant for a recovery of the excess, but directed the trustee to bring an action therefor. It simply assumed and exercised the jurisdiction conferred by § 60d to determine the amount of the excessive transfer for a counsel fee provided in view of filing a petition in bankruptcy. It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed.

*We reach the conclusion that no re-exami-[257] nation can be had in this transaction, except in the district court of the United States administering the estate.

If the opinions of text writers are to be looked to,—and certainly they are entitled to much respect,—they have spoken with clear meaning as to the section of the bankruptcy act which is the subject-matter now under consideration. In Loveland on Bankruptcy, 3d ed. p. 166, that author says:

"The petition by the trustee to re-examine a transaction between the bankrupt and his attorney under this section is administrative in character, of which the court of bankruptcy has jurisdiction, irrespective of § 23 of the act."

And in Collier on Bankruptcy, 6th ed., the rule is thus stated (p. 492):

"The practice on proceedings of this character—the attorney being usually an officer of the court—is both simple and summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in schedule B (4) of a voluntary petition. Any notice to the attorney directed by the court is sufficient. The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt."

In Brandenburg on Bankruptcy, 3d ed. § 971, it is said:

"This provision [60d] recognizes this fact [the right to employ counsel] and approves the payment by the bankrupt to such attorney of reasonable compensation. The reasonableness of it may be inquired of by the court upon the petition of the trustee or any creditor. This proceeding is administrative in character, in which the jurisdiction of the court is not dependent on the service of process, but is expressly given by statute, and a notice of hearing therein, given by mail a reasonable time before the hearing, is sufficient."

And in the latest work on the subject, Remington on Bankruptcy, the rule is thus stated:

"The court has jurisdiction over the attor-[258]ney to require repayment *by him. Such jurisdiction may be exercised in the bankruptcy proceedings themselves; and its exercise is not violative of the rules regarding the form for suits against adverse claimants; moreover, it is provided for by a special clause of the bankrupt act itself. Such re-examination should be had, however, only on due notice to the attorney concerned." Sec. 2099, p. 1298.

The construction which we have given § 60d does not deprive parties of rights secured under the 7th Amendment of the Constitution to trials by jury in suits at common law where the value in controversy exceeds $20. This provision of the Constitution extends to rights and remedies peculiarly legal in their nature, and such as it was proper to extend in courts of law by the appropriate modes and proceedings of such courts. Shields v. Thomas, 18 How. 253-262, 15 L. ed. 368-372.

This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors. The order contemplated can only be made after reasonable notice, which the facts certified in this case show was given to the petitioners.

The first and second questions should be answered in the affirmative; and the third, as having application to a suit before the order is made in the bankruptcy proceeding, in the negative.

*Mr. Justice **Brewer**, with whom Mr. Justice **Peckham** and Mr. Justice **Moody** concur, dissenting: [259]

I am constrained to dissent in this case, and will state my reasons therefor. The facts are sufficiently given in the opinion of the court. The petitioners were lawyers, living at Hot Springs, Arkansas. They had never been within the state of Colorado, or appeared in the district court except to file their petition for review, and the only service upon them was made in Arkansas by the delivery of a copy of the application and an order to show cause. The district court of Colorado, the court in which the bankruptcy proceedings were had, confirming the report of the referee, adjudged that, of the money paid to the petitioners employed by the bankrupt in anticipation of proceedings in bankruptcy, to render services therein, the sum of $800 was a reasonable compensation for such services, and ordered that the trustee proceed to recover the excess from petitioners. Justification for this order is found in this paragraph of the bankruptcy act:

"Sec. 60d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." 30 Stat. at L. 544, 562, chap. 541, U. S. Comp. Stat. 1901, pp. 3418, 3446.

It is said that this was an administrative, and not a judicial, proceeding. Three possibilities are suggested by the section. One is that the bankruptcy court, after an examination, may find that there is reason to believe that the attorneys have been paid an excessive sum, and direct the trustee to proceed by action in any court acquiring jurisdiction of the persons of the attorneys to recover what, by that court, shall be adjudged excessive. This would be a strictly [260] administrative proceeding, *and if that were the conclusion of the court I should have nothing to say in the way of dissent. Another is that the bankruptcy court both adjudicates the amount of the excess—the amount which has been wrongfully paid to the attorneys, and by which, in effect, they have been preferred to the prejudice of creditors of the bankrupt—and also awards process for the collection of that excess. This is not suggested in the opinion of the court, which, in effect, holds the third possibility,—to wit, that the bankruptcy court can adjudicate the amount of the wrongful prepayment, leaving the recovery of that amount to be accomplished by action in a court acquiring jurisdiction of the person in the ordinary way of legal proceedings. Such a construction is inconsistent with the whole history of the jurisdiction of district and circuit courts since the foundation of the government, and is, indeed, against the construction placed on other provisions of the present bankruptcy law.

By article 6 of the Amendments to the Constitution, criminal prosecutions are limited to "the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." By this, so far as criminal cases are concerned, a state locality of jurisdiction is established beyond the power of Congress to disturb. We need not stop to inquire whether Congress can invest the district court of a single district or state with a jurisdiction in civil cases operative through the whole length and breadth of the country, but has it done so?

The original judiciary act, passed in 1789 (1 Stat. at L. 73, 79, chap. 20), provides, in respect to circuit courts, that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." See also, with respect to the jurisdiction of district courts, Rev. Stat. § 563, U. S. Comp. Stat. 1901, p. 455; and, with respect to that of circuit courts, Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 503.

Construing the judiciary act of 1789, it was said in Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104:

*"The judiciary act has divided the United [261] States into judicial districts. Within these districts a circuit court is required to be holden. The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district; with the single exception of subpœnas for witnesses, within a limited distance."

While the general conditions of jurisdiction of the Federal courts were in some respect changed by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508) the change does not affect the present question.

Before the district court of Colorado could, in ordinary matters, acquire jurisdiction over the person of one not found within its territorial limits, there must be a voluntary appearance of the defendant. He cannot, in an ordinary litigation, be brought into that court by service of process outside the limits of the court's jurisdiction. It has been held that the circuit court of one state has no jurisdiction in matters such as the sale of real property beyond the limits of the state. Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 233, 14 L. ed. 674. It is true that, when suit is brought to enforce any legal or equitable claim against real or personal property within the district where the suit is brought, one who is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, can be brought into court by personal service outside the limits of the district or by publication, as the court may direct; but any adjudication made in that suit, as regards such absent defendant, without appearance, affects only his property within the district. Rev. Stat. § 738. So, where suit is brought to foreclose a [262] mortgage or trust deed on property *situate in several states, the settled practice is for proceedings of foreclosure to be commenced in one court, called the court of primary jurisdiction, and then, in order to establish and maintain judicial control over the property in the other states, obtain ancillary administration in those states; although, if the defendant, the owner of the property, is brought into the court of primary jurisdiction, that court may act upon him and compel him to do with the property that which ought to be done. But, in all these cases, either the person or the property is within the territorial jurisdiction of the court.

When an individual, not an inhabitant of the state or district, and not found therein, is sought to be charged by reason only of his indebtedness to a defendant duly served, jurisdiction is not acquired by mere service of notice outside the state, for the fact of indebtedness does not bring him within the jurisdiction of the court. While, for some purposes, the situs of a debt may accompany the creditor, yet that situs is not sufficient to give to a court jurisdiction of a personal action against the debtor; that must be maintained in the state where the debtor is found.

Now the recovery of an amount due or of property belonging to an individual or an estate is ordinarily by a common-law action. That the claimant is an estate and in the hands of a trustee or receiver does not change the nature of the proceeding. Suppose one of our large railroad properties is in the hands of receivers,—can it be tolerated that the amount of the indebtedness by any individual to that estate can be determined absolutely by the court without a jury? If this be so, what becomes of the protection given by article 7 of the Amendments to the Constitution, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved?" Even if an action has to be brought to obtain the process of execution in the state where the alleged debtor resides, of what significance is it if the amount which is to be recovered is already settled, not by a jury, but by a court, acting independently, and in a prior [263] proceeding? *If the benefit of a trial by jury can in that way be taken away, it will take but little ingenuity on the part of lawmakers to provide for the total destruction of the right of trial by jury,—a right which has been considered of priceless benefit in all English-speaking nations, and the protection of which is imbedded in the national as well as state Constitutions.

How appropriate, in this connection, is the language of Mr. Justice Bradley, delivering the opinion of the court in Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524, 535, where, speaking of an attack upon another constitutional provision, he says:

"Illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Again, it is said that an excessive prepayment to an attorney does not come within the technical definition of a preference, as stated in § 60:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445, as amended, 32 Stat. at L. 799, § 13, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1031.]

An attorney rendering services becomes thereby a creditor of the client; and, if he is paid more for the services than they are worth, he has received as creditor more than he is entitled to, *and comes within the [264] spirit, if not the letter, of § 60a, which provides that "a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." The idea of bankruptcy is that the bankrupt is unable to pay his debts in full; and, if the attorney has received payment in full, he has received a greater percentage of his debt than any other creditor.

While § 60d is not in the bankruptcy act of 1867 [14 Stat. at L. 517, chap. 176], obviously it was specially inserted in the present act for the purpose of making clear the liability of counsel receiving payment in advance. It is simply a declaration that an excessive prepayment to counsel employed with a view to bankruptcy proceedings is to be considered, so far as the excess is concerned, a preference, and recoverable by the trustee in bankruptcy. And, unless a contrary intent be clearly manifested, the proceeding to recover that preference should be in the same way and by the same tribunals that have jurisdiction of any other proceeding to recover money or property given by way of preference. It would be giving an unreasonable extension to language to make it not simply a declaration of the right to recover, but also a limitation of the tribunal in which the recovery can be had or the amount due determined,—a limitation not obtaining in respect to any other preference.

In Re Waukesha Water Co. 116 Fed. 1009, it was held by the district court of the eastern district of Wisconsin that the "bankrupt act 1898 confers no power on a court of bankruptcy to summon before it, by a rule to show cause, third persons who are not parties to the record, and who reside without the district and state, and are there served with the order, and, under the general rules of law governing the Federal courts, in the absence of express authority, such service is ineffectual to confer jurisdiction *in personam*."

[265] *Again, it is suggested that § 60d provides for proceedings in the bankruptcy court,—no vesting of jurisdiction in any other than that court,—and it is said there is no provision for a plenary suit to recover the amount of the excessive prepayment and none for a jury. But, by the bankrupt act of March 2, 1867, the general jurisdiction over bankruptcy proceedings was vested in the court in which they were commenced, and there was no special provision for ancillary proceedings in the courts of other districts, and yet it was decided that those ancillary proceedings might be held; that that seemed to be the necessary result of the general jurisdiction conferred, and to be in harmony with the design and scope of the act. As said by Mr. Justice Bradley, in Lathrop v. Drake, 91 U. S. 516, 518, 23 L. ed. 414, 415:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. . . . Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act."

For these reasons, thus outlined, I must dissent from the opinion and judgment of the court.

*CITY OF ST. LOUIS, Appt., [266]
v.
UNITED RAILWAYS COMPANY and St. Louis Transit Company. (No. 193.)

CITY OF ST. LOUIS, Appt.,
v.
ST. LOUIS & SUBURBAN RAILWAY COMPANY. (No. 194.)

CITY OF ST. LOUIS, Appt.,
v.
ST. LOUIS & MERAMEC RIVER RAILROAD COMPANY. (No. 195.)

(See S. C. Reporter's ed. 266-280.)

Constitutional law — impairing contract obligations — license tax on street railways.

An inviolable contract between a municipality and street railway companies which will prevent the exaction of a license tax under an acknowledged power of the municipality is not created by ordinances passed in the exercise of authority to grant the use of the streets, under which the companies have agreed to pay certain sums for the use of such streets for a given period, where such ordinances do not expressly relinquish the right to exact license fees or taxes.

[Nos. 193, 194, 195.]

Argued March 20, 23, 1908. Decided May 18, 1908.

APPEALS from the Circuit Court of the United States for the Eastern District of Missouri to review decrees enjoining, as impairing contract obligations, municipal ordinances imposing license taxes on street railway companies. Reversed.

The facts are stated in the opinion.

Mr. **William F. Woerner** argued the cause, and, with Mr. Charles W. Bates, filed a brief for appellant:

In construing the ordinance of a city conferring upon a street railway company the authority to construct and operate a street railway, the right of the city to exact license taxes will not be denied, unless such right has been expressly surrendered in the ordinance. Such grants are construed strictly against the corporation companies, and liberally in favor of the public; silence is negation, and doubt is fatal to the claim. There is no such surrender by a grant to operate, construct, and maintain a street railway, though given upon compliance with certain conditions and payments; and when the contract ordinance between the city and the company does not in terms dispense with the payment of a license tax, the rights of the company are not impaired by a subsequent ordinance requiring such payment.

Springfield v. Smith, 138 Mo. 655, 37 L.R.A. 446, 60 Am. St. Rep. 569, 40 S. W. 757; Wyandotte v. Corrigan, 35 Kan. 21, 10 Pac. 99; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 37, 50 L. ed. 65, 75, 25 Sup. Ct. Rep. 705; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 398, 49 L. ed. 1097, 1110, 25 Sup. Ct. Rep. 690; Blair v. Chicago, 201 U. S. 400, 471–473, 50 L. ed. 801, 830–832, 26 Sup. Ct. Rep. 427; State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 194, 39 N. W. 326; Newport News & O. P. R. & Electric Co. v. Newport News, 100 Va. 157, 40 S. E. 645; New Orleans v. Orleans R. Co. 42 La. Ann. 4, 21 Am. St. Rep. 365, 7 So. 59; New Orleans v. New Orleans City & Lake R. Co. 40 La. Ann. 587, 4 So. 512; San José v. San José & S. C. R. Co. 53 Cal. 481; State v. Herod, 29 Iowa, 123; Rochester R. Co. v. Rochester, 205 U. S. 236, 248, 51 L. ed. 784, 789, 27 Sup. Ct. Rep. 469; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. 399, 405, 27 Sup. Ct. Rep. 202.

If the companies wished or intended to have an exemption of any kind from taxation, or felt it was necessary for the profitable working of their business, they should have required a provision to that effect in their charters.

Memphis Gaslight Co. v. Taxing District, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 195, 36 L. ed. 122, 12 Sup. Ct. Rep. 406; Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 42, 50 L. ed. 77, 25 Sup. Ct. Rep. 705; Newport News & O. P. R. & Electric Co. v. Newport News, 100 Va. 163, 40 S. E. 645.

In case of ambiguity in the language, the contemporaneous interpretation placed upon a contract (though it be an ordinance contract with a city) by the parties themselves is entitled to great if not controlling influence,—especially if continued over a long period of time.

St. Louis Gaslight Co. v. St. Louis, 46 Mo. 127; St. Louis v. Laclede Gaslight Co. 155 Mo. 19, 55 S. W. 1003; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 273, 24 L. ed. 411; Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057.

The city cannot bind its hands not to tax, or to exempt from taxes.

Springfield v. Smith, 138 Mo. 645, 37 L.R.A. 446, 60 Am. St. Rep. 569, 40 S. W. 757; State v. Hannibal & St. J. R. Co. 75 Mo. 208; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 448, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69, Affirmed in 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705.

A license fee for revenue is a tax.

St. Louis v. Spiegel, 75 Mo. 145, 90 Mo. 591, 2 S. W. 839; Springfield v. Smith, supra.

Conceding, for the argument, that the franchises of these companies amount to a contract of exemption, yet since at the time of the adoption thereof there existed the paramount power to repeal, alter, or amend, the alleged exemption or relief from future license taxes may be revoked without impairing the obligations of the contract, because the paramount reserved power, which is treated as if embodied in the contract, deprives the contract of its irrevocable character, at least with respect to such provisions as relief from license taxation.

Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 540, 25 L. ed. 912, 915; Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 388–389, 51 L. ed. 237, 240, 241, 27 Sup. Ct. Rep. 74; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 308, 50 L. ed. 491, 494, 26 Sup. Ct. Rep. 261; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26; State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 193, 39 N. W. 326; Citizens' Sav. Bank v. Owensboro, 173 U. S. 639, 644, 43 L. ed. 841, 843, 19 Sup. Ct. Rep. 530, 571; Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 108, 34 L. ed. 898, 902, 11

Sup. Ct. Rep. 236; Atlantic & G. R. Co. v. Georgia, 98 U. S. 365, 25 L. ed. 187.

At all times when any of the right-of way ordinances were enacted which provide for the payments claimed to operate as immunity from the street car license tax, the general ordinance existed, formed part of the charter of the railroads, and was in fact complied with, fixing a tax of $25 per annum on each car; and the city certainly had the right to amend such general ordinance by changing the amount, under its power to alter, amend, or repeal any grant, in whole or in part, even if it had not power so to do otherwise.

State ex rel. Cream City R. Co. v. Hilbert, and Fair Haven & W. R. Co. v. New Haven, supra; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

Mr. **Henry S. Priest** argued the cause and filed a brief for appellees:

The city of St. Louis had the power to grant the right to construct railways in the streets of the city, and the right to operate cars thereon for a definite period and a specific sum, payable as might be agreed. It might do both in a single ordinance, and such an ordinance, when accepted by the grantee, would become a binding and unalterable contract. This we claim it did by the several ordinances pleaded and put in evidence.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

The charter reservation of the right to alter, amend, or repeal is not properly under discussion, because the ordinance which impairs the right does not pretend to be an amendment, alteration, or repeal of the special ordinances granting the several rights to the different companies; and, if it did, the right does not exist in such cases.

Ruschenberg v. Southern Electric R. Co. 161 Mo. 70, 61 S. W. 626; Detroit v. Detroit Citizens' Street R. Co. and Stearns v. Minnesota, supra.

Mr. Justice **Day** delivered the opinion of the court:

These cases were submitted together and involve the effect of certain ordinances of the city of St. Louis, which are alleged to be binding contracts, protected by the Federal Constitution.

A bill was filed in the circuit court of the United States for the eastern district of Missouri by the United Railways Company of St. Louis and the St. Louis Transit Company, the former being the lessor and the latter the lessee of a large system of street railways in the city of St. Louis. The bill seeks to enjoin the enforcement of a certain ordinance, No. 21,087, in the city of St. Louis, passed March 25, 1903, alleging violation of the contract clause of the Constitution and of rights secured by the 14th Amendment. The case was tried upon the bill, answer, replication, and an agreed statement of facts.

*The complainants are the owners of certain rights granted by ordinances to a number of street railway companies in the city of St. Louis, the assignors of the complainants. [270] These ordinances are set out in the record and are quite numerous. Some of them cover quite extended terms, running as long as forty and fifty years. They purport on their face to grant to the railway companies named in the ordinances, their licensees, successors, and assigns, rights in certain streets "to operate, maintain, and construct,"—"to lay down, construct, operate, and maintain,"—"to reconstruct its tracks and maintain and operate its railway thereon." The grants in these ordinances are in consideration of certain undertakings and obligations stated therein on behalf of the railway companies, which are thus epitomized, in the opinion of the learned judge in the case in the circuit court: (1) To commence and complete the work of laying down the tracks and installing the road within certain specified periods. (2) To grade the streets from curb to curb. (3) To construct and keep in repair that portion of the street lying between the tracks and 12 inches outside thereof. (4) To cause cars to be run day and night at certain intervals named in the ordinances. (5) To pay certain stipulated sums of money, or certain percentages of the gross earnings of the several companies, to the city each year during the continuance of the privileges specified in the contract.

At the time these ordinances were passed there was in force in the state of Missouri a certain provision of the state Constitution, namely:

"No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained." [Art. 12, § 20.]

The city charter of St. Louis contains, among others, the following provisions:

[271] *Article 10.

Sec. 1. Authority of municipal assembly in reference to street railroads; may sell franchises or impose a *per capita* tax or a tax on gross receipts.—The municipal assembly shall have power. by ordinance to determine all questions arising with reference to street railroads. in the corporate limits of the city. whether such questions may involve the construction of such street railroads. granting the right of way. or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder. or, as a consideration therefor. to impose a *per capita* tax on the passengers transported. or an annual tax on the gross receipts of such railroad, or on each car. and no street railroad shall hereafter be incorporated or built in the city of St. Louis except according to the above and other conditions of this charter. and in such manner and to such extent as may be provided by ordinance.

There was also in force in the city charter of St. Louis, article 3, § 26, subd. 11, which empowers the city, through its mayor and municipal assembly:

"Eleventh.—To protect rights of city in corporations; grant. regulate, and repeal railway franchises; free passes on street railways prohibited.—To take all needful steps in and out of the state, to protect the rights of the city in any corporation in which the city may have acquired an interest; to have sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part. and to regulate and control the same as to their fares, hours. and frequency of trips, and the repair of their tracks. and the kind of their rails and vehicles; but every right so granted shall cease, unless the work of construction shall be begun within one year from the granting of the right, and be continued to completion with all reasonable practical speed. and it shall be the cause of forfeiture of the rights and privileges derived from the [272] city of any railroad company operating *its road only within this city, which shall allow any person to ride or travel on its road gratuitously or for less than usual price of fare, unless such person be an officer or employee of such company."

The 5th subdivision of § 26 of article 3, clause 5, confers upon the mayor and assembly the power to license, tax, and regulate certain occupations and kinds of business, vehicles. conveyances, etc., among others, street railway cars. As appears from the agreed statement of facts, at the time the ordinances granting rights to the street railways were passed there were sections of the municipal code of St. Louis (2134 et seq.) in force, requiring the street railway companies to pay to the city collector an annual license fee of $25 for each and every car used by them in transporting passengers for hire in the city. These sections were passed under the power conferred to license, tax. and regulate occupations. vehicles. and street railway cars.

The ordinance which is the subject-matter of this controversy is No. 21.087. purporting to impose a tax equal to one mill for each pay passenger on each car. and purporting to be an amendment of the sections of the municipal code fixing the license tax at $25 per car. It is stipulated in the agreed statement of facts that all the railway companies named in the complaint. including the United Railways Company and the St. Louis Transit Company. paid the annual license of $25 per car until the going into effect of ordinance 21.087.

This case was decided by the learned judge of the circuit court upon the theory that the power of the city to give its consent to the use of the streets for the purpose of constructing and operating railroads. and the power to license street railway cars. were both exercised in the special ordinances in question, and that. in fixing the compensation to be paid by the railway companies. an irrevocable contract was made which prevented the city. during the terms of the ordinances, from imposing any license fee or tax for the operation of the cars; for. says the learned judge:

*"There is neither statutory command nor [273] any perceptible reason why both these powers should not be exercised in one and the same ordinance, and such. in my opinion. is the obvious purpose of the original ordinances granted to complainants' assignors.

"The right 'to construct and operate' is conferred in terms admitting of no doubt. The license. which is essentially an occupation tax. is. in my opinion. also fixed in each of the ordinances. The several original ordinances or contracts clearly mean that the city exacted, among other things, certain quarterly or yearly payments of money to be made to it by the railroad companies as a consideration for the grant by it of the right to occupy and use its streets for the purpose of laying down, maintaining. and operating railroad tracks thereon. The law nowhere commands that the license fee, as authorized by the 5th subdivision in question, shall be for annual or other terminal occupation. And I perceive no reason why the city may not at the outset fix such a license for the full term of its grant. This is what I think it did in and by the terms and stipulations of the several ordinances in question."

The theory, then, upon which the bill was framed and this case decided, was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance of March 25, 1903, amending the municipal code in the manner already referred to. These sections of the municipal code, requiring the payment of the license fee, impose a tax, as the main purpose of their enactment is the raising of revenue. St. Louis v. Spiegel, 75 Mo. 145, 146.

The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a state or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or [274]*license fees, at the same time the principle has been established that such deprivation can only follow when the state or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. The section of the Missouri Constitution, and the laws to which we have referred, clearly show that while the franchise of the corporation essential to its existence is derived from the state, the city retains the control of its streets, and the use of them must be acquired from the municipal authorities upon terms and conditions which they shall fix. Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

An examination of the cases in this court shows that it is not sufficient that a street railway company has agreed to pay for the privilege of using the streets for a given term, either in a lump sum, or by payments in instalments, or percentages of the receipts, to thereby conclude the municipality from exercising a statutory authority to impose license fees or taxes. This right still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions.

A leading case is New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406. In that case the city of New Orleans, on October 2, 1879, sold to the New Orleans City Railroad Company, assignor of the plaintiff in error, for the price of $630,000, the right of way and franchises for running certain lines of railroad for carrying passengers within the city, for the term of twenty-five years, and the company agreed to construct its railroad, to keep the streets in repair, to comply with the regulations as to the style and running of cars, rates of fare, and motive power, and to annually pay into the city treasury, upon the assessed value of the road and fixtures, the annual tax levied upon the real estate, the value of the road and fixtures to be assessed by the usual mode of assessment; and the city bound itself not to grant, during the period for which the franchises were sold, a right of way to any other *railroad[275] company upon the streets where their right of way was sold, unless by mutual agreement between the city and the purchaser or purchasers of the franchises.

Afterwards, in the year 1887, under authority of a legislative act, the city imposed a license tax upon the business of carrying on, operating, and running a horse or steam road for the transportation of passengers within the limits of the city, payable annually, and based on the annual gross receipts; when the same exceeded $500,000, the amount to be $2,500. The railroad company admitted its receipts exceeded that sum, and claimed the protection of the Constitution of the United States for its franchise contract extending to January 1, 1906, as above set forth.

This would seem to be as strong a case for the exemption from the license tax as could be made, short of a specific agreement binding the city not to exercise its power in that direction.

This court affirmed the judgment of the supreme court of Louisiana, denying the contention of the railroad company (40 La. Ann. 587, 4 So. 512), and Mr. Justice Gray, speaking for the court, said:

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property.

"In Gordon v. Appeal Tax Court, 3 How. 133, 11 L. ed. 529, upon which the plaintiff in error much relied, the only point decided was that an act of the legislature, continuing the charter of a bank, upon condition that the corporation should pay certain sums *annually for public purposes, and de-[276]

claring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. Piqua Branch of State Bank v. Knoop, 16 How. 369, 386, 401, 402, 14 L. ed. 977, 984, 990, 991; New York v. Tax & A. Comrs. 4 Wall. 244, 259, 18 L. ed. 344, 350; Jefferson Branch Bank v. Skelly, 1 Black, 436–446, 17 L. ed. 173–178; Farrington v. Tennessee, 95 U. S. 679, 690, 694, 24 L. ed. 558, 561, 562; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 328, 29 L. ed. 636, 643, 6 Sup. Ct. Rep. 334, 388, 1191.

"The case at bar cannot be distinguished from that of Memphis Gaslight Co. v. Taxing District, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gasworks and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that, if no express contract against taxation can be found here, it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state Constitution and state laws.' 109 U. S. 398, 400, 27 L. ed. 976, 977, 3 Sup. Ct. Rep. 205, 206."

This case was but an affirmation of the doctrine announced in Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888. The New Orleans case was quoted with approval, and the former cases in this court reviewed in the recent case of New York ex rel. Metropolitan Street R. Co. v. [277]New *York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705. In that case the decision of the New York circuit court of appeals was affirmed, sustaining the right of the state of New York to tax franchises of street railway companies, notwithstanding the railway companies had already paid for the right to construct, maintain, and operate and use street railroads in consideration of payment into the treasury of the city of New York of a percentage of their gross receipts. In that case Mr. Justice Brewer, who spoke for the court, said (pp. 37, 38):

"Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication, and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance of a street railroad. These were all that in terms were granted. As consideration for this grant, the grantees were to pay something, and such payment is nowhere said to be in lieu of, or as an equivalent or substitute for, taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation."

Many state authorities have reached the same conclusion. We will refer to some of them: Springfield v. Smith, 138 Mo. 645, 37 L.R.A. 446, 60 Am. St. Rep. 569, 40 S. W. 757; Wyandotte v. Corrigan, 35 Kan. 21, 10 Pac. 99; State ex rel. Cream City R. Co. v. Hilbert, 72 Wis. 184, 39 N. W. 326; Newport News & O. P. & Electric Co. v. Newport News, 100 Va. 157, 40 S. E. 645; New Orleans v. Orleans R. Co. 42 La. Ann. 4, 21 Am. St. Rep. 365, 7 So. 59; New Orleans v. New Orleans City & Lake R. Co. 40 La. Ann. 587, 4 So. 512; San José v. San José & S. C. R. Co. 53 Cal. 475, 481; State v. Herod, 29 Iowa, 123.

Applying these principles to the ordinances in question, we do not find in them any express relinquishment of the power to levy the license tax which is the subject-matter of this controversy. In some of them is found the language that "such payments are to be in addition to all taxes, as now or afterwards *shall be prescribed by law."[278] In one ordinance concerning consolidation of roads it is agreed, as to certain payments from gross receipts, that such "payments shall be in addition to all other taxes or license fees now or hereafter prescribed by law." In one of them is found the following language:

"Said Lindell Railway Company shall, in lieu of all payments now required of it under any and all previous ordinances, and such as are now, or may hereafter by ordinance passed be required of any railroad company whose tracks it is hereby authorized to acquire, etc., on the first day of (various months) pay to the city of St. Louis, etc. (various sums), which several sums said Lindell Railway Company, its successors and assigns, in consideration of the rights and privileges granted by this ordinance, hereby agrees to pay to the city of St. Louis, at the times, . . ." etc.

The stipulation as to the payments to be in lieu of all other payments under previous ordinances. and such as are now or may, by ordinance, be hereafter passed, etc., in this ordinance, may well be referred to the special ordinances passed under the right to grant the use of the streets "in consideration of the rights and privileges" therein granted. and are not designed to repeal *pro tanto* the section of the municipal code then in effect, imposing a license fee on railway cars operated in the city.

No ordinance contains any express relinquishment of the right to exact a license fee or tax. It is true that the city. in granting the right to use the streets by special ordinance. and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars, is dealing with rights and privileges somewhat similar, but. nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise. including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges [279]conferred. *The city does this by virtue of its power to grant rights and privileges and control their exercise in the streets of the city.—power expressly conferred in the charter of the city.

In the fixing of a license tax upon all companies alike for the privilege of using cars in the city. it is exerting other charter powers. It makes provision uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms. We do not perceive that the exercise of the power to grant privileges in the streets in making terms with companies seeking such rights. in the absence of plain and unequivocal terms to that effect, excludes the city's right to impose the license tax under the power conferred for that purpose.

How, then, stands the case? Is it true that because the city has required and the company has agreed to pay certain sums fixed in amount. or based on the receipts, for the use of the streets, that it has thereby deprived itself of the power to exercise the authority existing at the time the ordinances were passed to license street railway cars, and, in the exercise of that power, to charge a license fee or tax? At the time when the several special ordinances were passed the city of St. Louis had the right, under its charter, to grant the use of the streets for the use of the company, upon the terms which are named in such ordinances. It also had authority under another provision of its charter to require a license fee on certain vehicles, including street railway cars. There was in force a section of the municipal code assessing this license charge at $25 per annum for each car. (This is the code which has been amended by No. 21,087, in controversy.) It is stipulated that, until the passage of the last-named ordinance, the railway companies paid the license fees without objection. It is said in the opinion of the learned judge below that the tax, equal to one mill for each paid passenger, amounts to a tax of 2 per cent on the gross receipts. and is, therefore, an increase on what the company had theretofore agreed to pay. But the tax is not levied on the gross receipts as such. and any license tax, in *whatever sum imposed, would take some-[280] thing from the gross receipts of the company.

It seems to us that this case is virtually decided by the rule laid down in New Orleans City & Lake R. Co. v. New Orleans. 143 U. S. 192. 36 L. ed. 121, 12 Sup. Ct. Rep. 406. which holds that because a street railway company has agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation.

We are of the opinion that an application of settled principles, derived from the decisions of this court, shows that these ordinances do not contain any clearly-expressed obligation on the part of the city surrendering its right to impose further license fees or taxes upon street railway cars. and we are of the opinion that the learned circuit court erred in reaching the contrary conclusion, and in granting a decree perpetually enjoining the enforcement of the ordinance in controversy.

We have discussed this case on the record and briefs filed in No. 193. It was said by the learned counsel in the argument at bar that cases Nos. 194, 195 involved identical questions. For the reasons stated the decrees in the three cases are reversed.

Reversed.

[281]*ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

MAY TAYLOR, Administratrix in Succession of the Estate of George W. Taylor, Deceased.

(See S. C. Reporter's ed. 281-296.)

Error to state court — Federal question — jurisdiction.

1. The contention that the courts of Arkansas have no jurisdiction of causes of action arising under the laws of the Indian territory, giving a right of action for death, does not present a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.

Error to state court — Federal question — delegation of power.

2. Whether or not legislative power is unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 5, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission, is a Federal question within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Supreme Court of the United States to state courts.

Constitutional law — delegation of power — safety appliance act.

3. Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety appliance act of March 2, 1893, § 5, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission.

Master and servant — safety appliance act — drawbars of uniform height.

4. Drawbars of unloaded freight cars are required, by the safety appliance act of March 2, 1893, § 5, to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the 3 inches prescribed as the maximum permitted variation from the standard.

Error to state court — Federal question — instructions given or refused.

5. A party who insists, by way of objection to or requests for instructions, upon a construction of a Federal statute which will lead to a judgment in his favor, sets up a claim of a right or immunity under such statute within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Supreme Court of the United States to state courts.

Master and servant — safety appliance act — duty as to drawbars.

6. The statutory duty imposed upon carriers in absolute terms by the safety appliance act of March 2, 1893, § 5, of using in interstate commerce only such freight cars as comply with the standard fixed as the height for drawbars, is not discharged by furnishing cars constructed with drawbars of the standard height, and by furnishing to competent inspectors and train men a sufficient number of metallic wedges, or "shims," to use as occasion demands to raise to the legal standard drawbars lowered by the natural effect of proper use.

[No. 201.]

Argued and submitted April 14, 1908. Decided May 18, 1908.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which, on a second appeal, affirmed a judgment of the Crawford Circuit Court, in that state, in favor of plaintiff in an action to recover damages for death alleged to have been caused by defendant's negligence. Reversed.

See same case below on first appeal, 71 Ark. 445, 78 S. W. 220; on second appeal, 83 Ark. 591, 98 S. W. 958.

The facts are stated in the opinion.

Mr. **Rush Taggart** argued the cause, and, with Mr. John F. Dillon, filed a brief for plaintiff in error:

Three classes of cases are reviewable by the Supreme Court on a writ of error to a state court:

(1) There must have been drawn in question the validity of a treaty, order, or statute, or an authority exercised in the United States, and the decision must have been against the claim to maintain which either was relied upon.

(2) Or there must have been drawn in question a statute, or order or authority exercised in the state, upon the ground of repugnancy to the Constitution or a law or a treaty of the United States, and the decision must have been in favor of the validity of the state law or authority in question.

(3) Or a title, right, privilege, or immunity must have been claimed under the Constitution or law, or a treaty of, or by virtue of a commission held or authority exercised by, the United States, and the de-

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NOTE.—As to what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

cision must have been against the right so claimed.

Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825.

A case may be considered to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.

Cohen v. Virginia, 6 Wheat. 375, 5 L. ed. 284.

Or whenever the rights set up by a party may be defeated by the one construction or sustained by the opposite construction.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

The right of the Supreme Court to review the final decision of the highest court of the state extends to cases where any right, title, privilege, or immunity is claimed under the Constitution or treaty or statute of, or commission held, or authority exercised under the authority of, the United States, and the decision is adverse. The jurisdiction of the court under this section is not confined to rights created by the Constitution or treaty but extends to rights protected by the Constitution, treaty, or laws of the United States, from whatever source these arise or may spring.

New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109.

Where a party relies upon an act of Congress, and the questions construed by the court and upon which the case turns are whether the party has brought himself within the scope of that act, a Federal question is presented.

San José Land & Water Co. v. San Jose Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

The Congress of the United States alone has the power to provide for uniform and standard height of drawbars; this power was exclusively in the Congress, and could not be delegated to any other association, commission, or agency. When it came to making provision for uniform and standard height of drawbars it was the duty of the Congress to ascertain from any source it desired to use—the American Railway Association, Interstate Commerce Commission, the Master Car Builders' Association, or any number of those railway managers who may be found in any state of the Union—what that uniform and standard height should be, and then provide by specific enactment for its establishment, just as it did with regard to automatic couplers, air brakes, train-brake system, and grab irons. Having failed to do this, this provision has fallen entirely outside the congressional enactment, and is no more enforceable in the courts than if the subject had never engaged the attention of the Congress at all.

Cooley, Const. Lim. 5th ed. 139; 1 Dill. Mun. Corp. 4th ed. p. 78, § 44; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506.

Messrs. Lovick P. Miles, John F. Dillon, and Rush Taggart also filed an additional brief for plaintiff in error:

The construction of the act of March 2, 1893, contended for by plaintiff in error and denied by the trial court and the supreme court of Arkansas, brings this cause within the jurisdiction of the Supreme Court of the United States.

Taylor, Jurisdiction & Procedure of U. S. Supreme Ct. 364; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

The carrier is relieved of liability should the jury find that it had discharged its duty in equipping originally its cars as prescribed by the act, and thereafter exercising due diligence and ordinary care in maintaining its equipment in the condition prescribed in the act of Congress.

United States v. Atchison, T. & S. F. R. Co. 150 Fed. 442; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; United States v. Illinois C. R. Co. 156 Fed. 185; Elmore v. Seaboard Air Line R. Co. 130 N. C. 506, 41 S. E. 786; Missouri P. R. Co. v. Brinkmeier (Kan.) 93 Pac. 621; St. Louis & S. F. R. Co. v. Delk (C. C. App. 6th C.) 158 Fed. 931.

Mr. Oscar L. Miles also filed a brief in opposition to the motion to dismiss.

Mr. **Sam R. Chew** submitted the cause for defendant in error:

This court has no jurisdiction to review the judgment of the state court herein.

Taylor, Jurisdiction & Procedure of U. S. Supreme Ct. §§ 183. 190; Snell v. Chicago, 152 U. S. 193–195, 38 L. ed. 409, 410, 14 Sup. Ct. Rep. 489; Miller v. Swann (Miller v. Anderson) 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Scudder v. Comptroller (Scudder v. Coler) 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Congdon v. Goodman, 2 Black, 574, 17 L. ed. 257; Lessieur v. Price, 12 How. 59, 13 L. ed. 893; Scott v. James, 5 How. 343, 12 L. ed. 181; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; Kennard v. Nebraska, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879; Florida, C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44

L. ed. 276, 20 Sup. Ct. Rep. 222; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Bartlett v. Lockwood, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; Snell v. Chicago, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489; Miller v. National Bank, 106 U. S. 542, 27 L. ed. 289, 1 Sup. Ct. Rep. 536; DeLamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Rae v. Homestead Loan & G. Co. 176 U. S. 121, 44 L. ed. 398, 20 Sup. Ct. Rep. 341; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; Ferry v. King County, 141 U. S. 668–673, 35 L. ed. 895–898, 12 Sup. Ct. Rep. 128; McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; Nelson v. Moloney, 174 U. S. 164–168, 43 L. ed. 934–936, 19 Sup. Ct. Rep. 622; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556–582, 40 L. ed. 536–542, 16 Sup. Ct. Rep. 389; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

A statute conferring authority on a commission to regulate the charges of railroads for transportation of passengers and freight was held to be not a delegation to the commission of the lawmaking power of the legislature.

McWhorter v. Pensacola & A. R. Co. 24 Fla. 417, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129.

An act of the legislature of Minnesota gave the railroad commission of that state authority to determine what are equal and reasonable rates over railroads in that state. It was insisted that the legislature had illegally delegated its power to this commission, but the statute was held valid.

State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co. 38 Minn. 281, 37 N. W. 782.

Congress cannot delegate its power to make a law, but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action dependent.

Dastervignes v. United States, 58 C. C. A. 346, 122 Fed. 30; Wayman v. Southard, 10 Wheat. 15, 6 L. ed. 256; Tilley v. Savannah, F. & W. R. Co. 4 Woods, 427, 5 Fed. 641; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; United States v. Breen, 40 Fed. 402; United States v. Moline, 82 Fed. 592; Dent v. United States, 8 Ariz. 413, 76 Pac. 455; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

Congress must have intended that the couplers should be kept in proper repair for use.

Southern R. Co. v. Carson, supra.

The purpose of the statute is to make a railroad company liable unconditionally for its violation.

United States v. Atlantic Coast Line R. Co. 153 Fed. 918.

Where it is shown that defendant hauled over its line and used in interstate traffic a car on which the safety coupler was broken, and which could not be uncoupled without the necessity of men going between the ends of the cars, it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its car in repair.

United States v. Southern R. Co. 135 Fed. 122. To the same effect see United States v. Great Northern R. Co. 150 Fed. 229.

Mr. Justice **Moody** delivered the opinion of the court:

The defendant in error, as administratrix of George W. Taylor, brought, in the circuit court of the state of Arkansas, this action at law against the plaintiff in error, a corporation owning and operating a railroad. Damages were sought, for the benefit of Taylor's widow and next of kin, on account of his injury and death in the course of his employment as brakeman in the service of the railroad. It was alleged in the complaint that Taylor, while attempting, in the discharge of his duty, to couple two cars, was caught between them and killed. The right to recover for the death was based solely on the failure of the defendant to equip the two cars which were to be coupled with such drawbars as were required by the act of Congress known as the safety appliance law. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. The defendant's answer denied that the cars were improperly equipped with drawbars, and alleged that Taylor's death was the result of his own negligence. At a trial before a jury upon the issues made

[285]by the *pleadings, there was a verdict for the plaintiff, which was affirmed in a majority opinion by the supreme court of the state. The judgment of that court is brought here for re-examination by writ of error. The writ sets forth many assignments of error, but of them four only were relied upon in argument here, and they alone need be stated and considered. It is not, and cannot be, disputed that the questions raised by the errors assigned were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that. But the defendant in error insists that the questions themselves, though properly here in form, are not Federal questions; that is to say, not questions which we, by law, are authorized to consider on a writ of error to a state court. For that reason it is contended that the writ should be dismissed. That contention we will consider with each question as it is discussed.

The accident by which the plaintiff's intestate lost his life occurred in the Indian territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the territory, and was enforced in the courts of Arkansas. The plaintiff in error contends that of such a cause, triable as it was in the courts of the territory created by Congress, the courts of Arkansas have no jurisdiction. This contention does not present a Federal question. Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. Chambers v. Baltimore & O. R. Co. 207 U. S. 142, ante, 143, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the state court, so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final.

The next question presented requires an [286]examination of the *act of Congress upon which the plaintiff below rested her right to recover. Section 5 of the safety appliance law is as follows:

"Within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should such association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

The action taken in compliance with this law by the American Railway Association, which was duly certified to and promulgated by the Interstate Commerce Commission, was contained in the following resolution:

"Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for standard-gauge railroads in the United States, shall be 34½ inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be 3 inches.

*"Resolved, that the standard height of[287] drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for the narrow-gauge railroads in the United States, shall be 26 inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be 3 inches."

It is contended that there is here an unconstitutional delegation of legislative power to the railway association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349,—a case which, in principle, is completely in point. And see Union Bridge Co. v. United States, 204

U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, where the cases were reviewed.

Before proceeding with the consideration of the third assignment of error, which arises out of the charge, it will be necessary to set forth the course of the trial and the state of the evidence when the cause came to be submitted to the jury. This is done, not for the purpose of retrying questions of fact, which we may not do, but, first, to see whether the question raised was of a Federal nature; and, second, to see whether error was committed in the decision of it. Taylor was a brakeman on a freight train, which had stopped at a station for the purpose of leaving there two cars which were in the middle of the train. When this was done the train was left in two parts, the engine and several cars attached making one section and the caboose with several cars attached making the other. The caboose and its cars remained stationary, and the cars attached to the engine were "kicked" back to make the coupling. One of the cars to be coupled had an automatic coupler and the other an old-[288]fashioned link and pin coupler. That *part of the law which requires automatic couplers on all cars was not then in force. In attempting to make the coupling Taylor went between the cars and was killed. The cars were "kicked" with such force that the impact considerably injured those immediately in contact and derailed one of them. One of the cars to be coupled (that with the automatic coupler) was fully and the other lightly loaded. The testimony on both sides tended to show that there was some difference in the height of the drawbars of these two cars, as they rested on the tracks in their loaded condition, but there was no testimony as to the height of the drawbars if the cars were unloaded, except that, as originally made some years before, they were both of standard height. But as to the extent of the difference in the height of the drawbars, as the cars were being used at the time of the accident, there was a conflict in the testimony. One witness called by the plaintiff testified that the automatic coupler appeared to be about 4 inches lower than the link and pin coupler, although another, called also by the plaintiff, testified that the automatic coupler was 1 to 3 inches higher than the other. That the automatic coupler was the lower is shown by the marks left upon it by the contact, which indicated that it had been overridden by the link and pin coupler, and was testified to by a witness who made up the train at its starting point. Two witnesses called by the defendant testified to actual measurements made soon after the accident, which showed that the center of the drawbar of the automatic coupler was 32½ inches from the top of the rail, and that of the link and pin coupler 33½ inches from the top of the rail. The evidence, therefore, in its aspect most favorable to the plaintiff, tended to show that the fully-loaded car was equipped with an automatic coupler which, at the time, was 4 inches lower than the link and pin coupler of the lightly-loaded car. On the other hand, the evidence in its aspect most favorable to the defendant tended to show that the automatic drawbar of the loaded car was exactly 1 inch lower than the link and *pin [289] drawbar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the act of Congress. Before passing to the consideration of the charge to the jury we will for ourselves determine the meaning of that act. We think that it requires that the center of the drawbars of freight cars used on standard-gauge railroads shall be, when the cars are empty, 34½ inches above the level of the tops of the rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed 3 inches; that it does not require that the variation shall be in proportion to the load, nor that a fully-loaded car shall exhaust the full 3 inches of the maximum permissible variation and bring its drawbars down to the height of 31½ inches above the rails. If a car, when unloaded, has its drawbars 34½ inches above the rails, and, in any stage of loading, does not lower its drawbars more than 3 inches, it complies with the requirements of the law. If, when unloaded, its drawbars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law. On this aspect of the case the presiding judge gave certain instructions and refused certain instructions, both under the exception of the defendant. The jury were instructed, the italics being ours:

"1. The act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard-gauge railroads at 31½ inches, and unloaded cars at 34½ inches, measured perpendicularly from the level of the face of the rails to the centers of the drawbars, and this variation of 3 inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law

[290]required *that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height, from the level of the face of the rails to the center of the drawbars, of 34½ inches, *and, when loaded to the full capacity, should be of the uniform height of* 31½ *inches. Now, if the plaintiff, by a preponderance of the evidence, shows a violation of this duty on part of defendant, then this is negligence;* and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety, and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant. . . .

"2. *If there was the difference between the height of the center of the drawbars in the two cars in question, as indicated in the first instruction,* then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point, if such difference existed, and but for its existence the injury and death of Taylor would not have happened, then such difference is said in law to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor, and but for these other co-operating causes the injury and death of Taylor would not have ensued. But if such difference in height of the center of the drawbars as aforesaid actually existed, yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the drawbars, then such difference in the height of the center of the drawbars is not in law an efficient proximate cause of the injury and death of Taylor."

The clear intendment of these instructions was that the law required that the drawbars of a fully-loaded car should be of the height of 31½ inches, and that if either of the cars varied from this requirement the [291]defendant had *failed in the performance of its duty. We find nothing in the remainder of the charge which qualifies this instruction, and we think it was erroneous. We should be reluctant to insist upon mere academic accuracy of instructions to a jury. But how vitally this error affected the defendant is demonstrated by the fact that its own evidence showed that the drawbar of the fully-loaded car was 32½ inches in height. Under these instructions the plaintiff was permitted to recover on proof of this fact alone. From such proof a verdict for the plaintiff would logically follow. The error of the charge was emphasized by the refusal to instruct the jury, as requested by the defendant, "that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full 3 inches between the center of the drawbars of such cars, without regard to the amount of weight in the partially-loaded car." This request, taken in connection with the instruction that the drawbars of unloaded cars should be of the height prescribed by the act, expressed the true rule, and should have been given. On the other hand, a request for instructions, which was as follows: "The court charges you that the act of Congress allows a variation in height of 3 inches between the centers of the drawbars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the drawbar shank or draft line," contained an erroneous expression of the law, and was correctly refused. It is based upon the theory that the height of the drawbars of unloaded cars may vary 3 inches, while the act, as we have said, requires that the height of the drawbars of unloaded cars shall be uniform.

But we have not the power to correct mere errors in the trials in state courts, although affirmed by the highest state courts. This court is not a general court of appeals, with the general right to review the decisions of state courts. We may only inquire whether there has been error committed in the *decision of those Federal ques-[292] tions which are set forth in § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), and it is strenuously urged that the error in this part of the case was not in the decision of any such Federal question. That position we proceed to examine.

The judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Const. art. 3, § 2. The case at bar, where the right of action was based solely upon an act of Congress, assuredly was a case "arising under . . . the laws of the United States." It was settled, once for all time, in Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of state courts so far as they pass upon a law of the United States. It was said in that case (p. 416): "They [the words of the

Constitution] give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;" and it was further said (p. 379): "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." But the appellate jurisdiction of this court must be exercised "with such exceptions and under such regulations as the Congress shall make." Const. art. 3, § 2. Congress has regulated and limited the appellate jurisdiction of this court over the state courts by § 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. Murdock v. Memphis, 20 Wall. 590, 620, 22 L. ed. 429, 439. The words of that section material here are those authorizing this court to re-examine the judgments of the state courts "where any title, right, privilege, [293]*or immunity is claimed under . . . any . . . statute of . . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed . . . under such . . . statute." There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216; Rector v. City Deposit Bank Co. 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. ed. 596, 27 Sup. Ct. Rep. 391; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union.

It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the safety appliance act, which warranted on the evidence a judgment against it, and insisted upon a correct *con-[294] struction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here.

The plaintiff in error raises another question which, for the reasons already given, we think is of a Federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called "shims," which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that, in the caboose of this train, the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that, if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. R. Co. v. Delk, 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty **[295]** is described. It is enacted that "no *cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship *of such **[296]** injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. But, for the reasons before given, the judgment must be reversed.

Mr. Justice **Brewer** concurs in the judgment.

MUNICIPALITY OF PONCE, Appt.,
v.
ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO.

(See S. C. Reporter's ed. 296–324.)

Porto Rican assembly — legislative power — regulating jurisdiction and procedure.

1. The power of the legislative assembly of Porto Rico to confer, by the act of March 10, 1904, original jurisdiction upon the supreme court of Porto Rico for the trial and adjudication of questions between the Roman Catholic Church and the people or any municipality affecting property rights, was embraced in the express authority conferred by the Foraker act of April 12, 1900 (31 Stat. at L. 77, chap. 191), §§ 8, 15, 33, to legislate regarding the jurisdiction and procedure of the Porto Rican courts.

Territories — scope of local legislation.

2. General prohibitions in the act of July 30, 1886 (24 Stat. at L. 170, chap. 818), against the enactment by territorial legislatures of local or special laws in certain enumerated cases, have no application where specific permission to the contrary is granted by the organic act applying to a particular territory.

Evidence — judicial notice — historical and political matters.

3. The history of Porto Rico and its legal and political institutions, up to the time of its annexation to the United States, are matters which must be recognized by the Federal Supreme Court.

Evidence — judicial notice — Spanish law.

4. The Federal Supreme Court will take judicial notice of the Spanish law, as far as it affects the insular possessions of the United States.

NOTE.—On judicial notice generally—see note to Olive v. State, 4 L.R.A. 33.

Religious societies — corporate nature — powers.

5. The Roman Catholic Church in Porto Rico must be regarded as a legal personality, with capacity to sue and to take and hold property, in view of the law and history of the Roman Empire, of Spain, and Porto Rico down to the time of the cession to the United States, and of the recognition accorded to it as an ecclesiastical body by the treaty of Paris of December 10, 1898 (30 Stat. at L. 1758), art. 8, and by the law of nations.

Religious societies — formation and regulation.

6. The various laws of Porto Rico relating to the formation and regulation of business corporations have no application to the Roman Catholic Church of Porto Rico.

Religious societies — title to property.

7. The title of the Roman Catholic Church in Porto Rico to temples erected and dedicated to religious uses is not affected by the fact that some of the funds for building or repairing the churches were public funds, appropriated for that purpose by the municipality of Ponce, where such appropriations were made without reservation or restriction.

[No. 143.]

Argued and submitted March 3, 1908. Decided June 1, 1908.

APPEAL from the Supreme Court of Porto Rico to review a judgment in favor of plaintiff in an action by the Roman Catholic Church in Porto Rico, involving questions affecting the title to certain churches erected and dedicated to religious uses. Affirmed.

Statement by Mr. Chief Justice **Fuller**:

This suit was commenced by the Roman Catholic Church in Porto Rico through the bishop of that diocese, against the municipality of Ponce. The complaint fully set forth the facts by reason of which relief was demanded. A demurrer was interposed, which was overruled, and leave to answer granted, which defendant having failed to do, judgment was entered by default.

It appeared that the Roman Catholic Church had been for many years in the lawful and peaceful possession of two churches, or temples, one in Ponce and one in Playa, the port of Ponce, dedicated, consecrated to, and always used by, the Catholic Church for its worship.

The petition alleged, among other things, that "these temples or churches were built with the funds of the municipality within which they are situated, and since then they have been maintained by donations and alms from the parishioners; and, with respect to them, their possession by the Catholic Church runs for many years, counting from the time when the building *of the same was[298] completed. And none of the buildings of those temples, since they were built, have been used for any other purpose than Catholic worship."

In 1827, by reason of steps taken by the royal alcalde of Ponce and by the then governor of the island, Don Simon de la Torre, a board or commission having jurisdiction over the repairing and conservation of churches advised the governor that it was "in keeping with the decorum of a rich and Christian city like Ponce to have a temple which would show that such conditions existed, covered with an arched roof, and not a roof of thatch," etc.

The petition describes with considerable minuteness of detail the various steps taken to rebuild or repair this church at Ponce. The last estimate for repairs was made in 1872.

It is evident from the record that the sums expended came from several distinct sources—

(1) funds voluntarily contributed by the parishioners; (2) the funds of the "House of the King;" (3) an assessment made in 1835-6; (4) moneys advanced by the municipality.

As to the church at Playa, it was erected in part, at least, with funds donated by the parishioners, and apparently on private land.

Whether the funds subsequently used for repairs of either or both of the temples were in part derived directly from the municipality or merely taken by way of loan was a matter between the central government and the municipality, which could not affect the title of the church under the then-existing relations between church and state.

The complaint then alleged:

"13. The city council of the city of Ponce has included in the inventory of its property the parochial church described in the first allegation of the complaint, on the ground that, from time immemorial, the said church has been included in that inventory. We do not know the exact date on which that inventory may have been made, but, according to the information we have, it only runs back a few years from this date.

*"14. After the change of sovereignty, the[299] city council of Ponce attempted to record in the registry of property the possession of the said church, and the lot upon which the same is situated; but, in view of the fact that this was contrary to the provisions of paragraph 2 of article 25 of the regulations for the application of the mortgage law, which excludes the inscription of public temples used for Catholic worship, the registrar of property of the district of Ponce

refused to make the inscription unless a decision be obtained from the secretary of justice to authorize the same, notwithstanding the prohibitive provisions of the regulations. The secretary of justice rendered the decision applied for, repealing, without being a legislative authority, the said article 25 of the regulations in its second paragraph."

The supreme court of Porto Rico rendered the following judgment at San Juan, Porto Rico, May 21, 1906:

"This cause having heretofore been regularly called for decision upon the demurrer filed by the defendant to the plaintiff's complaint, and the same having been duly considered and overruled, and leave granted the defendant to file an answer within the time prescribed by law, and the said defendant having failed to file such answer, and judgment by default having been duly rendered therein, all of which proceedings appear in the record of this court, it is accordingly now hereby ordered, adjudged, and decreed that the plaintiff have judgment against the defendant as prayed for in the complaint, and that all adverse claims whatsoever of the defendant and of all persons claiming or to claim the property herein described, or any part thereof, under said defendant, are hereby ordered, adjudged, and decreed to be invalid and groundless, null and void; and that the plaintiff be and hereby is declared, adjudged, and decreed to be the sole, true, lawful owner of the houses and lands hereinafter described, as set forth in the complaint, and every part and parcel thereof, and that the title of the plaintiff thereto is adjudged and decreed to be quieted against any and all claims and demands [300]*of the defendant; and the said defendant is hereby perpetually enjoined and estopped from setting up any claim or title whatever thereto, or to any part thereof.

"Said premises are bounded and described as follows:

"'The first is a building constructed of brick and masonry, situated in the city of Ponce, on an area of 65 meters and 8 centimeters wide, including the walk, the building measuring 48 meters long by 24 meters and 67 centimeters wide; bounded on the north by the Plaza Principal; on the south by the Plaza de las Delicias; on the east by the fire department, which is situated on the same lot or yard as the church; on the west by the said Plaza Principal.

"'The second is another building situated in the center of the Plaza de la Playa de Ponce; the superficial area whereof measures 42 meters and 20 centimeters long, by 19 meters and 40 centimeters wide; including the walk, the building measuring 18 meters and 30 centimeters long by 16 meters and 20 centimeters wide. It is bounded on all four sides by the Plaza de la Playa.'

"The inscription of possession heretofore made in the registry of property at Ponce, concerning the above said properties, in favor of the defendant, the municipality of Ponce, is hereby canceled and declared to be utterly null and void, and the proper indorsement must be made upon the said registry indicating the same.

"It is hereby further ordered, adjudged, and decreed that the plaintiff do have and recover all costs of this suit, which are hereby taxed at $—— dollars, and that the defendant be ordered to pay the same within thirty days from this date.

"Thus we pronounce, command, and sign."

The case was then appealed to this court, and the following errors assigned:

"First. That the supreme court of Porto Rico was without jurisdiction of the subject-matter in controversy.

*"Second. That said court was without [301] jurisdiction of the parties.

"Third. That the said court erred in overruling the general demurrer and the eleven special grounds of demurrer interposed by the defendant to the complaint filed in said cause.

"Fourth. That the said court erred in rendering judgment against defendant in said cause, upon the pleadings in said cause, and that the judgment is contrary to the law and the facts as stated in the pleadings in said cause.

"Fifth. That the court erred in entering judgment without taking evidence and proofs or setting the cause upon the docket for hearing.

"Sixth. That the said court erred in rendering judgment in favor of the plaintiff and against the defendant in said cause."

Mr. **Frederick L. Cornwell** submitted the cause for appellant:

The legislature have no authority, under the Constitution, to suspend the operation of a general law in favor of an individual.

Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

The rights of every individual must stand or fall by the same rule or law that governs every member of the body politic or land under similar circumstances; and every partial or private statute, of which the direct purposes are to destroy or affect individual rights, or which does the same thing by offering remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law by another; whereas the like general law affecting the whole community could not have been passed.

Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511.

The legislature cannot exercise judicial functions; therefore cannot except one case, or one party, from the operation of a general rule of law, either as to right or remedy.

Guy v. Hermance, 5 Cal. 73, 63 Am. Dec. 85.

The act of the legislative assembly of Porto Rico, attempting to confer original jurisdiction on the supreme court of Porto Rico for the trial and adjudication of certain property claimed by the Roman Catholic Church in Porto Rico, is a private, or partial, or special act, and is contrary to the organic act of Congress creating a civil government in Porto Rico, and contrary to the general statutes of the United States having force and effect in Porto Rico.

Martin v. Territory, 8 Okla. 41, 56 Pac. 712; Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383.

The act of the legislative assembly of Porto Rico is an attempt to create a special court for the trial of the rights and obligations of particular parties.

Cooley, Const. Lim. 3d ed. p. 392; Bank of State v. Cooper, 2 Yerg. 599, 24 Am. Dec. 517.

Messrs. **Frederic R. Coudert** and **Howard Thayer Kingsbury** argued the cause, and, with Mr. Paul Fuller, filed a brief for appellee:

The law under which this suit was brought by the church is a valid enactment of the legislative assembly of Porto Rico, wholly within the scope of its powers under the organic act.

Kent v. Porto Rico, 207 U. S. 113, 117, ante, 127, 128, 28 Sup. Ct. Rep. 55; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 543, 7 L. ed. 242, 255.

The act under consideration is not objectionable as a special law.

Vanzant v. Waddel, 2 Yerg. 260; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 105, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; People ex rel. Kenny v. Folks, 89 App. Div. 179, 85 N. Y. Supp. 1100; United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Bank of Newbern v. Taylor, 6 N. C. (2 Murph.) 266.

The history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States are matters which this court can no more overlook or ignore than it can the history and the ancient laws or institutions of the states of Massachusetts or New York, when matters come before it from these jurisdictions.

Frémont v. United States, 17 How. 542, 557, 15 L. ed. 241, 245.

The court will take judicial notice of the Spanish law as far as it affects our insular possessions. It is *pro tanto* no longer foreign law.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808; Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121; Perez v. Fernandez, 202 U. S. 80–95, 50 L. ed. 942–947, 26 Sup. Ct. Rep. 561; Ortega v. Lara, 202 U. S. 339, 50 L. ed. 1055, 26 Sup. Ct. Rep. 707.

The Roman Catholic Church has been recognized as possessing a legal personality and a capacity to take and acquire property since the time of the Emperor Constantine.

Code of Emperor Justinian, Book 1, title 2, ¶ 1; I. Tissot, p. 27; 1 Milman's History of Latin Christianity, pp. 507, 535–537; Partidas, part 1, title 10, law 2, title 11, law 1, title 14, laws 1, 2, part 3, title 29, laws 6, 26; I Pollock & M. History of English Law, 2d ed. pp. 133, 499, 506; Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi, L. R. 31 Ind. App. 209; Maharanee Shibessouree Debia v. Mothooranath Acharjo, 13 Moore, Ind. App. 270; Terrett v. Taylor, 9 Cranch, 43, 49, 3 L. ed. 650, 652; Werlein v. New Orleans, 177 U. S. 390, 401, 44 L. ed. 817, 822, 20 Sup. Ct. Rep. 682; Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521.

The Spanish law as to the juristic capacity of the church in Porto Rico at the time of the cession is in no wise anomalous, but merely follows the principles of the Roman law which have had such universal acceptance, both in the law of continental Europe and in the common law of England.

Walton, Civil Law in Spain & Spanish America, pp. 523, 524; Moses, Establishment Spanish Rule in America, pp. 242, 243; 1 Sir Arthur Helps, Conquest of America, p. 178; 3 Alcubilla, art. Concordatos, pp. 94, 109; Olivart, Tratados Convenias de España; 3 Alcubilla, art. Constitución Politica, p. 357.

At the very least, and even assuming that for centuries the church had not been recognized as a body of equal importance with the state in Porto Rico, but that it was a merely *de facto* organization or association, holding property, it would nevertheless have sufficient standing to maintain this suit.

24 Am. & Eng. Enc. Law, Religious Societies, p. 331.

In the Philippines a judicial answer has been given to the question of the corporate capacity of the church and its right to hold the property which it had acquired under the Spanish régime.

Barlin v. Ramirez, 7 Philippine, 57.

The proposition that, because the church may have originally been built by the people of the municipalities, hence the title is in the municipality, has no basis in law or history.

Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 53, 34 L. ed. 478. 494, 10 Sup. Ct. Rep. 792.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This suit was brought under an act of the legislative assembly of Porto Rico, entitled, "An Act to Confer Original Jurisdiction on the Supreme Court of Porto Rico for the Trial and Adjudication of Certain Property Claimed by the Roman Catholic Church in Porto Rico," approved March 10, 1904, as follows:

"Be it enacted by the legislative assembly of Porto Rico:

"Sec. 1. Original jurisdiction is hereby conferred on the supreme court of Porto Rico for the trial and adjudication of all questions now existing, or which may arise, between the Roman Catholic Church in Porto Rico and the people of Porto Rico, affecting property rights, whether real or personal or mixed, claimed by either party.

"Sec. 2. The attorney general of Porto Rico shall be authorized to accept service for the people of Porto Rico of any citation summons, or other process issued by said court in said proceedings.

"Sec. 3. The supreme court, for the purpose of such trial and adjudication, shall have the right to issue process for witnesses and to receive and hear testimony, and the procedure in said court shall be the same, as near as may be, as that prescribed for the district courts of Porto Rico in civil [304]cases, and *the supreme court shall have full power to enter any and all orders and decrees that may be necessary to a final and full adjudication of all the claims of either party to the proceedings, and may issue all writs or process necessary to enforce the jurisdiction hereby conferred upon said court: Provided, that the attorney general of Porto Rico shall at once prepare for such hearing and trial, and, if the said Roman Catholic Church does not commence proceedings under this act within three months after its passage and approval, then, in that event it shall be the duty of the attorney general to commence said proceedings in behalf of the insular government.

"Sec. 4. After the issues have been fully submitted to said court upon the law and the facts, and after hearing the arguments of the respective parties, or, their counsel, the court shall enter a final judgment and decree, fully determining the rights of either or both of the parties, and vesting the title to the subject-matter of the controversy, or any part thereof, in such party or parties as the court may deem entitled thereto. The said court may issue any and all writs that may be necessary to place the parties in quiet possession of the property so adjudicated to them, or either of them. But nothing in this act shall be construed to limit the right of appeal, either of the people of Porto Rico or of the Roman Catholic Church, but either party may appeal from the final judgment or decree of said court to the Supreme Court of the United States, in the manner provided by law for appeals to that court generally.

"Sec. 5. Original jurisdiction is hereby also conferred on the supreme court of Porto Rico for the trial and adjudication of all questions now existing, or which may arise, between the Roman Catholic Church in Porto Rico and any municipality of Porto Rico, affecting property rights, whether real or personal or mixed, claimed by either party.

"Sec. 6. The mayor of any municipality within Porto Rico, wherein may be situated any property over which such questions exist, shall be authorized to accept service for the municipality *of any citation, summons, [305] or other process issued by said court in said proceedings.

"Sec. 7. For the purpose of such trial and adjudication and appeal, all the provisions of §§ 3 and 4 of this act shall be deemed applicable.

"Sec. 8. This act shall take effect from and after its passage."

The power to confer this jurisdiction was derived from the act of Congress creating an organized government for Porto Rico, approved April 12, 1900, usually called the Foraker act (31 Stat. at L. 77, chap. 191).

Section 8 of this act provides:

"That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict wth the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

It is further provided (§ 15):

"That the legislative authority hereinafter provided shall have power, by due enactment, to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may, from time to time, see fit."

The paragraph relating to the judiciary is as follows (§ 33):

"That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of general orders numbered 118, as promulgated by Brigadier General Davis, United States Volunteers, August 16th, 1899, and including also the police courts established by general orders numbered 195, promulgated November 29th, 1899, by Brigadier General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all [306] of *which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and *attachés* thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said general orders numbered 118 and 195, until otherwise provided by law: Provided, however, That the chief justice and associate justices of the supreme court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent of the executive council, and all other officials and *attachés* of all the other courts shall be chosen as may be directed by the legislative assembly, which shall have authority to legislate from time to time, as it may see fit, with respect to said courts and any others they may deem it advisable to establish, their organization, the number of judges and officials and *attachés* for each, their jurisdiction, their procedure, and all other matters affecting them."

Clearly, under these sections of the organic act the legislative assembly had express authority to legislate regarding the jurisdiction and procedure of its courts. While the jurisdiction of the other courts might be changed, the proper interpretation of the statute prevents the legislative assembly from passing an act in any wise affecting the jurisdiction of the supreme court or the district courts.

In Kent v. Porto Rico, 207 U. S. 113, 115, ante, 127, 28 Sup. Ct. Rep. 55, 56, it was contended that an act of the local legislature, creating additional judicial districts, and changing those fixed by the military orders and local law, referred to in the organic act, and also reducing the number of judges in the district court from three to one, "was void, because in conflict with the provisions of the 33d section of the act of Congress," the same one here relied upon by the appellant as making the jurisdiction of the courts unchangeable save by Congress.

But to that contention this court replied:

"The argument is that this local law, in so far as it changed *the district courts, and [307] especially in so far as it provided for one instead of three judges to preside over each court, was void, because in conflict with the provision of the 33d section of the act of Congress. The contention amounts to this, that there were no district courts in Porto Rico from the time of the going into effect of the Porto Rican act, in 1904, up to the present time. Whilst the proposition presents a formal Federal question, we think it is clear that it is so frivolous as to bring it within the rule announced in American R. Co. v. Castro, 204 U. S. 453, 51 L. ed. 564, 27 Sup. Ct. Rep. 466. We say this, because we think that no other conclusion is reasonably possible from a consideration of the whole of § 33 of the act of Congress and the context of that act, particularly § 15 thereof, both of which are reproduced in the margin.

"We do not deem it necessary to analyze the text of the act of Congress to point out the inevitable result just stated, since the obvious meaning of the act is established by a decision heretofore rendered. Dones v. Urrutia, 202 U. S. 614, 50 L. ed. 1172, 26 Sup. Ct. Rep. 767. . . . On appeal to this court the questions raised were fully argued in printed briefs, but were deemed to be of such a frivolous character as not to require an opinion, and were hence disposed of *per curiam*, referring to the provisions of the statute and pertinent authorities."

It is true that the act of Congress of July 30, 1886 (24 Stat. at L. 170, chap. 818), enacts "that the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases;" and among the prohibitions are those against "regulating the practice in courts of justice," and granting "to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise." But such general prohibitions have no application where specific permission to the contrary is granted by the organic act applying to the particular territories.

*This act is not a special law regulating [308] the practice in courts of justice, nor one granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. It confers the same right upon the people of Porto Rico and upon the municipalities as upon the church.

In the organic acts for the territories (59th Congress, Senate Doc. 148) it appears that it has been usual for Congress to give the local legislatures the power to regulate the jurisdiction and procedure of their courts.

In Hornbuckle v. Toombs, 18 Wall. 648, 21 L. ed. 966, after reviewing the question, the court, speaking through Mr. Justice Bradley, said:

"Whenever Congress has proceeded to organize a government for any of the territories it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. . . . The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature; and the jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the state courts

. . . . . .

"From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves."

The Porto Rican act under consideration merely repeats the action of Congress in the past in organizing other territories. The appellant contends "that the Roman Catholic Church of Porto Rico has not the legal [309] capacity to sue, for the *reason that it is not a judicial person, nor a legal entity, and is without legal incorporation. . . . If it is a corporation or association, we submit to the court that it is necessary for the Roman Catholic Church to specifically allege its incorporation, where incorporated, and by virtue of what authority or law it was incorporated; and, if a foreign corporation, show that it has filed its articles of incorporation or association in the proper office of the government, in accordance with the laws of Porto Rico."

Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory. The history of Porto Rico and its legal and political institutions up to the time of its annexation to the United States are matters which must be recognized by this court as the ancient laws and institutions of many of our states when matters come before it from their several jurisdictions.

The court will take judicial notice of the Spanish law as far as it affects our insular possessions. It is *pro tanto* no longer foreign law.

The Civil Code in force in Cuba, Porto Rico, and the Philippines at the time of the treaty of Paris [30 Stat. at L. 1754] contains these provisions (art. 35):

"Art. 35. The following are judicial persons: The corporations, associations, and institutions of public interest recognized by law. Their personality begins from the very instant in which, in accordance with law, they are validly established."

"Art. 38. Judicial persons may acquire and possess property of all kinds as well as contract obligations and institute civil or criminal actions in accordance with the laws and rules of their establishment.

"The church shall be governed in this particular by what has been agreed upon by both powers, and educational and charitable institutions by the provisions of special laws."

The phrase "agreed upon by both powers" refers to the *concordats* or treaties between the holy See and the Spanish Crown, which recognize the right of the church to possess and acquire property.

*The law thus recognized at the time of [310] the cession the juristic personality and legal status of the church.

In Ortega v. Lara, 202 U. S. 339, 342, 50 L. ed. 1055, 1056, 26 Sup. Ct. Rep. 707, 708, this court said:

"By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States, so far as applicable, would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.

"Nevertheless, and apparently largely out of abundant caution, the 8th section of the act of April 12, 1900, provided: 'That the laws and ordinances of Porto Rico, now in force, shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States, . . . '"

Article 8 of the treaty of Paris is to this effect:

"And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belongs to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories, renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be."

[311] *This clause is manifestly intended to guard the property of the church against interference with, or spoliation by, the new master, either directly or through his local governmental agents. There can be no question that the ecclesiastical body referred to, so far as Porto Rico was concerned, could only be the Roman Catholic Church in that island, for no other ecclesiastical body there existed.

The mortgage law, in force in Porto Rico both before the cession and at present, provided for the registration generally of "title deeds of real property or property rights owned or administered by the state or by civil or ecclesiastical corporations, subject to the provisions of laws or regulations." (Art. 2, paragraph 6.)

But this was qualified by the general regulations for the execution of the mortgage law (see translation of general regulations for the execution of the mortgage law for Cuba, Porto Rico, and the Philippines, War Department, 1899), which provided:

"Art. 25. Exceptions to the record required by article 2 of the law are—

"First. Property which belongs exclusively to the eminent domain of the state, and which is for the use of all, such as the shores of the sea, islands, etc., etc., walls of cities and parks, ports and roadsteads, and any other analogous property during the time they are in common and general use. . . .

"Second. Public temples, dedicated to the Catholic faith."

Of course, the temples in question were not subject to the registration law, and were recognized as a peculiar class of property, wholly different from that belonging to private individuals.

Counsel for appellee well argues that the Roman Catholic Church has been recognized as possessing a legal personality and the capacity to take and acquire property since the time of the Emperor Constantine. And he quotes from the Code of Justinian the law of Constantine of 321 to that effect.

The strictest prohibition against alienating the property of *the church exists in [312] that code, and it provides that the alienation of church property shall not take place, even with the assent of all the representatives of the church, since these rights "belong to the church," and the church is the mother of religion; and as faith is perpetual, its patrimony must be preserved in its entirety perpetually.

In his History of Latin Christianity (vol. 1, p. 507), Dean Milman says:

"The Christian Churches succeeded to that sanctity which the ancient law had attributed to the temples; as soon as they were consecrated they became public property, and could not be alienated to any other use. The ground itself was hallowed, and remained so even after the temple had been destroyed. This was an axiom of the heathen Papinian. Gifts to temples were alike inalienable, nor could they be pledged; the exception in the Justinian code betrays at once the decline of the Roman power, and the silent progress of Christian humanity. They could be sold or pledged for the redemption of captives,—a purpose which the old Roman law would have disdained to contemplate."

And Milman also points out that in the barbarian codes most sweeping provisions are found, recognizing the right of the church to acquire property, and its inalienability when acquired. Church property everywhere remained untouched by the rude hands of invading barbarians. Trespass upon or interference with such property was severely punished, and gradually it became exempted from taxation.

The historic continuity of the juristic conception, exemplified by the civil law, is mantained by the Partidas, the fundamental code of ancient Spanish law, whose provisions show that whoever built a church was required to provide it with an adequate perpetual endowment as well as a site, and refute any idea of a retention of ownership by the donor of the land or the contributors to the building.

In law 1, title 11, part 1, it is stated:

" . . . And, in addition, the churches have other privileges; *that as to the estates [313] which have been given or sold or left to them lawfully by will, even if they have not received possession of them, they get the title and right which has been given or sold or left to them, so that they can demand them for their own against whomsoever may hold them."

In law 1, title 14, part 1, we find a general prohibition against the alienation of church property, certain exceptions being enumerated.

While law 2 provides that, when alienation is permitted, it shall be made only by the prelates, with the authorization of their chapters; that lands shall be sold only in default of sufficient personalty to meet the requirements of the case, and that lands given by the Emperor or the King shall never be alienated.

Then law 6, title 29, part 3, the law governing prescription, provided that "a consecrated, or holy, or religious thing cannot be acquired by lapse of time."

Again, law 26, title 29, part 3, provided that lands belonging to the church (but apparently, not actually, consecrated) cannot be acquired by prescription in less than forty years; that destructible personal effects can be acquired by prescription in three years; and then: "But the others, which belong to the Church of Rome exclusively, cannot be acquired by anyone in less than one hundred years."

This was in substance the law of Spain and the rest of Europe throughout the middle ages, certain modifications being made in the way of prohibitions limiting the right to give to the church, which in no way affected the juristic personality of the church, or its general right to hold and acquire property in its corporate capacity.

As to England, the concept of the church as a corporation was worked out by the English canonists and fully recognized by the ordinary law courts before the end of the fourteenth century; and Pollock and Maitland show that the English ecclesiastical law was practically similar to that of continental Europe in its recognition of the property rights of the church.

[314] *In this country it was held in Terrett v. Taylor (1815) 9 Cranch, 43, 3 L. ed. 650, that the legislature of Virginia could not authorize any persons to take land formerly granted to the Church of England. Mr. Justice Story, speaking for the court, says (p. 49):

"Be, however, the general authority of the legislature as to the subject of religion as it may, it will require other arguments to establish the position that, at the Revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the state. Had the property thus acquired been originally granted by the state or the King, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or, rather, in their legal agents. It was not in the power of the Crown to seize or assume it; nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted. . . . Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the Revolution any more than the property of any other corporation created by the royal bounty or established by the legislature."

This court further held that it made no difference whether the church was a voluntary society or clothed with corporate powers; and the local authorities were restrained from interfering with the church property or claiming title thereto.

It is the settled law of this court that a dedication to a public or charitable use may exist, even where there is no specific corporate entity to take as grantee. Werlein v. New Orleans, 177 U. S. 390, 401, 44 L. ed. 817, 822, 20 Sup. Ct. Rep. 682; and see Beatty v. Kurtz 2 Pet. 566, 7 L. ed. 521.

The Spanish law as to the juristic capacity of the church at the time of the cession merely followed the principles of the Roman law, which have had such universal acceptance, both *in the law of continental Europe [315] and in the common law of England.

Roman Catholicism has been the official religion of Spain since time of the Visigoths. As far as the church in Spanish-America was concerned, the King of Spain was supreme patron. See Alcubilla, vol. 8, p. 662.

The laws enacted in Spain for the government of the Indies, and promulgated at different periods, were compiled by order of Philip IV. in 1661, in the "Recopilación" of the Laws of the Indies, of which a subsequent edition was published. This is the only authentic collection of the ordinances and decrees governing Spanish-America prior to the year 1860. Alcubilla, vol. 9, p. 936.

Under the bulls of Julius II. and Alexander XI. there were conceded to the Spanish Crown all the tithes of the Indies, under the condition of endowing the church and providing the priests with proper support. The church in Spanish-America, through his royal patronage, came into possession of considerable properties. The right of the church to own, maintain, and hold such properties was unquestioned, and the church continued in undisputed possession thereof.

In the year 1820 the Spanish revolutionary government passed certain confiscatory laws as to monasteries and other ecclesiastical foundations, but even these revolutionary enactments left the actual temples undisturbed.

There was further legislation to the same effect in 1835, and again in 1837; but this legislation does not appear to have ever been extended to the colonies, although it was wrongfully but effectually applied there by the seizure of church properties, afterwards agreed to be restored by the _concordats_ of 1851 and 1859. After more than twenty-five years of intermittent conflict between church and state, the Spanish government and the papacy concluded the _concordat_ of March 16, 1851, which had in Spain the force of law, and which was promulgated in the insular possessions. Alcubilla, vol. 3, p. 94, Diccionario de la Administración Española.

[316] *By the first article of this _concordat_ it is provided:

"That the Catholic apostolic religion, to the exclusion of any other religion whatever, shall continue to be the sole religion of the Spanish nation, and will always be preserved in the domains of His Catholic Majesty, with all the rights and privileges which it ought to enjoy, according to the law of God and the provisions of its sacred canons."

Article 11 of the Spanish Constitution of 1876 is to the same effect. Alcubilla, vol. 3, p. 357.

There are numerous provisions in the _concordat_ fixing the amounts to be paid by the state for the support of the church and for the settlement of other causes of difficulty between the Crown and the Roman See, and art. 41 specifically recognizes the church's "right of property in everything it now possesses or may hereafter acquire." Alcubilla, vol. 3, p. 109.

In 1859, as a further guaranty of the property rights of the church, an additional _concordat_ was made between the Spanish Crown and the Roman See. The first article of this, reciting the unfortunate events by reason of which ecclesiastical properties have been wrongfully taken, obligates the Spanish Crown not to sell or alienate any of these properties without the permission of the Holy See.

The third article reads as follows:

"Art. 3. Especially the government of His Majesty again formally recognizes the full and free right of the church to acquire, retain, and enjoy in full property right, and without limitation or reserve, all kinds of property and values, renouncing in consequence by this treaty any disposition contrary hereto and particularly those which may be contained in the law of May 1st, 1855. The properties which, in virtue of this right, the church may acquire and possess in future, are not to be considered as part of the donation which is assigned to it by the _concordat_."

The difficulties between church and state incident to the revolutionary movement were thus adjusted; but in 1868, during the _régime_ of the provisional government, there were *certain decrees closing all conventual **[317]** establishments, etc., but the relations between the church and the government were finally restored by King Alfonso XII., who, in January, 1875, issued a decree, returning to the church all the property belonging to the clergy which was still in the hands of the government.

None of these revolutionary decrees disturbed actual church edifices, but were directed almost wholly against conventual properties, belonging to the various congregations or monastic orders. The attacks were directed against the property of the regular clergy, and not that of the seculars.

Under the civil law of Spain, the collection of tithes and first fruits of land and stock was obligatory. First, they were collected by the church, but later collected by the government and turned over to the church. The levy of such tithes finally disappeared under the _concordat_, because the government paid all expenses of worship.

In Report No. 2977, Senate Doc. 57th Congress, 2d Session, the subject was discussed, and, in accordance with the terms of the _concordat_, down to the occupation of Porto Rico by the American troops in August, 1898, amounts were regularly appropriated by the Spanish government for the expenses of worship in Spain, Cuba, Porto Rico, and the Philippines.

At the date of the American military occupation neither the state nor the municipalities, directly or indirectly, disputed or questioned the legitimate ownership and possession by the church of the property occupied by her, including temples, parochial houses, seminaries, and ecclesiastical buildings of every description. It is only since the occupation that some of the ayuntamientos have evinced a desire to deprive the church of her temples, under the pretext that they were built with municipal funds.

At the time of the American occupation the Catholic Church was the only church in the island. In 1900, Governor Allen, in the first annual report, said:

"Out of the 953,243 inhabitants of Porto Rico, there are nearly 950,000 Catholics, and there is a Catholic church in *every town **[318]** and village, and, in the larger towns and cities, several; in the city of San Juan there are eight, including the cathedral. Nearly all these are well-built structures, occupying central locations, and are ornaments to the towns where situated. There are many parochial schools and other church institutions, belonging to the Catholics. . . . None of the public money is now used in the salaries of clergymen or otherwise in the support of religion. All such expenses are defrayed, as in the United States, by voluntary contribution of the congregation and friends on the continent. The controversies formerly existing between the municipal and the church authorities concerning the ownership of church property have not yet been settled."

This was the status at the moment of the annexation, and, by reason of the treaty, as well as under the rules of international law prevailing among civilized nations, this property is inviolable.

The corporate existence of the Roman Catholic Church, as well as the position occupied by the papacy, have always been recognized by the government of the United States.

At one time the United States maintained diplomatic relations with the papal states, which continued up to the time of the loss of the temporal power of the papacy. 1 Moore's Dig. of International Law, pp. 130, 131.

The Holy See still occupies a recognized position in international law, of which the courts must take judicial notice.

"The Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of the Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged. Nevertheless, he does not make war, and the conventions which he concludes with states are not called treaties, but *concordats*. His relations with the Kingdom of Italy are gov- **[319]** erned, unilaterally, by *the Italian law of May 13, 1871, called 'the law of guarantees,' against which Pius IX. and Leo XIII. have not ceased to protest." 1 Moore's Dig. of International Law, p. 39.

After the cession of Louisiana by France to the United States certain questions came up as to the title to lands granted by the King of Spain to the Roman Catholic Church. The opinion of Attorney General Wirt having been asked thereon, he wrote as follows, 1 Ops. Atty. Gen. 563:

"There can be no doubt of the power of the King of Spain to grant lands in Florida while the province was his, nor of the capacity of the Roman Catholic Church to take by grant. Our treaty with Spain recognizes and ratifies all such grants made prior to a certain day."

The proposition, therefore, that the church had no corporate or jural personality, seems to be completely answered by an examination of the law and history of the Roman Empire, of Spain, and of Porto Rico down to the time of the cession, and by the recognition accorded to it as an ecclesiastical body by the treaty of Paris and by the law of nations.

Appellant claims that there were some laws of Porto Rico which should have been complied with before the Roman Catholic church could have any corporate existence or right to sue. It may be assumed that he refers to the various laws of Porto Rico relating to the formation and regulation of business corporations. But it is plain that none of these laws have any application to the church and never were so intended.

If the people of Porto Rico had passed some law by which the manner of holding properties by ecclesiastical bodies through trustees or otherwise, or the method in which such body should be represented before the courts, were prescribed, a different question would arise. But there was no such law, and by the Spanish law, from the earliest moment of the settlement of the island to the present time, the corporate existence of the Catholic Church has been recognized. As counsel for the appellee says: "At the very least, and even assuming that for centuries the church had not been recognized as a body of equal *impor- **[320]** tance with the state in Porto Rico, but that it was a merely *de facto* organization or association holding property, it would nevertheless have sufficient standing to maintain this suit."

There is no pretense in the corporation law of regulating the manner in which the Roman Catholic Church or any other religions corporation or body shall hold its property. No question of conformity to any law of *sociétés cultuelles* or of "associations" or religious societies can here arise, since there are no statutes relating to any such genus of legal or artifical persons.

The general law as to corporations is found in titles 1 and 2 of the Civil Code now in force. We give in the margin §§ 27, 29, 30, and part of § 65.†

*Domestic corporation law is equally inap- **[321]**

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†Sec. 27. The following are artificial persons:

(1) Corporations, associations, and institutions of public interest, having artificial personality recognized by law.

The personality of such bodies shall commence from the moment of their establishment in accordance with law.

(2) Private associations, whether civil,

plicable. Its terms are found in the Civil Code, title 2, chap. 1, and have reference solely to business or commercial corporations. No religious, eleemosynary, or charitable corporation can fall within its purview. Stock, stockholders, capital, surplus, officers, directors, the doing of business—are the basic elements of this statute.

The properties of the church in Cuba and the Philippines at the time of the ratification of the treaty were far more considerable than those in Porto Rico. And the controversies or questions arising as to those properties have been quite generally adjusted in both Cuba and the Philippines, partly with, and partly without, recourse to the courts. In Cuba a commission was appointed to consider the whole question, and its report contains much interesting and pertinent information. It begins with the fundamental proposition that: "The church, as a juridical person, has held and holds the right to acquire, possess, or transfer all kinds of properties. The church has never been denied this right in Spain; rather, on the contrary, in all the provisions covering these matters this right has been recognized in the church." Sen. Rep. 2977, 57th Cong. 2d Sess. p. 12.

On this admitted basis was concluded a satisfactory adjustment of the difficult problem incident to the transfer of sovereignty from a *régime* of union of church and state to the American system of complete separation.

Even greater difficulties were settled in the Philippines, and the American government never suggested that the church was without juristic capacity to possess or protect property rights. The suggestion that it did not possess a license from the local authorities "to do business" was never put forward.

Whether these ecclesiastical properties originally came from the state or any subdivision thereof, they were donated to, at once became, and have ever since remained, the property and in the peaceful possession of the Roman Catholic Church.

In the Philippines, the supreme court of the islands has recently treated these questions in an interesting and satisfactory opinion. Barlin v. Ramirez, 7 Philippine, 41. The suggestion, *made there as here, [322] that the church was not a legal person, entitled to maintain its property rights in the courts, the supreme court answered by saying that it did not require serious consideration when "made with reference to an institution which antedates, by almost a thousand years, any other personality in Europe."

It is urged that the complaint does not state facts sufficient to constitute any cause of action, and that it admits that the property in question was constructed out of funds of the municipality of Ponce, Porto Rico. This contention has been sufficiently answered. Counsel for appellee rightly says that—

"Whether the property originally came from the Crown or the local government is immaterial, since it had been for centuries recognized as the property of the church. Because the Spanish Crown or one of its municipal agencies chose to donate churches some years or centuries ago, it scarcely follows that it can now be claimed that the gift is revocable, and that the municipality may now expropriate the church and convert the property to any purpose it may desire."

In his statement to His Holiness, the Pope, when on special mission, Mr. Taft, the then governor general of the Philippines, said, in referring to those islands:

"The transfer of sovereignty and all governmental property rights and interests from the Crown of Spain to the United States in the Philippine Islands, contained in the treaty of Paris, was a transfer from a government between which and the Church of Rome there had been in those islands the closest association in property, religion, and

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commercial, or industrial, to which the law grants legal personality.

Sec. 29. The civil status of corporations shall be governed by the laws which create or recognize them; that of associations by their by-laws; and that of institutions by the rules of their establishment, duly approved by administrative action, when such requisite be necessary.

Sec. 30. Artificial persons may acquire and possess property of all kinds and also contract obligations and institute civil and criminal actions in accordance with the laws and regulation of their establishment.

Sec. 65. All corporations or joint stock companies, organized under the laws of any state, or of the United States, or of any foreign government, shall, before doing business within this island, file in the office of the secretary a duly authenticated copy of their charters or articles of incorporation, and also a statement verified by the oath of the president and secretary of said corporation, and attested by the majority of its board of directors, showing—

(1) The name of such corporation and the location of its principal office or place of business, without this island; and, if it is to have any place of business or principal office within this island, the location thereof.

(2) The amount of its capital stock.

(3) The amount of its capital stock actually paid in, in money.

(4) The amount of its capital stock paid in, in any other way, and in what, etc.

politics, to a government which, by the law of its being, is absolutely prevented from having such associations with any church. To make the transfer effectual, and, at the same time, just, it is obvious that the proper line of division must be drawn between what were really civil property interests of the Crown of Spain and what were religious trusts of the Catholic Church; and that all union of civil and clerical agencies for performance of political functions must end." Report of the Secretary of War, 1902, p. 237.

[323] *In Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 53, 34 L. ed. 478, 494, 10 Sup. Ct. Rep. 792, 806, Mr. Justice Bradley said:

"By the Spanish law, whatever was given to the service of God became incapable of private ownership, being held by the clergy as guardians or trustees; . . . when property was given for a particular object, as a church, a hospital, a convent, or a community, etc., and the object failed, the property did not revert to the donor, or his heirs, but devolved to the Crown, the church, or other convent or community," etc.

All the public funds employed in church buildings and other property were appropriated for that purpose without any reservation or restriction whatever, being approved according to law by the representatives of the nation in the Cortes, or by those of the towns in the common councils. Therefore the application of funds thus appropriated and voted by the legitimate mandataries of the nation or of the municipalities constituted, from the standpoint of law and justice, a perfect, irrevocable gift.

Certain objections in the nature of matters of procedure made by appellant we do not think we need consider. They may be classified as follows:

(1) Misjoinder of causes of action; (2) insufficiency and irregularity of form; (3) bar of statute of limitations; and (4) lack of authority to bring suit in name of the church.

We do not regard either of these as possessing sufficient merit to require discussion.

We accept the conclusions of appellee's counsel as thus summarized:

"First. The legislative assembly of Porto Rico had the power to confer jurisdiction on the supreme court of the island of this special class of controversies. Such legislation was not contrary to the Constitution, and was in conformity with the power conferred by Congress upon the legislative assembly to regulate the jurisdiction of the courts.

"Second. The Roman Catholic Church has been recognized as possessing legal [324] personality by the treaty of Paris, and its *property rights solemnly safeguarded. In so doing the treaty has merely followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession. This juristic personality and the church's ownership of property had been recognized in the most formal way by the *concordats* between Spain and the papacy, and by the Spanish laws from the beginning of settlements in the Indies. Such recognition has also been accorded the church by all systems of European law from the fourth century of the Christian era.

"Third. The fact that the municipality may have furnished some of the funds for building or repairing the churches cannot affect the title of the Roman Catholic Church, to whom such funds were thus irrevocably donated, and by whom these temples were erected and dedicated to religious uses."

Decree affirmed.

DELMAR JOCKEY CLUB, Plff. in Err.,
v.
STATE OF MISSOURI ON THE RELATION OF THE ATTORNEY GENERAL.

(See S. C. Reporter's ed. 324-335.)

Error to state court — frivolousness of Federal questions.

Contentions that immunities secured by U. S. Const., 14th Amend., are violated by a decision of a state court, that forfeiture of a corporate franchise may be declared for nonuser, and by its ruling, following its conception of the rules of pleading, that the charges of nonuser contained in an information in the nature of quo warranto stand as confessed under the pleadings, so as to sustain a motion for final judgment of ouster, are too frivolous to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[No. 219.]

Argued April 29, 30, 1908. Decided June 1, 1908.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment in an action in the nature of quo warranto, ousting a corporation of all its franchises and charter rights, forfeiting the same to the state, and dissolving the corporation. Dismissed for want of jurisdiction.

See same case below, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

NOTE.—On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

Statement by Mr. Justice **White**:

The plaintiff in error was organized as a corporation under the laws of the state of Missouri on January 18, 1901, for the following purposes, stated in its articles of association:

"The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting, and pacing horses, by giving exhibitions of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses, and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections, and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock, and of speed or races between horses, for premiums, purses, or other awards, made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and track; to engage in pool selling, book making, and registering bets on exhibition of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, *cafés*, and other stands for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated."

In 1905 the attorney general of Missouri, *ex officio*, filed in the supreme court of the state of Missouri an information, in the nature of quo warranto, seeking to annul the charter of the company and forfeit all of its franchises and property, for the following alleged acts of abuse and nonuse of its corporate powers and franchises: First, engaging in book making, pool selling, and the registration of bets upon horse races, from the date of its incorporation up to June 16, 1905; second, during the same period **[326]** selling pools and accepting and registering *bets from minors upon the result of horse races run on the track of the corporation; third, engaging in book making, pool selling, and the registration of bets upon horse races after June 16, 1905, in violation of an act of the legislature of Missouri approved March 21, 1905; and fourth, failure to give any exhibition of agricultural products, or to give any exhibition of speed in races between horses for the purposes of improving the stock of trotting and pacing horses, or to establish or maintain any fair grounds in the city or county of St. Louis, or any other place.

The corporation demurred to the information upon nine grounds. In the first it was recited that, as the information did not charge that the defendant was not licensed to engage in the business of book making, etc., alleged to have been carried on prior to June 16 1905, no violation of law was stated. The remaining grounds set forth reasons why it was asserted that the information in the second and third grounds, heretofore stated, did not charge violations of law or state facts upon which a judgment of ouster for such alleged acts could lawfully be based. After hearing argument, the supreme court of Missouri sustained the first ground of demurrer and overruled all the others, and granted defendant fifteen days in which to answer the remaining allegations contained in the information, *viz.*, the second, third, and fourth grounds of alleged misuse and nonuse of the corporate franchises, heretofore referred to. 200 Mo. 34, 92 S. W. 185, 98 S. W. 539. Subsequently an answer was filed, of which (omitting title) a copy is in the margin.† *Thereupon a motion for a final judgment of **[327]** ouster, etc., on the pleadings, was filed, for the following reasons:

"First. That said return and answer fails to state facts showing any sufficient cause or excuse for, or any legal defense to, the nonuser of respondent's franchises, authorizing it to give exhibitions of agricultural products and exhibition of contests of speed or races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and for the establishing and maintaining of suitable fair grounds in the city and county of St. Louis, as set forth and charged in the information herein.

"Second. It appears from the facts stated

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†Respondent, Delmar Jockey Club, comes by its attorneys, and for its answer to the information of the attorney general herein, admits that it is a corporation duly organized and incorporated under the laws of the state of Missouri, and denies each and every other allegation in said information alleged or contained.

Wherefore, respondent prays that it be hence discharged with its costs.

2. For its further answer to that portion of the information of the attorney general herein, wherein it is alleged that respondent has failed to exercise certain franchises claimed to be possessed by it, this respondent states that it has fully carried out and exercised all those provisions in its charter authorizing it to give exhibitions of agricultural products and exhibitions of contests of speed and races between horses for the purpose of encouraging and promoting agriculture and the improvement of stock, and has provided suitable fair grounds for the same, in this: That between the 18th day of January, 1901, and the 16th

in said return and answer, and the second count thereof, that respondent is guilty of the acts of misuser and abuser of its franchises charged in the information herein filed, in this; to wit, that respondent engaged in the business of book making and pool selling, registration of bets, and the acceptance of bets, in violation of the laws of this state:

"Wherefore, informant prays that final judgment of ouster be rendered against the respondent, as prayed for in the information in the case."

A motion to strike from the files having been overruled, the motion was heard and granted, and judgment of ouster was entered, a fine of $5,000 was imposed upon the corporation because of nonuse, misuse, and violation of its franchises, and provision was made for the winding up of the affairs of the corporation. A motion for a rehearing [328] was *made, in which the protection of various clauses of the Constitution of the United States was invoked, the following only being material to the controversy arising on this record:

"Third. Respondent is charged with nonuse of its corporate franchise as to the right to hold fairs. The general denial of respondent applies to this charge, and there has been no trial as to that fact. Yet the judgment adjudges the respondent guilty without a hearing, thereby also violating the 14th Amendment to the Constitution of the United States.

"But without this, the plea of estoppel interposed by the respondent to the charge of nonuse does not deprive respondent of the benefit of its general denial of that charge. Even at common law, and certainly since the statute of Anne, a plea of estoppel may be united with a general denial in a quo warranto proceeding.

"Fifth. The judgment of ouster ought not to be entered in this case in the present state of the pleadings, for the reason that, even though the power conferred by the charter of the respondent to engage in book making and pool selling be regarded as taken away by the repeal of the breeder's law, and even though respondent has lost its charter privileges to conduct *fairs by [329] failure to exercise those privileges, nevertheless, respondent has other privileges conferred by its charter which are not contrary to any law of this state or to the policy of the state, and which have not been lost by nonuser, among which privileges is the right to conduct horse races for prizes or purses or at pleasure, and which the judgment of this court deprives respondent of without respondent having, in any manner, lost the right so to do; and in this respect, also, the judgment deprives the re-

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day of June, 1905, in pursuance of the provisions and requirements of §§ 7419 to 7424, inclusive, Revised Statutes of Missouri, 1899, respondent duly paid large sums of money into the treasury of the state of Missouri, which were placed by the treasurer of the state of Missouri to the credit of the state fair fund, the same being a fund created by § 7424, Revised Statutes of Missouri, 1899, for the development and advancement of the industrial interests of this state under the direction of the state board of agriculture, and that all of said money so paid into said fund was received, used, and appropriated by the state of Missouri for the purpose of holding and giving annual exhibitions of agricultural products and stock of every kind and description at the city of Sedalia, state of Missouri, and that the said sums of money paid by respondent into the treasury of the state of Missouri under the terms of §§7419 to 7424, inclusive, were used and appropriated by the said state of Missouri and its said state board of agriculture solely for the maintenance and support of said Missouri state fair held annually at Sedalia, Missouri, and for the further purpose of providing, constructing, improving, and equipping all grounds, stands, and buildings necessary for the holding and giving of said fair.

Respondent further states that, by exacting and receiving the said sums of money for the above-mentioned purposes, the said state of Missouri intended to and did accept the same as full and complete performance and use by respondent of its franchise to give exhibitions of agricultural products and stock, and the said state of Missouri thereby intended to and did waive any other or further exercise of such franchise on the part of respondent.

Further answering the allegations of nonuser from June 16, 1905, to the date of the filing of this information, to wit, July 28, 1905, respondent states that the franchise of giving exhibitions of agricultural products and stocks is not one which can be exercised continuously and at all times, from the beginning to the end of the year, but is one, owing to its peculiar character, which can only be exercised during the harvest season of each year. For these reasons respondent was not required to exercise such franchise between the above specified dates, but respondent further avers that it has, in good faith, endeavored at all times to exercise the franchises granted to it by its articles of incorporation in the manner and for the purposes intended by such grants, and that such is its purpose in the future, and respondent intends in every way to comply with and perform, according to law, all the obligations which it assumed upon the grant of the aforesaid franchises to it by the state of Missouri, and respondent again specifically denies each and every charge, allegation, or assertion of a contrary purpose on its part, contained in the information filed herein.

Wherefore, respondent prays that it be hence discharged with its costs.

spondent of its property without due process of law, contrary to the guarantees of the 14th Amendment to the Constitution of the United States, which respondent here invokes."

The motion for a rehearing was granted, and, upon a reconsideration of the cause, the motion for judgment on the pleadings was again sustained upon the ground of nonuser of the corporation franchises, and judgment was entered, ousting the corporation of all of its franchises and charter rights, and adjudging that the same be forfeited to the state, and the corporation dissolved, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539. A motion for a rehearing having been filed and overruled, the cause was brought here by writ of error.

Mr. **Thomas Bond** argued the cause, and, with Mr. Henry W. Bond, filed a brief for plaintiff in error.

Mr. **John Kennish** argued the cause, and, with Mr. Herbert S. Hadley, filed a brief for defendant in error.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

Soon after the filing of the record in this court, the attorney general of Missouri submitted a motion to dismiss the writ of error, or to affirm, and the determination of the motion was postponed until the hearing on [333] the merits. The cause having been *argued, the motion to dismiss or affirm must now be disposed of.

We are of oinion that the record does not present any Federal question, and that the motion to dismiss must be granted.

The supreme court of Missouri, in the opinion delivered by it on the rehearing, considered three propositions: First, the effect of the general denial, contained in the first paragraph, and the plea embodied in the second numbered paragraph of the answer; second, upon what grounds a forfeiture of a corporate franchise might be declared; and. third, whether or not, in addition to ousting the corporation from its franchises, the court could and should "appropriate a part of its substance to the use and benefit of the state." These propositions were determined after an elaborate consideration of the subject and a review of many authorities. It was decided that the plea following the general denial in the answer amounted to a plea of confession and avoidance; that, in consequence, the general denial first pleaded raised no issue, and hence "the motion for judgment upon the ground of nonuser should be sustained." It was next determined, after declaring that it was the duty of the court to act with great caution in decreeing a forfeiture, that forfeiture of the corporate franchises might be declared "where there is either wilful misuse or wilful nonuse of the franchise or franchises, which are of the essence of the contract with the state, and those in which the state or public is most interested, then a forfeiture of the whole charter should be and will be declared. When a corporation receives from the state a charter granting certain franchises or rights, there is at least an implied or tacit agreement that it will use the franchises thus granted; that it will use no others; and that it will not misuse those granted. A failure in any substantial particular entitles the state to come in and claim her own, the rights theretofore granted, and this through a judgment of forfeiture in a proceeding like the one at bar." On this branch of the case the court concluded as follows:

*"The right to construct and maintain [334] suitable fair grounds in the city and county of St. Louis, and to give exhibitions of agricultural products thereat, is one of the essence of this contract between the state and the respondent. It was and is the franchise in the exercise of which the state and general public have the most interest and concern. A failure to exercise this franchise was a failure to perform the very thing which was of the essence of the contract. That this failure was wilful is shown by the length of time of the admitted nonuser as well as by other things made apparent by the pleadings. So far as the state and general public are concerned, this right or franchise, so long neglected, was leading and uppermost in interest. No legal excuse is offered for respondent's failure. It would appear, at least by inferences deducible from the pleadings, that respondent was alert in promoting that incidental feature of its charter,—gambling upon horse races. and furnishing its gamblers with refreshments, both liquid and solid,—but extremely indifferent as to doing the things, moral in character, which it had, by receiving its charter, tacitly agreed to do, and the only things in which the state and the public had any special interest.

"Such a flagrant and wilful nonuser of franchises which are of the very essence of the grant demand, in our judgment, the forfeiture of all the rights and franchises granted; and we therefore hold that there shall be a judgment decreeing a forfeiture of all the rights and franchises granted to respondent by its charter, and a dissolution of said corporation."

As to the third proposition, the court was of opinion that no further fine or punishment than that of ouster should be inflicted.

In substance, the contention of plaintiff in error is that the plea, contained in the second paragraph of the answer, merely presented a question of estoppel, which did not waive the prior general denial, and that the judgment of the supreme court of Missouri destroyed, "without a trial or a hearing, and by an unequal and unjust enforcement [335] of the law, vested property *rights, both of plaintiff in error and its stockholders, in the face of Federal immunities which the record shows to have been specially set up and claimed." In effect this is but asserting that the judgment of the supreme court of Missouri was so plainly arbitrary and contrary to law as to be an act of mere spoliation. But we fail to perceive the slightest semblance of ground for such a contention. In determining the scope and effect of the allegations of the answer, and in reaching the conclusion that the charges of nonuser contained in the information stood as confessed under the pleadings, the supreme court of Missouri followed its conception of the rules of pleading, as expounded in many of the previous decisions of that court, and the question of the extent of the power to take from the corporation its charter grant of franchises was determined as a question of general law. The determination of those matters did not involve a Federal question. San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241. Manifestly, the proceeding constituted due process. Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; New Orleans Waterworks Co. v. Louisiana (where the subject of the power of a state to forfeit corporate franchises is considered), 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691. And if the fact was, which we do not intimate is the case, that the court below erred in the conclusions reached by it in respect to the propositions which it determined, the error would not afford a basis for reviewing its judgment in this court. Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80, and cases cited: Ballard v. Hunter, 204 U. S. 241, 259, 51 L. ed. 461, 473, 27 Sup. Ct. Rep. 261; Patterson v. Colorado, 205 U. S. 460, 51 L. ed. 880, 27 Sup. Ct. Rep. 556.

The asserted Federal questions were so plainly devoid of merit as not to constitute a basis for the writ of error (Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct Rep. 435), and the writ of error is, therefore, dismissed.

*KANSAS CITY NORTHWESTERN RAILROAD COMPANY, Appt., [336]

v.

FREDERICK ZIMMERMAN, as Administrator of L. Zimmerman, Deceased.

(See S. C. Reporter's ed. 336-339.)

Direct appeal from circuit court — effect of prior appeal to circuit court of appeals.

1. A defendant which, on an appeal to a circuit court of appeals from a decree of a Federal circuit court sustaining a demurrer to a bill on the ground of want of jurisdiction of the state court from which the case was removed, does not insist upon the jurisdictional objection, but takes its chances on the merits, stands in no better position, so far as its right to appeal to the Supreme Court from a decree of the circuit court, entered pursuant to the direction of the circuit court of appeals, is concerned than if it had itself taken the appeal to that court.

Appeal — jurisdiction of circuit court of appeals.

2. A circuit court of appeals is not without jurisdiction of an appeal from a decree of a Federal circuit court in a suit founded upon a decree of that court because the petition for the removal of the suit from the state court in which it was brought alleges that the construction of the Federal Constitution is involved.

Direct appeal from circuit court — jurisdiction below.

3. The contention that a Federal circuit court has no jurisdiction of a suit founded on a decree of that court because the state court from which the suit was removed was without jurisdiction does not present a question of the jurisdiction of the circuit court as a Federal court, so as to sustain a direct appeal to the Supreme Court, on the ground that the jurisdiction of the circuit court was in issue.

Direct appeal from circuit court — jurisdiction below — questions reviewable.

4. The objection that a Federal circuit court to which a suit has been removed from a state court was without jurisdiction because the removal was improper is not open on a direct appeal to the Supreme Court, presenting the question of the jurisdiction of the circuit court, where the record and certificate show that the jurisdiction of that court was denied on the single ground that

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NOTE.—As to direct review in Federal Supreme court of judgments and decrees of circuit and district courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

On the jurisdiction of the circuit courts of appeals—see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; Salmon v. Mills, 13 C. C. A. 374; and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.

the state court where the proceedings started was without jurisdiction.

[No. 231.]

Submitted April 28. 1908. Decided June 1, 1908.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree in favor of plaintiff in a suit founded upon a prior decree of that court. Dismissed for want of jurisdiction.

See same case below, 75 C. C. A. 424, 144 Fed. 622.

The facts are stated in the opinion.

Mr. **Balie Peyton Waggener** submitted the cause for appellant:

The decision of this court in the case of American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, settles the following propositions, *viz.:*

First. That the circuit court of appeals had no appellate jurisdiction to review the judgment of the circuit court; and

Second. That the appellate jurisdiction of this court under the act of March, 1891, is exclusive.

The parties could not consent to give the circuit court of appeals appellate jurisdiction where it had not been conferred by statute.

Cutler v. Rae, 7 How. 731, 12 L. ed. 891; Gruner v. United States, 11 How. 164, 13 L. ed. 647; People's Bank v. Calhoun (People's Bank v. Winslow) 102 U. S. 260, 26 L. ed. 102.

It has been uniformly held by the circuit courts of appeal that such courts do not have jurisdiction to directly review a judgment of a circuit court which sustains an objection to its jurisdiction, and dismisses the suit on that ground.

St. Louis Cotton Compress Co. v. American Cotton Co. 60 C. C. A. 80, 125 Fed. 196; The Alliance 17 C. C. A. 124, 44 U. S. App. 52, 70 Fed. 273; The Annie Faxon, 31 C. C. A. 325, 59 U. S. App. 421, 87 Fed. 963; Davis & R. Bldg. & Mfg. Co. v. Barber. 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; United States v. Sutton, 2 C. C. A. 115, 47 Fed. 129; Cabot v. McMaster, 13 C. C. A. 39, 24 U. S. App. 571, 65 Fed. 533; Excelsior Wooden-Pipe Co. v. Pacific Bridge Co. 48 C. C. A. 349, 109 Fed. 497; Dudley v. Lake County. 43 C. C. A. 184, 103 Fed. 209; Hays v. Richardson, 57 C. C. A. 598, 121 Fed. 536; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658; Re Aspinwall. 33 C. C. A. 217, 61 U. S. App. 434, 90 Fed. 675; Halpin v. Amerman, 70 C. C. A. 462. 138 Fed. 548.

The decision and judgment of the circuit court of appeals, reversing the judgment of the circuit court, was not a final judgment, which could have been reviewed by this court by writ of error, certiorari, or otherwise.

Haseltine v. Central Nat. Bank, 183 U. S. 131, 46 L. ed. 118, 22 Sup. Ct. Rep. 49; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Schlosser v. Hemphill, 198 U. S. 175, 49 L. ed. 1002, 25 Sup. Ct. Rep. 654; United States v. Krall, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712.

The appellant is now, for the first time, before a court competent to entertain its appeal on the subject of the jurisdictional incapacity of the circuit court.

Union & Planters' Bank v. Memphis, 189 U. S. 71–74, 47 L. ed. 712–715, 23 Sup. Ct. Rep. 604; Scott v. Sandford, 19 How. 427, 15 L. ed. 709; Pennoyer v. Neff, 95 U. S. 728, 24 L. ed. 570; Kimball v. Kimball, 174 U. S. 163, 43 L. ed. 934, 19 Sup. Ct. Rep. 639.

Mr. **John H. Atwood** submitted the cause for appellee. Mr. W. W. Hooper was on the brief:

The appeal should be dismissed.

Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Carter v. Roberts. 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; Cincinnati, H. & D. R. Co. v. Thiebaud. 177 U. S. 615. 44 L. ed. 911, 20 Sup. Ct. Rep. 822; Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity to enjoin the appellant, hereafter called the defendant, from operating its railroad over certain land in Leavenworth, formerly belonging to the plaintiff's intestate, until a judgment against the defendant's predecessor in title for the damages caused by the appropriation of the land should be paid. It appears from the bill, among other things, that the defendant's predecessor appropriated the land without regular proceedings, and in 1889 the plaintiff's intestate began an action on which he recovered a judgment on May 15, 1897; *that the defendant's prede- [337] cessor had mortgaged its road in 1888: that on March. 1890, a suit to foreclose the mortgage was begun, and in 1893 there was a decree of foreclosure; and that this decree was followed (in 1894) by a sale to the defendant. It is alleged that the defendant became the successor in interest to all the rights. "and, as part of the consideration, assumed and was subject to all the liabilities," of its predecessor, "under and by virtue of said decree and purchase;" and again, "that, under and by virtue of said decree and the ordinances of said city, said defendant assumed and agreed to pay off any and all obligations" of the earlier road.

The present suit was begun in a state court in May, 1899. In June the defendant removed it to the circuit court of the United States, on the ground that the determination of the cause involved the construction of the foreclosure decree and of the Constitution and of the laws of the United States. The bill was reformed, and the defendant demurred to the merits, and also on the ground that the state court had no jurisdiction, and that therefore the United States court had none. The demurrer was sustained by the circuit court on the ground of want of jurisdiction in the state court; but, on appeal by the plaintiff, the decree was reversed by the circuit court of appeals and a decision rendered for the plaintiff on the merits. 75 C. C. A. 424, 144 Fed. 622. Thereupon, on November 27, 1906, a decree was entered for the plaintiff. On January 17, 1907, an appeal to this court was taken by the defendant and allowed; and on October 23 of the same year a certificate was made that the question involving the jurisdiction of the circuit court was in issue and decided against the defendant, and thus the case now stands.

We do not deem it necessary to discuss all the difficulties that the appellant would have to overcome in order to maintain its case. It seems from the opinion of the circuit court of appeals not to have insisted on the objection to the jurisdiction there, but to have taken its chances on the merits (75 C. C. A. 424, 144 Fed. 624), as also by its demurrer it relied mainly on the want [338]of equity *in the bill. See St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982. It comes here on the purely technical proposition that, although the plaintiff is in the right court, and although the case has been heard on the merits at the defendant's invitation, the plaintiff must begin over again because he did not come into court by the right way.

If the defendant had confined its defense to a denial of jurisdiction, there would be force in the consideration that the plaintiff, not it, took the case to the circuit court of appeals. But, in the circumstances of this case, the defendant seems to us to stand no better than it would if it had taken the appeal to the circuit court of appeals. Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863, 20 Sup. Ct. Rep. 713; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343. It is suggested that the circuit court of appeals had no jurisdiction, citing American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646. But, although the defendant, in its petition for removal, set up that the construction of the Constitution of the United States was involved, such was not the fact, and the language of the case cited does not apply.

It is enough, however, that the ground on which the jurisdiction of the circuit court was denied did not go to its jurisdiction as a Federal court. Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119. The certificate does not purport to enlarge the record, but simply to state what was in issue. The record shows that the jurisdiction of the circuit court was denied on the single ground that the state court where the proceedings started had none. Whether that contention was correct or not under Wabash R. Co. v. Adelbert College, 208 U. S. 38, ante, 379, 28 Sup. Ct. Rep. 182, it had nothing to do with the jurisdiction of the Federal court as such, or, indeed, at all, except for the reason that the power of a secondary tribunal can go no higher than its source. We may add that the jurisdiction of the circuit court, if it existed, was ancillary to its possession of the *res*, if it had it, that the principles to be applied are of general application (208 U. S. 54), and again these do not concern the jurisdiction of the Federal court as such.

*The defendant now, after having secured [339] a removal, and after having successfully resisted a motion to remand, attempts to deny the jurisdiction of the circuit court on the ground that the removal was improper. It is enough to say that that question is not open under the certificate.

Appeal dismissed.

BOBBS-MERRILL COMPANY. Appt.,
v.
ISIDOR STRAUS and Nathan Straus, Copartners, Doing Business under the Firm Name and Style of R. H. Macy & Company.

(See S. C. Reporter's ed. 339-351.)

Copyright — restrictions on sales by purchasers.

The sole right to vend a copyrighted book, secured by U. S. Rev. Stat. § 4952, U. S. Comp. Stat. 1901, p. 3406, to the owner of a copyright, does not include the right to impose, by a notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract.

[No. 176.]

Argued March 12, 13, 1908. Decided June 1, 1908.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, dismissing a bill to restrain the sale of a copyrighted book at less than the retail price fixed by a notice printed immediately below the notice of copyright. Affirmed.

See same case below. 15 L.R.A.(N.S.) 766, 77 C. C. A. 607, 147 Fed. 15.

The facts are stated in the opinion.

Mr. **W. H. H. Miller** argued the cause, and, with Messrs. C. C. Shirley and Samuel D. Miller, filed a brief for appellant:

The matter here involved is of statutory copyright, pure and simple; no question of common-law right or property of either the author or publisher is presented. We claim the right to control the price under the provision of the statute which gives the owner of a copyright the "sole" right of "vending," in strict analogy to the right of the owner of a patent to control the price of the patented article under the statutory use of the same word.

Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; Dickerson v. Tinling, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 192; Dickerson v. Matheson, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

If the opinion of the trial court be the law, then every decision holding that a sale in violation of the restriction that the book is to be sold only on subscription is unlawful is wrong; for, in every such case referred to in the opinion of the learned district judge, the printing was lawful. According to this opinion, if the owner of a copyright were to print an edition of his book, and a pirate could get hold of all or any of the books by any sort of dishonest means, such pirate could not be enjoined from selling the same, because the books were lawfully printed. Is it necessary to do more than state this proposition to demonstrate that it is not the law?

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 247, 41 L.R.A. 846, 63 Am. St. Rep. 666. 49 N. E. 873; Gilmore v. Anderson, 38 Fed. 846, 42 Fed. 267; Fishel v. Lueckel, 53 Fed. 499; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155.

The owner of a copyright, as well as the owner of a patent right, is given the exclusive right or liberty to vend. The important distinction between the two rights lies in the fact that the patent law grants a monopoly of use of the invention (that is, a monopoly of the idea embodied in the patented article), while the copyright law does not, in terms, give a monopoly of the ideas expressed in the book.

Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.

But this difference in the laws creating the respective rights does not affect the present case. The complainant here seeks to establish its right to control the vending of the copyright book, and this right is expressly granted by the copyright law.

Messrs. **John G. Carlisle** and **Edmond E. Wise** argued the cause and filed a brief for appellees:

The copyright law does not grant to the author the power of sale, as that was in him at all times; nor did it intend to enlarge it; but it does grant to him the sole right to multiply, which, after a sale, the common law did not reserve to him.

Stephens v. Cady, 14 How. 528-530, 14 L. ed. 528, 529; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155; American Tobacco Co. v. Werckmeister, 207 U. S. 284, ante, 208, 28 Sup. Ct. Rep. 72; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 247, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321, Approved in American Tobacco Co. v. Werckmeister, supra; Palmer v. DeWitt, 47 N. Y. 536, 7 Am. Rep. 480; Drone, Copyright, p. 100; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Wheaton v. Peters, 8 Pet. 725, Appx., 8 L. ed. 1106, Appx.; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

Identity of ownership of the book and of the copyright is the controlling factor necessarily present in order to retain dealings concerning the book itself within the protection of the copyright law, and when that identity is destroyed, the book, independent of the right to reproduce, is entirely out of the sphere and scope of the copyright statute.

Henry Bill Pub. Co. v. Smythe, 27 Fed. 914; Harrison v. Maynard, M. & Co. 10 C. C. A. 17, 26 U. S. App. 99, 61 Fed. 690;

Clemens v. Estes. 22 Fed. 899; Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 329; Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772; Kipling v. G. P. Putnam's Sons, 65 L.R.A. 873, 57 C. C. A. 295, 120 Fed. 631; Bobbs-Merrill Co. v. Snellenburg, 131 Fed. 533.

An assignment of the copyright transfers no interest in the books published. and *vice versa,* an assignment of the book published transfers no interest in the copyright itself.

American Tobacco Co. v. Werckmeister; Stephens v. Cady; and Stevens v. Gladding. —supra.

The vending or sale of a copy of a book transfers the title to that particular copy and nothing more. It does not transfer one single vestige of the intangible right granted by the statute. The payment of the royalty upon that sale emancipates that particular copy from the dominion of the copyright (Keeler v. Standard Folding Bed Co. 157 U. S. 660, 39 L. ed. 848, 15 Sup. Ct. Rep. 738), without, in the slightest degree, diminishing the proprietor's monopoly of vending other copies.

The purposes of the Constitution and of the statutes are completely satisfied by the interpretation given to it in the court below, to the effect that the copyright owner has the sole and exclusive right of first sale. If, upon such sale, any restrictions are imposed, the rights of the parties depend altogether upon the common law and equity principles, and not upon the statute.

Dale Tile Mfg. Co. v. Hyatt. 125 U. S. 46, 31 L. ed. 683. 8 Sup. Ct. Rep. 756; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282. 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Albright v. Teas. 106 U. S. 613, 27 L. ed. 295, 7 Sup. Ct. Rep. 550.

Owing to the difference both in the theory and the letter of the patent and copyright statutes, the patent cases relied upon by complainant are inapplicable to the question of copyright here presented.

Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58. 123 Fed. 424; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Dickerson v. Matheson. 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524; Dickerson v. Tinling, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 192; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Cortelyou v. Charles Enew Johnson & Co. 138 Fed. 110.

The patent cases referred to have never been affirmed in the Supreme Court.

American Cotton-Tie Co. v. Simmons, 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52; Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. and E. Bement & Sons v. National Harrow Co. supra.

The United States Supreme Court has uniformly held that if the suit is brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and the jurisdiction of the circuit court can only be maintained upon the grounds of diversity of citizenship.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. supra; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 54, 31 L. ed. 683, 686. 8 Sup. Ct. Rep. 756; Kinsman v. Parkhurst, 18 How. 289, 15 L. ed. 385; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511.

In the nearest case to the case at bar, decided by the United States Supreme Court, a restrictive sale by a licensee was declared to be wholly freed from such restriction, at least, in so far as the patent laws were concerned.

Keeler v. Standard Folding Bed Co. supra.

Mr. Stephen H. Olin filed a brief on behalf of Charles Scribner's Sons:

The multiplication of copies by printing is not the sole right given by the copyright statutes.

Harper & Bros. v. Donohue, 144 Fed. 491.

The right of the owner of an article in which he has a monoply, to sell the article with a valid restriction upon its use or future sale, has been established in patent cases.

Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 735; Robinson, Patents, § 824; Edison Electric Light Co. v. Peninsular Light, Power & Heat Co. 43 C. C. A. 479, 101 Fed. 836; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; Dickerson v. Matheson, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524; Dickerson v. Tinling, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 195; New Jersey Patent Co. v. Schaeffer. 144 Fed. 437; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Badische Anilin-und Soda-

Fabrik v. Isler, 75 L. J. Ch. N. S. 411, [1906] 1 Ch. 605, 94 L. T. N. S. 367. Affirmed in 75 L. J. Ch. N. S. 749 [1906] 2 Ch. 443; Incandescent Gaslight Co. v. Brogden, 16 Rep. Pat. Cas. 179; National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. 24 Times L. R. 291.

The copyright cases show that, in the three fields of making, use, and sale, the law closely agrees with the law of patents.

(a) "The field of making."

Harper & Bros. v. Donohue, 144 Fed. 492; Drone, Copyright, pp. 334, 341, 343, 363; MacGillivray, Copyright, 274; Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 621.

(b) "The field of use."

Drone, Copyright, pp. 383, 387–399, 433, 467; Story v. Holcombe, 4 McLean, 306, Fed. Cas. No. 13,497; Macgillivray, Copyright, 281, 282; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; West Pub. Co. v. Lawyers Co-Op. Pub. Co. 35 L.R.A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 756, Reversing 25 L.R.A. 441, 64 Fed. 360; Reed v. Holliday, 19 Fed. 325; List Pub. Co. v. Keller, 30 Fed. 772; Gilmore v. Anderson, 38 Fed. 846; Harper & Bros. v. Donohue, supra; Falk v. Brett Lithographing Co. 48 Fed. 678; Social Register Asso. v. Murphy, 128 Fed. 116; Encyclopædia Britannica Co. v. American Newspaper Asso. 130 Fed. 460; Harper v. Ranous, 67 Fed. 904; Guggenheim v. Leng, 12 Times L. R. 491; Roberts v. Myers, 13 Month. L. Rep. 401; Nicholls v. Parker, 17 Times L. R. 482; Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552; Daly v. Webster, 4 C. C. A. 10, 1 U. S. App. 573, 56 Fed. 483; Press Pub. Co. v. Monroe, 51 L.R.A. 353, note; Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 142 Fed. 536.

(c) "The field of sale."

Drone, Copyright, pp. 365, 445, 449; Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 426, 56 N. Y. Supp. 597; Clemens v. Estes, 22 Fed. 899; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Hudson v. Patten, 1 Root, 133; Black v. Henry G. Allen Co. 56 Fed. 768; Aronson v. Baker, 43 N. J. Eq. 369, 12 Atl. 177; Cooper v. Stephens [1895] 1 Ch. 567; Harper v. Shoppell, 23 Blatchf. 431, 26 Fed. 520; Authors & Newspapers Asso. v. O'Gorman Co. 147 Fed. 616; Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 776; Straus v. American Publishers' Asso. 177 N. Y. 489, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; John D. Park & Sons v. Hartman, supra; Marshall v. Bull, 85 L. T. N. S. 82; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155; Patterson v. J. S. Ogilvie Pub. Co. 119 Fed. 453.

Where there is a restricted publication, no rights inconsistent with the restriction are surrendered. There may be a sale of the subject of copyright, separate and distinct from the sale of the copyright therein.

Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Werckmeister v. Springer Lithographing Co. 63 Fed. 808; Caird v. Sime, L. R. 12 App. Cas. 344; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Prince Albert v. Strange, 2 De G. & S. 652; Ladd v. Oxnard, 75 Fed. 729; Queensberry v. Shebbeare, 2 Eden, 329; Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Aronsen v. Baker, 43 N. J. Eq. 370, 12 Atl. 177; Cooper v. Stephens, supra; Blunt v. Patten, 2 Paine, 393, Fed. Cas. No. 1,579; French v. Kreling, 63 Fed. 621.

Mr. Justice **Day** delivered the opinion of the court:

The complainant in the circuit court, appellant here, the Bobbs-Merrill Company, brought suit against the respondents, appellees here, Isidor Straus and Nathan Straus, partners as R. H. Macy & Company, in the circuit court of the United States for the southern district of New York, to restrain the sale of a copyrighted novel, entitled "The Castaway," at retail at less than $1 for each copy. The circuit court dismissed the bill on final hearing. 139 Fed. 155. The decree of the circuit court was affirmed on appeal by the circuit court of appeals, 77 C. C. A. 607, 147 Fed. 15.

The appellant is the owner of the copyright upon "The Castaway," obtained on the 18th day of May, 1904, in conformity to the copyright statutes of the United States. Printed immediately below the copyright notice, on the page in the book following the title page, is inserted the following notice:

> The price of this book at retail is $1 net No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.
>
> The Bobbs-Merrill Company.

Macy & Company, before the commencement of the action, purchased copies of the book for the purpose of selling the same at retail. Ninety per cent of such copies were purchased by them at wholesale at a price [342] below the retail price by about *40 per cent, and 10 per cent of the books purchased by them were purchased at retail, and the full price paid therefor.

It is stipulated in the record:

Defendants, at the time of their purchase of copies of the book, knew that it was a copyrighted book, and were familiar with the terms of the notice printed in each copy thereof, as above set forth, and knew that this notice was printed in every copy of the book purchased by them.

The wholesale dealers, from whom defendants purchased copies of the book, obtained the same either directly from the complainant or from other wholesale dealers at a discount from the net retail price, and, at the time of their purchase, knew that the book was a copyrighted book, and were familiar with the terms of the notice printed in each copy thereof, as described above, and such knowledge was in all wholesale dealers through whom the books passed from the complainants to defendants. But the wholesale dealers were under no agreement or obligation to enforce the observance of the terms of the notice by retail dealers, or to restrict their sales to retail dealers who would agree to observe the terms stated in the notice.

The defendants have sold copies of the book at retail at the uniform price of 89 cents a copy, and are still selling, exposing for sale, and offering copies of the book at retail at the price of 89 cents per copy, without the consent of the complainant.

Much of the argument on behalf of the appellant is based upon the alleged analogy between the statutes of the United States securing patent rights to inventors, and the copyright acts, securing rights and privileges to authors and others. And this analogy, it is contended, is so complete that decisions under the patent statutes in respect to the rights claimed in this suit under the copyright act are necessarily controlling.

In the main brief submitted by the learned counsel for the appellant it is said:

"All of the argument has been upon the [343] assumption that *the very numerous decisions of the circuit courts and circuit courts of appeals, such as the Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288, the Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424, and others along the same line, as well as the Cotton Tie Case in this court, upholding this restriction, with reference to sales of patented articles, express the law; and we have been especially confident that such must be the case, for the reason that this court, in E. Bement & Sons v. National Harrow Co. 186 U. S. page 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, has given its sanction to the broad doctrines laid down in the Heaton-Peninsular Case, supra.

The present case involves rights under the copyright act. The facts disclose a sale of a book at wholesale by the owners of the copyright, at a satisfactory price, and this without agreement between the parties to such sale obligating the purchaser to control future sales, and where the alleged right springs from the protection of the copyright law alone. It is contended that this power to control further sales is given by statute to the owner of such a copyright in conferring the sole right to "vend" a copyrighted book.

A case such as the present one, concerning inventions protected by letters patent of the United States, has not been decided in this court, so far as we are able to discover. In the so-called "Cotton Tie Case" (American Cotton Tie Co. v. Simmons, 106 U. S. 89, 27 L. ed. 79, 1 Sup. Ct. Rep. 52), the complainant company owned patents for improvements in metallic cotton-bale ties, and these cotton-bale ties were manufactured by the patentee, and stamped in the buckles were the words: "Licensed to use once only." After the bands had been severed at the cotton mill, the respondent bought them and the buckles as scrap iron, rolled and straightened the pieces of the bands, and riveted their ends together. He then cut them into proper lengths and sold them, with the buckles, to be used as ties.

The report of this case in the circuit court for the district of Rhode Island is found in 3 Bann. & Ard. 320, Fed. Cas. No. 293. The report shows that Judge *Shepley dis- [344] missed the bill on the ground that the attempted restriction to a single use by the words stamped on the buckle was not one which the patentee was entitled to impose, as the sale of the patented article, as an ordinary article of commerce, had taken it outside of the limits of the patent monopoly, and that the purchaser took unrestricted title to the buckle, without any reservation in the vendor. This court reversed that decision, holding that the reconstructed ties were not a repair of the old article, but a recreation of the subject of the patent, and, therefore, an infringement. Mr. Justice Blatchford, in delivering the opinion of the court, said:

"Whatever right the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band, to make a cotton-bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that."

That the case was not decided as one of restricted license, because of the words stamped on the buckle, is shown by the language of Mr. Justice Blatchford, in concluding his opinion:

"We do not decide that they are liable as infringers of either of the three patents, merely because they have sold the buckle considered apart from the band or from the entire structure as a tie."

We cannot agree that any different view of the Cotton Tie Case was indicated in the comments of the learned justice, speaking for this court, in Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 433, 38 L. ed. 500, 503, 14 Sup. Ct. Rep. 627. What was there said [345] in connection *with the quotation from the opinion of Mr. Justice Blatchford in the Cotton Tie Case enforces the view that the case was one of infringement because of the reconstruction of the patented device.

In E. Bement & Sons v. National Harrow Co. supra, the suit was between the owners of the letters patent as licensor and licensees, seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee. The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the state court, and, of course, does not dispose of the questions to be decided in this case.

The question was supposed to be involved in the recent case of Cortelyou v. Johnson, 207 U. S. 196, ante, 167, 28 Sup. Ct. Rep. 105, where a patented machine, known as the Neostyle, was sold with a license, printed on the baseboard of the machine, limiting the use thereof to certain paper, ink, and other supplies, made by the Neostyle company. While the question as to the validity of such license restriction was fully and ably argued by counsel, the case went off upon the finding that notice of the license restriction was not brought home to the defendant company.

If we were to follow the course taken in the argument, and discuss the rights of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent, when one of that character shall be presented to this court.

We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. This was recognized by Judge Lurton, who wrote a leading case on the subject in the Federal courts (Button Fastener Case, supra), for he said in the subsequent case of John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24:

*"There are such wide differences between [346] the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes, that the cases which relate to the one subject are not altogether controlling as to the other."

We therefore approach the consideration of this question as a new one in this court, and one that involves the extent of the protection which is given by the copyright statutes of the United States to the owner of a copyright under the facts disclosed in this record. Recent cases in this court have affirmed the proposition that copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under article 1, § 8, of the Federal Constitution: "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." American Tobacco Co. v. Werckmeister, 207 U. S. 284, ante, 208, 28 Sup. Ct. Rep. 72; White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, ante, 655, 28 Sup. Ct. Rep. 319; following the previous cases of Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Banks v. Manchester, 128 U. S. 244-253, 32 L. ed. 425-429, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123-151, 33 L. ed. 76-86, 9 Sup. Ct. Rep. 710.

The learned counsel for the appellant in this case, in the argument at bar, disclaims relief because of any contract, and relies solely upon the copyright statutes, and rights therein conferred. The copyright statutes ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.

At common law an author had a property in his manuscript, and might have redress against anyone who undertook to realize a profit from its publication without authority of the author. Wheaton v. Peters, 8 Pet. 591-659, 8 L. ed. 1055-1080.

In Drone on Copyright, that author says, page 100:

"As the law is now expounded, there are [347] important differences *between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute, and the latter only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter, it is perpetual. The rights do not co-exist in the same composition; when the statutory right begins the common-law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common-law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured."

While the nature of the property and the protection intended to be given the inventor or author as the reward of genius or intellect in the production of his book or work of art is to be considered in construing the act of Congress, it is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes. Speaking for this court in Stephens v. Cady, 14 How. 528, 530, 14 L. ed. 528, 529, Mr. Justice Nelson said:

"The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map; or, as said by Lord Mansfield in Millar v. Taylor, 4 Burr. 2396, 'a property in notion, and has no corporeal, tangible substance.'"

This fact is emphasized when we note the title to the act of Congress, passed at its first session,—"An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, during the Times Therein Mentioned." 1 Stat. at L. by Peters, chap. 15, p. 124.

In order to secure this right it was provided in that statute, as it has been in subsequent ones, that the authors of books, their executors, administrators, or assigns, shall have the "sole right and liberty of printing, reprinting, publishing, and vending" such book for a term of years, upon complying with the *statutory conditions set [348] forth in the act as essential to the acquiring of a valid copyright. Each and all of these statutory rights should be given such protection as the act of Congress requires, in order to secure the rights conferred upon authors and others entitled to the benefit of the act. Let us see more specifically what are the statutory rights, in this behalf, secured to one who has complied with the provisions of the law and become the owner of a copyright. They may be found in §§ 4952, 4965, and 4970 of the Revised Statutes of the United States, and are as follows:

"Sec. 4952. Any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." U. S. Comp. Stat. 1901, p. 3406.

"Sec. 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit *one dol- [349] lar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale, one half thereof to the proprietor and the other half to the use of the United States." U. S. Comp. Stat. 1901, p. 3414.

Section 4970 is as follows:

"The circuit courts, and district courts having the jurisdiction of circuit courts shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable." U. S. Comp. Stat. 1901, p. 3416.

Section 4965 undertakes to work a forfeiture of copyrighted articles, and confers a right of action for a penalty. Relief is given in a single suit, one half of the money recovered going to the United States. Werckmeister v. American Tobacco Co. 207 U. S. 375, ante, 254, 28 Sup. Ct. Rep. 124.

As this is a suit in equity for relief under § 4970 of the U. S. Revised Statutes, giving to the circuit and district courts of the United States the right to grant relief by injunctions to prevent the violation of rights secured by the copyright statutes, we are not concerned with rights and remedies under § 4965.

It is the contention of the appellant that the circuit court erred in failing to give effect to the provision of § 4952, protecting the owners of the copyright in the sole right of vending the copyrighted book or other article, and the argument is that the statute vested the whole field of the right of exclusive sale in the copyright owner; that he can part with it to another to the extent that he sees fit, and may withhold to himself, by proper reservations, so much of the right as he pleases.

What does the statute mean in granting "the sole right of vending the same?" Was it intended to create a right which would permit the holder of the copyright to fasten, [350] by notice *in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of $1 per copy.

The precise question, therefore, in this case is, Does the sole right to vend (named in § 4952) secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.

In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose *to [351] secure the right of multiplying copies of the work,—a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment.

This conclusion renders it unnecessary to discuss other questions noticed in the opinion in the circuit court of appeals, or to examine into the validity of the publisher's agreements, alleged to be in violation of the acts to restrain combinations creating a monopoly or directly tending to the restraint of trade.

The decree of the Circuit Court of Appeals is affirmed.

[352]*CHARLES SCRIBNER and Arthur H. Scribner, Trading as Charles Scribner's Sons, Appts.,
v.
ISIDOR STRAUS and Nathan Straus, Individually and as Copartners, Trading under the Firm of R. H. Macy & Company. (No. 204.)

CHARLES SCRIBNER'S SONS, INCORPORATED, Appt.,
v.
ISIDOR STRAUS and Nathan Straus, Individually and as Copartners, Trading under the Name of R. H. Macy & Company. (No. 205.)

(See S. C. Reporter's ed. 352–355.)

Federal courts — jurisdiction — copyright case.

1. Whether the owners of the copyright in a book can have relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of an alleged conditional sale, is a question which the Federal courts cannot consider in a suit to restrain the sale of the book at retail at less than the fixed price, in which there is no claim of damages in the sum of $2,000, and no diversity of citizenship.

Appeal — review of facts — concurrent findings.

2. Concurrent findings of the courts below in a suit to restrain the sale of copyrighted publications at less than the fixed price, that there was no satisfactory proof that the defendant had induced and persuaded sundry jobbers and dealers, who had obtained copyrighted books from the complainants, to deliver the same to the defendant for sale at retail at less than the prices fixed by the complainants, and in violation of the agreement upon which the books were obtained, will not be disturbed by the Federal Supreme Court, on appeal, if not clearly erroneous.

[Nos. 204, 205.]

Argued and submitted April 16, 1908. Decided June 1, 1908.

APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review decrees affirming decrees of the Circuit Court for the Southern District of New York dismissing the bills in suits to restrain the sale of copyrighted publications at retail for less than the price fixed by the owners of the copyright. Affirmed.

See same case below, 78 C. C. A. 122, 147 Fed. 28.

The facts are stated in the opinion.

Mr. **Stephen H. Olin** submitted the cause for appellants. Messrs. Olin, Clark, & Phelps were on the brief:

Macy & Company not only sold the plaintiffs' books without a license, but they induced jobbers and booksellers to break their contracts with the complainants touching the monopoly of their copyrights.

This brings the case within the rule of contributory infringement established in patent cases.

Heaton-Peninsula Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005; Tubular Rivet & Stud Co. v. O'Brien, 93 Fed. 200; Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; Brodrick Copygraph Co. v. Mayhew, 131 Fed. 92; National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. 24 Times L. R. 201.

Contributory infringement is the "intentional aiding of one person by another in the unlawful making or selling or using of the patented invention."

Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co. 72 Fed. 1016.

This doctrine applies in the law of copyright.

Harper v. Shoppell, 23 Blatchf. 431, 26 Fed. 521.

In selling articles not protected by patent or copyright, but manufactured by secret process, the vendor may impose limitations upon the use or future sale of the articles, which may be enforced in equity.

Elliman Sons & Co. v. Carrington & Son [1901] 2 Ch. 275, 84 L. T. N. S. 858; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 252, 49 L. ed. 1039, 25 Sup. Ct. Rep. 637; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 9, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Fowle v. Park, 131 U. S. 88, 97, 33 L. ed. 67, 74, 9 Sup. Ct. Rep. 658; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 461; Re Park, 138 Fed. 421.

Mr. **John G. Carlisle** argued the cause, and, with Mr. Edmond E. Wise, filed a brief for appellees.

Mr. Justice **Day** delivered the opinion of the court:

These actions were submitted at the same time and admittedly involve the same questions of law. The suits were brought, the one by a partnership, as Charles Schribner's Sons, *and the other by a corporation, Charles[353] Scribner's Sons, Incorporated, against R. H. Macy & Company, to restrain the selling at retail of the complainants' books, copyrighted under the laws of the United States, at prices less than those fixed by complainants, and from buying such copyrighted books except under the rules and regulations of the American Publishers' Association. The learned counsel for the appellants in this case, by consent, filed a brief in the case of Bobbs-Merrill Co. v. Straus, No. 176 (just decided), 210 U. S. 339, ante, 1086, 28 Sup. Ct. Rep. 722. So far as the same questions are involved, the decision in No. 176 is pertinent to this case, and these cases are controlled by the rulings made in that case.

The defendants carried on a department store. Among other things, they sold books at retail,—some copyrighted and some not. In the year 1901 the American Publishers' Association was formed among certain publishers of copyrighted books, and in their agreement is found the following:

"3. That the members of the association agree that such net copyrighted books, and all others of their books, shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations, as hereinafter provided."

Scribner's Sons' catalogue, invoices, and bill of goods contained the following notice: "Copyrighted net books published after May 1, 1901, and copyrighted fiction published after February 1, 1902, are sold on condition that prices be maintained as provided by the regulations of the American Publishers' Association."

In the case of a new publisher, notice was given by correspondence and by sending a blank, as follows:

[354] *American Publishers' Association.

—— —, 190—.

In consideration of discount allowed on books bought from ——— ——— we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1, 1902, at a greater discount than 28 per cent at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers Association to any dealer known to us to cut prices of net books or of new fiction, except as above provided.

The new publisher was required to execute this pledge before deliveries were made, although, if dealers refused to sign, the trade was still allowed to sell to them and would sell to them. If a new member made application for books, such application was referred to the association, and the agreement executed before deliveries were made.

Macy & Company refused to enter the association or to be bound by its rules. They sold books at less than the prices fixed by the association, and bought books from other dealers, including publications of complainants, and sold them at less prices than those fixed by the association. And they purchased from dealers who knew that Macy & Company intended to sell at such prices.

Upon the theory that Macy & Company had notice of these agreements, it was sought to hold them as copyright infringers. Both the circuit court (139 Fed. 193) and the court of appeals (78 C. C. A. 122, 147 Fed. 28) held that there was nothing in any of the notices of a claim of right or reservation under the copyright law, and held that the question was one of the right of the complainants to relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of the alleged conditional sale embodied in the notice as to the copyright book. The circuit court of appeals held, rightfully, as we think, that this question was not open in the case, *as in the first case there was no[355] diversity of citizenship, nor in either case a claim of damages in the sum of $2,000, requisite to confer jurisdiction of questions of rights independent of the copyright statutes.

Upon the allegations of the bill as to alleged contributory infringement of the copyright, that the defendant had induced and persuaded sundry jobbers and dealers who had obtained copyrighted books from the complainants to deliver the same to the defendant for sale at retail at less than the prices fixed by the complainants, and in violation of the agreement upon which the books were obtained, both the circuit court and the circuit court of appeals held that there was no satisfactory proof that the defendant did thus induce any person to break his agreement with the complainants. It is contended in the brief of the complainants that these findings are opposed to the weight of the testimony, and particularly violate the admissions of the answer; but we think, taking the answer altogether, it did deny the allegations of the complaint as to the conduct of the defendant in inducing dealers to violate their agreements.

Upon the question of fact involved in this branch of the case both courts below found against the contention of the complainants in this respect, and, applying the usual rule in such cases, we find no occasion to disturb such findings.

The decrees of the Circuit Court of Appeals in both cases are affirmed.

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[356]*GLOBE NEWSPAPER COMPANY, Plff. in Err.,

v.

GEORGE H. WALKER and Oscar W. Walker, Copartners, Doing Business under the Firm Name and Style of George H. Walker & Company.

(See S. C. Reporter's ed. 356–367.)

Error to circuit court — effect of prior appeal to circuit court of appeals.

1. A judgment of a Federal circuit court in favor of plaintiff in an action to recover damages for the infringement of a copyrighted map, in which a prior judgment sustaining a demurrer to and dismissing the declaration on the ground that the copyright law gave no such action was reversed by the circuit court of appeals, to which the case was carried by the plaintiff, may be reviewed by the Federal Supreme Court on a direct writ of error sued out by the defendant below under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, as presenting the question of the jurisdiction of the circuit court.

Copyright — maps — exclusiveness of statutory remedy for infringement.

2. The remedies of forfeiture and penalty and of injunction, given by U. S. Rev. Stat. §§ 4965, 4970, U. S. Comp. Stat. 1901, pp. 3414, 3416, to the owner of a copyrighted map in case of infringement, are exclusive, and preclude any resort to an action at law to recover the damages sustained by reason of the infringement.

[No. 210.]

Argued April 23, 1908. Decided June 1, 1908.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiffs in an action to recover damages for the infringement of a copyrighted map. Reversed and remanded, with directions to dismiss the action for want of jurisdiction.

See same case below, 2 L.R.A.(N.S.) 913, 72 C. C. A. 77, 140 Fed. 305.

The facts are stated in the opinion.

Mr. **William Quimby** argued the cause and filed a brief for plaintiff in error:

All common-law rights of authors are superseded by the copyright statute after copyright.

Banks v. Manchester. 23 Fed. 143, 128 U. S. 244, 252, 32 L. ed. 425, 428, 9 Sup. Ct. Rep. 36; Wheaton v. Peters, 8 Pet. 591. 662, 663, 8 L. ed. 1055. 1081; Holmes v. Hurst, 174 U. S. 82, 85, 43 L. ed. 904, 905, 19 Sup. Ct. Rep. 606; Werckmeister v. American Lithographic Co. (C. C. App. 2d C.) 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 324; Palmer v. De Witt, 47 N. Y. 536, 7 Am. Rep. 480; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666. 49 N. E. 872.

Congress intended to restrict the remedies for infringement of maps to copies "found." Such provision is a reasonable one.

Bolles v. Outing Co. 175 U. S. 262, 266, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94.

The adequacy or inadequacy of such a provision is unimportant. It is not the judicial function to remedy alleged defects of the copyright act. Inconveniences and insufficiencies of rights and remedies can only be adjusted by amendment to the law.

Holmes v. Hurst, 174 U. S. 82, 90, 43 L. ed. 904, 907, 19 Sup. Ct. Rep. 606; Arnson v. Murphy, 109 U. S. 238, 243, 27 L. ed. 920, 922, 3 Sup. Ct. Rep. 184; Bennett v. Boston Traveler Co. (C. C. App. 1st C.) 41 C. C. A. 445, 101 Fed. 448; Chapman v. Ferry, 8 Sawy. 191, 12 Fed. 696; Carte v. Duff. 23 Blatchf. 347, 25 Fed. 187; Sarony v. Ehrich. 23 Blatchf. 556, 28 Fed. 80.

The copyright act provides no remedy by a civil action, either at law or in equity, for damages on behalf of the owner of a copyright of a map.

Thornton v. Schreiber, 124 U. S. 612, 614; 31 L. ed. 577, 578, 8 Sup. Ct. Rep. 618; Macgillivray, Copyright, p. 290; Chapman v. Ferry and Sarony v. Ehrich, supra.

The owner of a cut or a map cannot avail himself of the remedies, damages, and forfeitures for copies sold or offered for sale, provided for a book or a painting.

Bennett v. Boston Traveler Co. supra.

Maps may be copyrighted as an atlas or book.

Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 625.

A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but where the provision for the liability is coupled with the provision for a special remedy,

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NOTE.—On direct review in Federal Supreme court of judgments or decrees of district and circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

As to common-law rights of authors and others in intellectual productions—see notes to Press Pub. Co. v. Monroe, 51 L.R.A. 353; State v. State Journal Co. 9 L.R.A.(N.S.) 174; and Bobbs-Merrill Co. v. Straus, 77 C. C. A. 620.

that remedy, and that alone, must be employed.

Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. ed. 212; Arnson v. Murphy, 109 U. S. 238, 239, 27 L. ed. 920, 921, 3 Sup. Ct. Rep. 184; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 758, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757; Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co. 197 U. S. 394, 405, 49 L. ed. 803, 810, 25 Sup. Ct. Rep. 462; Smith v. Drew, 5 Mass. 514; Coffin v. Field, 7 Cush. 358; Pollock v. Eastern R. Co. 124 Mass. 158.

Mr. **H. L. Boutwell** argued the cause, and, with Mr. A. W. Levensaler, filed a brief for defendants in error:

Where a right, previously existing by the common law, is secured by a statute which provides no remedy for its protection, the common-law remedies are available; and where the statute prescribes penalties and forfeitures, but does not provide a remedy for damages, the common-law action for damages will lie. This rule has been applied in the interpretation of copyright statutes.

Drone, Copyright, pp. 473, 493, 494; Sutherland, Stat. Constr p 509.

This construction of our law is favored by the text writers.

Drone, Copyright, p. 473; 7 Am. & Eng. Enc. Law, 2d ed. pp. 592, 593; Curtis, Copyright, p. 313; Copinger, Copyright, pp. 247–252; Slater, Copyright, pp. 168, 169.

This rule was admirably stated by Lord Kenyon in 1798 in the case of Beckford v. Hood, 7 T. R. 620.

See also Cadell v. Robertson, 5 Paton, App. Cas. 493; Roworth v. Wilkes, 1 Campb. 94; Sheriff v. Coates, 1 Russ. & M. 159; Tennyson v. Forrester (1871) 43 Scot. Jur. 278.

Courts of Canada have followed the English decisions.

Bernard v. Bertoni, 14 Quebec, L. R. 219.

With the exception of the decision in this action (2 L.R.A.[N.S.] 913, 72 C. C. A. 77, 140 Fed. 305), no United States case has been found bearing directly upon this rule. It has been held that the passage by Congress of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript.

Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 199.

It is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required.

2 Coke, Inst. 200; Arthur v. Bokenham, 11 Mod. 148; 1 Kent, Com. 14th ed. § 464; Black, Constr. & Interpretation of Laws, p. 233; Lewis's Sutherland, Stat. Constr. 2d ed. pp. 861, 862; Hardcastle, Statutory Law, p. 310; Greenwood v. Greenwood, 28 Md. 369; Bellant v. Brown, 78 Mich. 294, 44 N. W. 326; McRoberts v. Lyon, 79 Mich. 25, 44 N. W. 160; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchant's Nat. Bank) 101 U. S. 557, 565, 25 L. ed. 892, 894; Ryalls v. Mechanics' Mills, 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766; Rosin v. Lidgerwood Mfg. Co. 89 App. Div. 245, 86 N. Y. Supp. 49; Cadwallader v. Harris, 76 Ill. 370; Smith v. Laatsch, 114 Ill. 271, 2 N. E. 59; Almy v. Harris, 5 Johns. 175; Edwards v. Gaulding, 38 Miss. 118; Howe v. Peckham, 6 How. Pr. 229; Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147; Scaife v. Stovall, 67 Ala. 237; Keech v. Baltimore & W. R. Co. 17 Md. 32; Hooper v. Baltimore, 12 Md. 464.

Where a remedy is provided by statute, one having existed at common law, such remedies thereby become cumulative, and the plaintiff may elect between them.

Tennyson v. Forrester, supra; 1 Kent, Com. 14th ed. § 464; Sutherland, Stat. Constr. p. 509; Wheaton v. Peters, 33 U. S. 591, 690, 8 L. ed. 1055, 1091; 2 Bacon, Abr. 803, 805; 2 Coke, Inst. 209; Comyn's Dig. Action upon Statute, 6; Rosin v. Lidgerwood Mfg. Co. supra; Hardcastle, Statutory Law, p. 312; 6 Am. & Eng. Enc. Law, p. 270; People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Candee v. Hayward, 37 N. Y. 653; Wetmore v. Tracy, 14 Wend. 255, 28 Am. Dec. 525; Clark v. Brown, 18 Wend. 220; Cadwallader v. Harris, 76 Ill. 372; Almy v. Harris and Bernard v. Bertoni, supra.

The damages recoverable under U. S. Rev. Stat. § 4964, U. S. Comp. Stat. 1901, p. 3413, relative to infringement of copyright of books, have been construed as in the nature of penalties and forfeitures.

Wheeler v. Cobbey, 70 Fed. 487; Walker v. Globe Newspaper Co. 2 L.R.A.(N.S.) 913, 72 C. C. A. 77, 140 Fed. 310. See also, Daly v. Brady, 69 Fed. 285.

Damages for infringement of copyright cannot be recovered by a bill in equity.

Chapman v. Ferry, 8 Sawy. 191, 12 Fed. 692.

The courts of the United States adopt the statutory or common law of the state where the cause of action arose, and, so far as the remedy is concerned, the statutory or common law of the state where the litigation is pending.

Walker v. Globe Newspaper Co. supra; Murray v. Chicago & M. W. R. Co. 62 Fed. 24; Western U. Teleg. Co. v. Call Pub. Co.

181 U. S. 92, 101, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561.

That the law confers no right without a remedy to secure it is a maxim of the law.

Beckford v. Hood, 7 T. R. 620; 11 Am. & Eng. Enc. Law, p. 179; 1 Pom. Eq. Jur. 2d ed. § 423; Miller v. Jefferson College, 5 Smedes & M. 661; Stanley v. Earl, 5 Litt. (Ky.) 282, 15 Am. Dec. 66; Robinson v. The Red Jacket, 1 Mich. 175.

When the unsuccessful party wishes to have the judgment or decree reviewed upon jurisdictional grounds and other grounds as well, he cannot appeal to both the Supreme Court and the circuit court of appeals.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; Columbus Constr. Co. v. Crane Co. 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

It was the duty of the plaintiff in error, if it desired to carry the question of jurisdiction to this court, to request the circuit court of appeals to certify the question of jurisdiction.

United States v. Jahn, supra: McLish v. Roff, 141 U. S. 661-667, 35 L. ed. 893-895, 12 Sup. Ct. Rep. 118.

Not having availed itself of the right given it by the statute, it must be deemed to have waived such right, and to have elected to have the question of jurisdiction finally determined by the circuit court of appeals.

Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

[360] *Mr. Justice Day delivered the opinion of the court:

This case is here upon writ of error to the circuit court of the United States for the district of Massachusetts, upon a question of its jurisdiction to entertain a suit to recover damages for an alleged infringement of the copyright of a map.

The Revised Statutes of the United States, § 711, ¶ 5, U. S. Comp. Stat. 1901, p. 578, give jurisdiction to the courts of the United States in cases arising under the patent-right or copyright laws of the United States, exclusive of the courts of the several states. The case is one, therefore, which involves the jurisdiction of a Federal court as such.

The defendants in error, plaintiffs below, partners under the style of George H. Walker & Company, are the owners of a certain copyrighted map, known as the "map of the electric railways of the state of Massachusetts accompanying the report of the railroad commissioners." They allege that they had complied with all of the requirements of the copyright statutes of the United States, and that the defendant, Globe Newspaper Company, well knowing the premises, without the plaintiff's consent, printed and sold a large number of the copies of the copyrighted map. And the plaintiffs sought to recover damages in an action at law thus begun for the alleged infringement of the copyright.

The newspaper company demurred upon several grounds, among others:

"1. That the statutes relating to copyrights provide no remedy by a civil action on behalf of the owner of the copyright of a map.

"2. That the declaration confuses two separate and distinct causes of action, neither of which is authorized by the statutes relating to the copyright of maps.

"3. That the declaration contains no allegation that any copy or copies of the alleged infringing map complained of was or were found in the possession of the defendant.

"4. That the declaration contains no allegation that the *alleged infringing map [361] complained of, or any copy thereof, was published with the knowledge or consent of the defendant, or any of its officers, or with any intent to evade the statutes for the protection of the copyright for a map."

Upon hearing the demurrer the circuit court, at its February term, 1904, sustained the same, on the ground that the copyright law gave no such action, and judgment was entered for the newspaper company. 130 Fed. 594. Walker & Company took the case to the court of appeals, where the judgment of the circuit court was reversed. 2 L.R.A. (N.S.) 913, 72 C. C. A. 77, 140 Fed. 305. That court, holding that the declaration contained a good cause of action for money damages against the newspaper company, the cause was remanded and a new trial had in the circuit court, which resulted in a verdict and judgment in the sum of $250 in favor of the Walker Company against the Globe Newspaper Company. At the trial the newspaper company moved that the action be dismissed and a verdict be directed for it, on the ground that the court had no jurisdiction of the action. At the close of the plaintiffs' evidence in chief the motion was renewed; the court overruled the motion and the defendant excepted. A like motion and order was made at the close of all the evidence. The court made a certificate that the denial of the motions aforesaid was based in each case solely upon the ground that the cause set forth in the declaration was one, in the opinion of the court, which arose under the copyright laws of the United States, whereof the circuit court of the United States had jurisdiction, and, in any event, its action was controlled by the opinion of the circuit court of appeals in

2 L.R.A.(N.S.) 913, 72 C. C. A. 77, 140 Fed. 305. Thereupon the case came here upon the question of jurisdiction.

A preliminary objection is made that this court cannot entertain jurisdiction of this writ of error, because the case is not one which may properly come here under § 5 of the court of appeals act of 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549]; and it is contended that, as the case went to the circuit court of appeals, and that court determined it, if the present plaintiff in error wished to save the ques-[362]tion of *jurisdiction, it should have been duly certified to this court from the court of appeals. But we are of the opinion that this objection is untenable. The case was taken to the circuit court of appeals by Walker & Company. The judgment of the circuit court was in favor of the newspaper company. It had no occasion to take the case to the court of appeals. When the court of appeals reversed the decision of the circuit court and remanded the case for trial, because of its holding that the declaration contained a cause of action in favor of Walker & Company, the circuit court was bound by, and of course followed, the decision of the circuit court of appeals.

The newspaper company, in various forms, objected to the jurisdiction of the court as a court of the United States, because there was no such action under the copyright law as was asserted in the declaration filed against it. Its objection to the jurisdiction was overruled. It saved the question in various ways and brought it here upon an adequate certificate, raising solely the question of jurisdiction. We think we have jurisdiction of the case.

Certain propositions arising under the copyright laws are settled by the decisions of this court beyond the necessity of further discussion. In this country the right of an author to multiply copies of books, maps, etc., after publication, is the creation of the Federal statutes. These statutes did not provide for the continuation of the common-law right, but, under constitutional authority, created a new right. This was directly held in the case in this court of Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055. That case has frequently been followed since, and is directly approved of in subsequent cases in this court. Bobbs-Merrill Co. v. Straus (just decided) 210 U. S. 339, ante, 1086, 28 Sup. Ct. Rep. 722, and the previous cases from this court therein cited.

The question in this case, therefore, is whether, in the absence of a statute to that effect, there is a common-law right of action, because of the right of property created by the statute, to recover money damages against infringers of a copyright. That there is no express statutory provision giving such right *of action is conceded. The[363] circuit court (130 Fed. 594) was of the opinion that the question was determined adversely to plaintiffs below by the well-known case of Wheaton v. Peters, supra. In that case the court held that there could be no relief at common law in an action brought for the infringement of the copyright of Wheaton's reports, because of the publication, since the passage of the copyright act, of condensed reports of cases decided in the Supreme Court of the United States. It was held that there was no common law of the United States, and that, for common-law rights, this court looked to the state in which the controversy originated; and the court held that there was no common-law right in Pennsylvania to a perpetual copyright. And, further, held that Congress, by the copyright act of 1790 [1 Stat. at L. 124, chap. 15], instead of sanctioning an existing right, created a new one; and said (p. 662) that "if the right of the complainants can be sustained, it must be sustained under the acts of Congress." The judgment of the court below was reversed, and the cause remanded to the circuit court, with directions to direct an issue of fact to be examined and tried by a jury as to whether Wheaton, the author, or other person as proprietor, had complied with the requirements of the copyright act of the United States of May 31, 1790.

While we agree that the case did not necessarily decide the point made in the present case, yet the reasoning and the decree of the court decidedly favor the conclusion that Congress not only created a new right in the copyright statute, but that the remedies therein given are the only ones open to those seeking the benefit of the statutory right thereby created.

The circuit court of appeals, conceding the effect of the decision in Wheaton v. Peters, supra, as to the origin of property in copyright, says:

"The property right being established, the common-law remedies attach, whether the right arises out of the common law or under a statute, unless there is something in the statute to the contrary."

And in support of this doctrine reliance is had on Beckford v. *Hood, 7 T. R. 620.[364] That was an action on the case to recover damages for the publication of the plaintiff's book, "Thoughts upon Hunting." Neither the original nor any subsequent editions were entered in Stationers' Hall, as required by the statute. The defendant published the same work under title, "Thoughts upon Hare and Fox Hunting," with plaintiff's name upon the title page.

Lord Kenyon, Ch. J., in the opinion delivered by him, held that the statute, 8 Anne, chap. 9, vested in authors for the periods named in the act the sole right and liberty of printing, etc., and the statute, having vested the right in the author, the common law gave the remedy by action on the case. "Of this," says Lord Kenyon, p. 627, "there could have been no doubt made if the statute had stopped there. But it has been argued that as the statute, in the same clause that creates the right, has prescribed a particular remedy, that and no other can be resorted to. And, if such appeared to have been the intention of the legislature, I should have subscribed to it, however inadequate it might be thought;" and, concluding his opinion, says:

"On the fair construction of this act, therefore, I think it vests the right of property in the authors of literary works for the times therein limited, and that consequently the common-law remedy attaches if no other be specifically given by the act; and I cannot consider the action given to a common informer for the penalties which might be preoccupied by another as a remedy to the party grieved within the meaning of the act."

The gist of this decision is that the statute gave the right of exclusive publication of copies, and gave the proprietor of the copyright no remedy; hence, the common law supplied one.

As we shall have occasion to see, the American copyright act does give special remedies to the owner of a copyright of maps. Inadequate it may be to fully protect the property in the copyright, yet such as Congress has seen fit to give, and which it, not the courts, have power to enlarge by amendment of the statutes.

[365] *And we think an inspection of the copyright statute indicates that the purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights may be enforced. The general rule applicable in such cases was stated in Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376:

"A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Pollard v. Bailey has been many times cited with approval and followed in this court. In Middleton Nat. Bank v. Toledo, A. A. & N. M. R. Co. 197 U. S. 394, 49 L. ed. 803, 25 Sup. Ct. Rep. 462, the principle was applied in an action brought outside the state of Ohio to recover the stockholders' liability given by the statutes of that state, and it was held that the action could not be maintained; that the statutory method providing for the enforcement of the right in the courts of the state must be followed. Mr. Justice Peckham, speaking for the court, said:

"The statute, under such circumstances, may be said to so far provide for the liability and to create the remedy as to make it necessary to follow its provisions and to conform to the procedure provided for therein. See Pollard v. Bailey, 20 Wall. 520, 526, 22 L. ed. 376, 378; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 756, 758, 30 L. ed. 825, 829, 830, 7 Sup. Ct. Rep. 757; Evans v. Nellis, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74."

Looking to the copyright statutes, we find a comprehensive system of rights and remedies provided. Section 4952 (U. S. Comp. Stat. 1901, p. 3406) provides that the author, inventor, designer, or proprietor of any book, map, etc., upon complying with the provisions of this section, "shall . . . have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." This is the section creating the right.

Section 4963 provides for a penalty of $100 for falsely inserting or impressing a copyright notice where no copyright has been obtained. The penalty in this section is recoverable, one *half for the person suing [366] for the same, and one half to the use of the United States; and the circuit courts of the United States, sitting in equity, are authorized to enjoin the issuing, publishing, or selling of articles marked or imported in violation of the copyright laws of the United States.

By § 4964 it is provided, as to books, that those who print, publish, dramatize, translate, or import the same, without the consent of the proprietor of the copyright, signed in the presence of two witnesses, or who, knowing the same to be so printed, published, dramatized, and translated or imported, shall sell, or expose to sale any copies of such article, shall forfeit every copy thereof to the proprietor of the copyright, and shall also forfeit and pay such damages as may be recovered in a civil action by the proprietor of the copyright in any court of competent jurisdiction. Here is a specific remedy given to recover damages for books wrongfully printed or published, etc., in violation of the act. While Congress conferred this action to protect copyrighted books, for some reason it does not include the holders of copyrighted maps within its provisions.

Section 4965 relates to the owners of copyrights on maps, charts, etc., and provides for the forfeiture of plates and copies, and for the recovery of money penalties in certain cases, one half of the penalty to go to the proprietor of the copyright, the other half to the use of the United States.

Section 4966 gives remedies for damages against those wrongfully performing or representing a dramatic or musical composition, in public, such damages to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court may seem just; and such offending persons are declared guilty of a misdemeanor, and, upon conviction, liable to imprisonment not exceeding one year; or an injunction may be granted upon hearing, after notice to the defendant, by any circuit court of the United States.

Section 4967 gives an action for damages for printing or publishing any manuscript without the consent of the author or proprietor.

[367] *Section 4970 provides for injunctions in copyright cases in the circuit and district courts of the United States, by bill in equity, to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

We think these statutes, taken together, indicate the purpose of Congress to provide a system of remedies to enforce the rights which have been granted to those who shall avail themselves of the statutes of the United States, and, in accordance therewith, become the owners of the exclusive right, for a limited term, to publish and multiply the copyrighted work.

To the owner of a copyright on a map is given, under § 4965, forfeiture of plates and sheets, and one half the penalty of $1 for every sheet found in the defendant's possession; under § 4970, the right to proceed by injunction. It thus appears that Congress has prescribed the remedies it intends to give; this being true, "however inadequate," as Lord Kenyon said in Beckford v. Hood, supra, "no others can be resorted to."

We, therefore, think the circuit court erred in holding that it had jurisdiction of this action by virtue of the laws of the United States.

The judgment of the Circuit Court is reversed and the cause remanded to that court, with directions to dismiss the action for want of jurisdiction.

Reversed.

*WESTERN LOAN & SAVINGS COMPANY, Plff. in Err., [368]
v.
BUTTE & BOSTON CONSOLIDATED MINING COMPANY.

(See S. C. Reporter's ed. 368-372.)

Federal courts — proper district for suit — waiver.

The objection that a particular Federal circuit court is without jurisdiction of a suit between citizens of different states because neither of the parties is a resident of the district is waived by demurring upon grounds reaching to the merits of the cause of action in addition to jurisdictional grounds, where, under the local practice, defendant could have made a special appearance by motion aimed at the jurisdiction of the court over his person, or by motion to quash the service of process.

[No. 351.]

Submitted April 20, 1908. Decided June 1, 1908.

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment dismissing, for want of jurisdiction, a suit between citizens of different states, because neither of the parties was a resident of the district. Reversed.

The facts are stated in the opinion.

Mr. **John A. Shelton** submitted the cause for plaintiff in error.

Mr. **Lewis O. Evans** submitted the cause for defendant in error. Messrs. C. F. Kelley and John F. Forbis were on the brief.

Mr. Justice **Day** delivered the opinion of the court:

The plaintiff in error brought this action at law against the defendant in error in the circuit court for the district of Montana. Jurisdiction was based solely on the diversity of citizenship of the parties. The plaintiff was a citizen of Utah and the defendant a citizen of New York. The judge of the circuit court dismissed the action for want of jurisdiction, and whether *that [369] decision was correct is the single question brought directly here by writ of error. The circuit court for the district of Montana was without jurisdiction of the action, because neither of the parties to it was a resident of that district, and the statute (25 Stat. at

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NOTE.—As to what Federal district is proper place for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

As to waiver of right as to proper district—see note to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192.

L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508) requires that where the jurisdiction is founded on the fact that the parties are citizens of different states, suit shall be brought only in the district where one of them resides. But we have recently held that where diversity of citizenship exists, as it does here, so that the suit is cognizable in some circuit court, the objection that there is not jurisdiction in a particular district may be waived by appearing and pleading to the merits. Re Moore, April 20, 1908. [209 U. S. 490, ante, 904, 28 Sup. Ct. Rep. 585.] Anything to the contrary said in Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, was overruled. The question here, therefore, is narrowed to the inquiry whether the defendant waived the objection to the jurisdiction.

While the conformity act, Revised Statutes, § 914, U. S. Comp. Stat. 1901, p. 684, provides that the practice, pleadings, forms, and modes of proceeding in civil causes, other than those in equity and admiralty, in the circuit and district courts of the United States, shall conform, as near as may be, to the practice, pleadings, and forms, and modes of proceedings existing at the time in like causes in courts of record of the state wherein such United States courts are held, nevertheless, in cases like the one under consideration, involving the jurisdiction of the Federal courts, the ultimate determination of such question is for this court alone. This doctrine finds illustration in the case of Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859, in which the subject is discussed by Mr. Justice Jackson, delivering the opinion of the court. In that case it was held that the Texas statute, which had been upheld by the courts of the state, giving to a special appearance, made solely to challenge the court's jurisdiction, the effect of a general appearance, was not binding upon the Federal courts sitting in the state, notwithstanding the provisions of § 914 of the Revised Statutes of the United States.

In the case at bar, defendant filed its [370] demurrer to the complaint, *alleging: 1st, that the court has no jurisdiction of the subject of the action; 2d, that the court has no jurisdiction of the person of the defendant; 3d, that said complaint does not state facts sufficient to constitute a cause of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible.

The learned judge, on the 7th of November, 1903, overruled the demurrer as to the first, second, and third grounds of the complaint, but sustained it upon the fourth and fifth grounds, in that the complaint was uncertain and unintelligible. Thereupon the plaintiff filed an amended complaint; the defendant repeated the same grounds of demurrer, and the same was submitted to the court on the first and second grounds,—those covering jurisdiction over the subject-matter of the action and jurisdiction over the person of the defendant, respectively,—and on the 26th of October, 1906, Judge Hunt, holding the circuit court for the district of Montana, in a well-considered opinion, held that, inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana district, and had submitted to the jurisdiction. In support of his view Judge Hunt cited Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Re Keasbey & M. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Lowry v. Tile, Mantel, & Grate Asso. 98 Fed. 817; Texas & P. R. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90, 14 Sup. Ct. Rep. 257. Thereafter, before any further steps were taken in the case the learned judge changed his ruling on the question of jurisdiction, and filed the following brief memorandum opinion:

"As neither party to this action was, at the time of the institution thereof, a citizen or resident of the state of Montana, *upon [371] the authority of Ex parte Wisner, decided by the Supreme Court December 10, 1906, and followed by the court of appeals of this circuit in Yellow Aster Min. & Mill. Co. v. Crane Co. 80 C. C. A. 566, 150 Fed. 580, and Southern P. Co. v. Burch, decided February 11, 1907, 82 C. C. A. 34, 152 Fed. 168, I must reverse the ruling heretofore made by me upon the demurrer, and dismiss the case for lack of jurisdiction.

"So ordered."

Let us see, then, whether the defendant had submitted to the jurisdiction of the circuit court. It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits, so far as the legal sufficiency of the cause of action is concerned. Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling it subsequently changed on the authority of Ex parte Wisner, which is now overruled in Re Moore, in so far as it was said in the Wisner Case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed.

So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to § 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States circuit court, as is shown by the case of Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935,—a suit in a district in the state of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of [372] states other than *New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in Re Keasbey & M. Co. supra.

In St. Louis & S. F. R. Co. v. McBride, supra, the case, like the present one, arose in a code state. Suit was brought in the circuit court of the United States for the western district of Arkansas. The Arkansas Code, in respect to grounds of demurrer, is identical with the Montana Code. Kirby's Digest of the Statutes of Arkansas, 1904, p. 1285. Following the Arkansas Code, as the defendant in this case follows the Montana Code, the defendant filed a demurrer in language identical upon these points with the demurrer in this case. The demurrer reads: "1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court had no jurisdiction of the subject-matter of the action. 3d. Because the complaint does not state facts sufficient to constitute a cause of action."

Of the effect of this demurrer Mr. Justice Brewer, delivering the opinion of the court, said:

"Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and, by filing the demurrer on the grounds stated, submitted to the jurisdiction of the circuit court.

Judgment reversed.

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*WOLFE LONDONER and Dennis Sheedy, [373]
Plffs. in Err.,
v.
CITY AND COUNTY OF DENVER, as Successor to the City of Denver, et al.

(See S. C. Reporter's ed. 373-386.)

Constitutional law — due process of law — public improvements — notice.

1. A charter provision making conclusive the finding of a city council that a proper petition for a public improvement has been filed does not deny the due process of law guaranteed by U. S. Const., 14th Amend., although such finding is made without notice.

Error to state court — scope of review — question of local law.

2. Whether or not a city council has determined that the board of public works has complied with the conditions of its jurisdiction to order a street improvement is not a Federal question, which can be reviewed by the Federal Supreme Court on writ of error to a state court.

Constitutional law — judicial exercise of legislative power.

3. No valid objection founded upon the 14th Amendment to the Federal Constitution can be urged against the action of a state court in so construing a state law as to bring it into harmony with the Federal and state Constitutions on the theory that the court so far neglected the obvious meaning of the statute as to make its judgment an exercise of legislative power.

NOTE.—As to what questions the Federal Supreme court will consider when reviewing the judgment of a state court—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

Constitutional law — due process of law —hearing on assessment for street improvement.

4. Something more than an opportunity to submit in writing to the city council, sitting as a board of equalization, all objections to, and complaints of, an assessment for a public improvement, is essential to satisfy the due process of law guaranteed by U. S. Const., 14th Amend., where the law denies the landowners the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

[No. 157.]

Argued March 6, 9, 1908. Decided June 1, 1908.

IN ERROR to the Supreme Court of the State of Colorado to review a decree which reversed a decree of the District Court of Arapahoe County, in that state, granting the relief sought against an assessment for a street improvement, and ordered judgment for defendants. Reversed.

See same case below, 33 Colo. 104, 80 Pac. 117.

The facts are stated in the opinion.

Mr. **Joshua F. Grozier** argued the cause and filed a brief for plaintiffs in error:

This court cannot be deprived of its lawful authority to review judgments depriving persons of life, liberty, or property without due process of law, or of an equal protection of the laws, in violation of the Federal Constitution, by state action.

McGehee. Due Process of Law, pp. 24–30; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Reagan v. Farmers' Loan & T. Co. 154 U. S. 390, 38 L. ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Hovey v. Elliott, 167 U. S. 409, 417, 42 L. ed. 215, 221, 17 Sup. Ct. Rep. 841; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Capital City Gas Co. v. Des Moines, 72 Fed. 821; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 317.

The action of the state court is the action of the state.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Virginia v. Rives (Ex parte Virginia) 100 U. S. 318, 25 L. ed. 669; Neal v. Delaware, 103 U. S. 370, 397, 26 L. ed. 567, 574; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 419, 33 L. ed. 972, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Raymond v. Chicago Union Traction Co. 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7; Re Kelly, 46 Fed. 654.

The municipality is a mere state agency, or instrument, and its acts are the acts of the state.

People ex rel. Barton v. Londoner, 13 Colo. 308, 6 L.R.A. 444, 22 Pac. 764; Carpenter v. People, 8 Colo. 116, 5 Pac. 828; Re Senate Bill, 12 Colo. 188, 21 Pac. 481; Denver v. Iliff, 38 Colo. 357, 89 Pac. 823; Johnson v. People, 6 Colo. App. 167, 40 Pac. 576; Brown v. Galveston, 97 Tex. 1, 75 S. W. 488.

Where the legislature does not itself determine the purely discretionary matters of apportionment, but commits their determination to a municipal council, or other subordinate administrative or legislative board or commission, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing before the subordinate body making the conclusive decision.

Parsons v. District of Columbia, 170 U. S. 52, 42 L. ed. 946, 18 Sup. Ct. Rep. 521; Spencer v. Merchant, 125 U. S. 357, 31 L. ed. 768, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 167, 41 L. ed. 391, 17 Sup. Ct. Rep. 56; French v. Barber Asphalt Paving Co. 181 U. S. 337–341, 45 L. ed. 887, 888, 21 Sup. Ct. Rep. 625.

The question of whether or not a given petition is subscribed by a given number of people is a question of the purest fact. Its determination involves no elements of discretion. All questions of pure fact are judicial or quasi-judicial questions. That is, they cannot be conclusively determined without investigation, notice, and opportunity to defend.

People ex rel. School Dist. No. 5 v. Van Horn, 20 Colo. App. 230, 77 Pac. 978; Rio Grande Sampling Co. v. Catlin, 40 Colo. 450, 94 Pac. 323; Benson v. People, 10 Colo. App. 175, 50 Pac. 212; People ex rel. Simpson v. Denman, 16 Colo. App. 337, 65 Pac. 455; Rhodes v. Board of Public Works, 10 Colo. App. 100, 49 Pac. 430; La Junta v. Heath, 38 Colo. 372, 88 Pac. 459; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Carter v. Durango, 16 Colo. 534, 25 Am. St. Rep. 294, 27 Pac. 1057.

All questions of fact, not involving discretion in the tribunal authorized to determine them, can be determined only after notice and opportunity to defend.

Thorp v. Woolman, 1 Mont. 170; State ex rel. Riddell v. District Court, 33 Mont. 529, 85 Pac. 367; Christy v. Kingfisher, 13 Okla. 585, 76 Pac. 135; Fitch v. Manitou County, 133 Mich. 178, 94 N. W. 954; Creote v. Chicago, 56 Ill. 427; Ames v. Port Huron Log Driving & Boom. Co. 11 Mich. 147, 83 Am. Dec. 731; State ex rel. Haughey v. Ryan, 182 Mo. 349, 81 S. W. 435; Mulligan v. Smith, 59 Cal. 233, Approved in Zeigler v. Hopkins, 117 U. S. 683, 687, 688, 29 L. ed. 1019-1021, 6 Sup. Ct. Rep. 919; Davidson v. New Orleans, 96 U. S. 97, 102, 107, 24 L. ed. 616, 618; Hurtado v. California, 110 U. S. 536, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Monongahela Nav. Co. v. United States, 148 U. S. 327, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; American School v. McAnnulty, 187 U. S. 94, 107, 47 L. ed. 90, 95, 23 Sup. Ct. Rep. 33; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

A mere recital that specified facts, essential to jurisdiction, exist, can never bind an adversary. An adversary power or essential pure fact can never be created by mere recital.

Cooley, Const. Lim. 7th ed. 139; Portland v. Bangor, 65 Me. 120, 20 Am. Rep. 681; Bennett v. Davis, 90 Me. 106, 37 Atl. 864; Keller v. Hawk (Okla.) 91 Pac. 778; Mulligan v. Smith, 59 Cal. 230, Approved in Zeigler v. Hopkins, 117 U. S. 687, 688, 29 L. ed. 1020, 1021, 6 Sup. Ct. Rep. 919; People ex rel. Elder v. Sours, 31 Colo. 421, 102 Am. St. Rep. 34, 74 Pac. 167; Goodykoontz v. Acker, 19 Colo. 366, 35 Pac. 911; Platte & D. Canal & Mill. Co. v. Lee, 2 Colo. App. 184, 29 Pac. 1036; Yates v. Milwaukee, 10 Wall. 498, 505, 19 L. ed. 984, 986.

Due process of law implies the right of the person affected to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Zeigler v. South & North Ala. R. Co. 58 Ala. 597; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 402, 31 Pac. 177; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; East Kingston v. Towle, 48 N. H. 61, 2 Am. Rep. 174, 97 Am. Dec. 575; Meyers v. Shields, 61 Fed. 717; McGavock v. Omaha, 40 Neb. 77, 58 N. W. 543; Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289; Violett v. Alexander, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Norfolk v. Young, 97 Va. 728, 47 L.R.A. 574, 34 S. E. 886; Barber Asphalt Paving Co. v. Ridge, 169 Mo. 376, 68 S. W. 1043.

Property owners are entitled to notice and opportunity to appear at a specified time and place before a board or tribunal competent to administer proper relief, in order that they must be heard concerning the correctness of the charge before it is made conclusive.

Brown v. Denver, 7 Colo. 312, 3 Pac. 455; Dexter v. Boston, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379; White v. Gove, 183 Mass. 338, 67 N. E. 359; Bennett v. Davis, 90 Me. 107, 37 Atl. 864; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

If the charter is not, the procedure in this case is, unconstitutional.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

No procedure which will result, as does that in this case, in an actual confiscation of the property of the citizen, can ever be justified by any manner, process, or method of reasoning, however astute.

White v. Tacoma, 109 Fed. 32.

One of the broad distinctions between judicial and legislative bodies, and judicial and legislative action, so far as the right to hearings are concerned, is that, independent of any statute expressly giving the citizen the right to be heard, the former must, in order for their proceedings to be valid, before acting, and as a matter of right, hear him against whom it seeks to act (Brown v. Denver, supra; McVeigh v. United States, 11 Wall. 259, 267, 20 L. ed. 80, 81; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841); whereas, as to matters clearly within its legislative discretion (and it has power legislatively to act on no others), the latter may or may not hear him, as it prefers (11 Burgess, Political Science & Comparative Const. Law, pp. 57, 58; Williams v. Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Parsons v. District of Columbia, 170 U. S. 45, 52, 42 L. ed. 943, 946, 18 Sup. Ct. Rep. 521).

A notice of the time and place for hearings was essential.

Denver v. Dumars, 33 Colo. 98, 80 Pac. 114; Brown v. Denver, 7 Colo. 313, 3 Pac. 455; State, Brinley, Prosecutor, v. Perth Amboy, 29 N. J. L. 262; State, Durant, Prosecutor, v. Jersey City, 25 N. J. L. 309; McGavock v. Omaha, 40 Neb. 76, 58 N. W. 543; Hopkins v. Mason, 61 Barb. 470; Merritt v. Portchester, 71 N. Y. 314, 27 Am. Rep. 47; Highway Comrs. v. Hoblit, 19 Ill. App. 261; Meyers v. Shields, 61 Fed. 718; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 410; Gray, Limitations of Taxing Power, § 1153.

The object of any hearings at all must be to correct errors and afford proper relief.

Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

The phrase "due process of law," as used in the 14th Amendment, itself inhibits legislation by other than the legislative department of the government; it prohibits pure and simple legislation by state courts.

Osborn v. Bank of United States, 9 Wheat. 865, 6 L. ed. 234; Re Burrus, 136 U. S. 610, 34 L. ed. 508, 10 Sup. Ct. Rep. 850; Luther v. Borden, 7 How. 41, 12 L. ed. 598; Kilbourn v. Thompson, 103 U. S. 182, 26 L. ed. 384; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Dixon County v. Field, 111 U. S. 83, 92, 28 L. ed. 360, 363, 4 Sup. Ct. Rep. 315; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Yick Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; San Diego Land & Town Co. v. National City, 174 U. S. 740, 750, 43 L. ed. 1155, 1158, 19 Sup. Ct. Rep. 804; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 100, 46 L. ed. 105, 22 Sup. Ct. Rep. 30; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

It is only the state court's settled constitutional construction of any of its laws which this court follows, and not mere oscillations in the course of settlement of questions in state courts.

Gelpcke v. Dubuque, 1 Wall. 176, 205, 17 L. ed. 520, 525; San Antonio v. Mehaffy, 96 U. S. 315, 24 L. ed. 817.

Whether oscillations in Colorado decisions on this subject exist is perhaps best shown by a comparison of some of the decisions themselves.

Palmer v. Way, 6 Colo. 106; Denver v. Knowles, 17 Colo. 204, 17 L.R.A. 135, 30 Pac. 1041; Denver v. Campbell, 33 Colo. 162, 80 Pac. 142; Brown v. Denver, 7 Colo. 305, 3 Pac. 455; Jenks v. Stump (Colo.) 15 L.R.A. (N.S.) 554, 93 Pac. 17; Burcher v. People (Colo.) 93 Pac. 14; People ex rel. Elder v. Sours, 31 Colo. 438, 102 Am. St. Rep. 34, 74 Pac. 167; Lambert v. Shumway, 36 Colo. 350, 85 Pac. 89; Leadville v. Coronado Min. Co. 37 Colo. 246, 86 Pac. 1034; Holmberg v. News-Times Pub. Co. 31 Colo. 456, 73 Pac. 865; Denver v. Hayes, 28 Colo. 110, 63 Pac. 311; Schwed v. Hartwitz, 23 Colo. 187, 58 Am. St. Rep. 221, 47 Pac. 295; Richardson v. Denver, 17 Colo. 398, 30 Pac. 333; Mitchell v. Minnequa Town Co. (Colo.) 92 Pac. 678; Evans v. Denver, 26 Colo. 193, 57 Pac. 696; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 402, 31 Pac. 177; Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Beckett v. Cuenin, 15 Colo. 284, 22 Am. St. Rep. 399, 25 Pac. 167; Cordilla v. Pueblo, 34 Colo. 293, 82 Pac. 594; Ahern v. High Line Irrig. District, 39 Colo. 409, 89 Pac. 963; Goodykoontz v. Acker, 19 Colo. 366, 35 Pac. 911; Killgore v. Cranmer, 35 Colo. 487, 84 Pac. 70; La Junta v. Heath, 38 Colo. 372, 88 Pac. 459.

This court is not bound to follow state decisions which it does not approve, and even in those cases where the jurisdiction of the Federal courts rests on nonresidence only, it does so simply as a matter of comity.

Burgess v. Seligman, 107 U. S. 32–38, 27 L. ed. 364–366, 2 Sup. Ct. Rep. 10.

Applicable legislation by the legislative department of the state is an essential element of due process of law under the taxing power.

Gifford v. Callaway, 8 Colo. App. 359, 46 Pac. 626; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200; Rees v. Watertown, 19 Wall. 122, 22 L. ed. 76; Nashville v. Ray, 19 Wall. 475, 22 L. ed. 168; Heine v. Levee Comrs. 19 Wall. 655, 661, 22 L. ed 223, 226.

Even had the council considered any of the objections filed, so far as the apportionment was concerned, too general, they were bound to give the objectors notice of when and where to be heard on the council's contemplated action on the objections filed, if not, indeed, opportunity to make them more specific, as the property owners intended doing by evidence and testimony had they been permitted a hearing. They could not, even if insufficient, in effect strike them from the files without notice and opportunity to defend against the proposed action.

Davidson v. Chicago, 178 Ill. 582, 53 N. E. 367; Wier v. Bradford, 1 Colo. 16; Cleveland v. Nubian Min. Co. 38 Colo. 195, 88 Pac. 179.

Mr. **Halsted L. Ritter** argued the cause, and, with Mr. Henry A. Lindsley, filed a brief for defendants in error:

The provisions of the charter respecting the petition do not violate the 14th Amendment.

Denver v. Dumars, 33 Colo. 94, 80 Pac. 114; Denver v. Londoner, 33 Colo. 104, 80 Pac. 117, Rehearing, 33 Colo. 121, 80 Pac. 122.

The constitutional provision relative to due process of law is fully complied with when the property owner is afforded an opportunity to be heard and test the validity of the special assessment, and the proportion of the general cost of the improvements which shall be assessed against his property.

Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Brown v. Denver, 7 Colo. 305, 3 Pac. 455; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 45, 43 L. ed. 359, 19 Sup. Ct. Rep. 90; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966, 25 Am. & Eng. Enc. Law, 2d ed. p. 1173; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

There is no Federal question involved here.

Williams v. Albany County, 122 U. S. 154, 164, 30 L. ed. 1088, 1089, 7 Sup. Ct. Rep. 1244; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

There is no provision of the Federal Constitution forbidding the state from granting to a tribunal, whether called a court or not, the final determination of a legal question.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

In the following state courts the matter of insufficient petitions and a curative act were considered, and the statute upheld on the ground that no petition was necessary in the first place.

Richman v. Muscatine County, 77 Iowa, 513, 4 L.R.A. 445, 14 Am. St. Rep. 308, 42 N. W. 422; Whitney v. Pittsburgh, 147 Pa. 351, 30 Am. St. Rep. 740, 23 Atl. 395; Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

The notices and hearings provided for in the charter of the city of Denver under which the paving was done in Eighth avenue paving district are sufficient to constitute due process of law under the 14th Amendment to the Constitution of the United States.

Denver v. Kennedy, 33 Colo. 90, 80 Pac. 122, 467; Denver v. Dumars, 33 Colo. 96, 80 Pac. 114; Denver v. Londoner, 33 Colo. 111, 80 Pac. 117; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley and Bauman v. Ross, supra; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Paulsen v. Portland, 149 U. S. 41, 37 L. ed. 641, 13 Sup. Ct. Rep. 750; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, supra; Kelley v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Shumate v. Heman, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

Due process of law does not require a judicial hearing in the ordinary acceptation of that term, but is complied with in matters of assessments for public improvements if the parties assessed have an opportunity to be heard, either before a juridical tribunal or before a board of assessment, at some stage of the proceedings.

Hibben v. Smith, 191 U. S. 311, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The rule or method of apportionment being fixed, of which fact every property owner was advised, the hearings provided for were more than ample.

Michigan R. Tax Cases, 138 Fed. 223.

Mr. **F. W. Sanborn** also argued the cause for defendants in error.

*Mr. Justice **Moody** delivered the opinion of the court: [**374**]

The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the supreme court of the state, which ordered judgment for the defendants. 33 Colo. 104, 80 Pac. 117. The case is here on writ of error. The supreme court held that the tax was assessed in conformity with the Constitution and laws of the state, and its decision of that question is conclusive.

The assignments of error relied upon are as follows:

"First. The supreme court of Colorado erred in holding and deciding that the portion of proviso 'eighth' of § 3 of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, Signed and Approved by the Governor of Colorado, April 3, 1893' (commonly called the Denver city charter of 1893), which provided, 'And the finding of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal,' as construed by the supreme court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted was drawn in question and denied by appellees in said cause, on the ground of its being repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States, and in contravention thereof.

"Second. The supreme court of Colorado further erred in assuming that said city council ever made a finding by ordinance in accordance with said proviso 'eighth.'

. . . . . .

"Fifth. The supreme court of Colorado more particularly erred in holding and deciding that the city authorities, in following [375]*the procedure in this Eighth avenue paving district, No. 1, of the city of Denver, Colorado, in the manner in which the record, evidence, and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the 14th Amendment of the Constitution of the United States.

"Ninth. The supreme court of Colorado erred in upholding §§ 29, 30, and 31, and each thereof, of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, Signed and Approved by the Governor of Colorado April 3d, 1893' (commonly called the Denver city charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty and property of these several plaintiffs in error without due process of law, in violation of both the state and Federal Constitution and the 14th Amendment thereof.

"Tenth. The supreme court of Colorado erred in upholding each of the several assessments against the corner lots, and particularly those lots belonging to said Wolfe Londoner and Dennis Sheedy, because each thereof was assessed for the paving and other improvements in this district alone for more than the several lots so assessed were ever actually worth, and far in excess of any special benefits received from the alleged improvements."

These assignments will be passed upon in the order in which they seem to arise in the consideration of the whole case.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. It does not seem necessary to set forth fully the elaborate provisions of the charter regulating the exercise of this power, except where they call for special examination. The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order the paving of a street. The board must, however, first adopt specifications, mark out a district of assessment, *cause a map[376] to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. Before action, notice by publication and an opportunity to be heard to any person interested must be given by the board.

The board may then order the improvement, but must recommend to the city council a form of ordinance authorizing it, and establishing an assessment district, which is not amendable by the council. The council may then, in its discretion, pass or refuse to pass the ordinance. If the ordinance is passed, the contract for the work is made by the mayor. The charter provides that "the finding of the city council, by ordinance, that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal." The charter then provides for the assessment of the cost in the following section:

"Sec. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof, affording complete drainage for any part or parts of the district, and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein, showing the whole cost of the improvement, or such parts thereof, including 6 per cent additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first instalment thereof, are, by the laws of this state, made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

"Sec. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published *in the city of Denver, notify the[377] owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

"Sec. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated: 1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

[378] *In the case before us the board took the first step by transmitting to the council the resolution to do the work and the form of an ordinance authorizing it. It is contended, however, that there was wanting an essential condition of the jurisdiction of the board; namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council the authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. That ordinance, after reciting a compliance by the board with the charter in other respects, and that "certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the city charter required," enacted "That, upon consideration of the premises, the city council doth find that, in their action and proceedings in relation to said Eighth avenue paving district Number 1, the said board of public works has fully complied with the requirements of the city charter relating thereto." The state supreme court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the state. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. Voigt v. Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397. The *legislature might have authorized the [379] making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action, it could, so far as the Federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed. This disposes of the first assignment of error, which is overruled. The second assignment is that the court erred in deciding that the city council had determined that the board of public works had complied with the conditions of its jurisdiction to order the work done. It is enough to say that this is not a Federal question.

We see nothing in the sixth assignment of error.† It is apparently based upon the proposition that, in construing a law of the state in a manner which the plaintiffs in error think was clearly erroneous, the supreme court of the state exercised legislative power, and thereby violated the 14th Amendment. We are puzzled to find any other answer to this proposition than to say that it is founded upon a misconception of the opinion of the court and of the effect of the 14th Amendment. The complaint in this assignment is not that the court gave a construction to the law which brought it into conflict with the Federal Constitution, but that, in construing the law so as to bring it into harmony with the Federal and state Constitutions, the court so far neglected its obvious meaning as to make the judgment an exercise of legislative power. We know of nothing in the 14th Amendment which gives us authority to consider a question of this kind. We think it fitting, however, to say that we see nothing extraordinary in the method of interpretation followed by the court, or in its results. Whether we should or not have arrived at the same conclusions is not of consequence.

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†[This assignment of error is as follows: "Sixth: That, by the opinion and the judgment and decree of the supreme court of Colorado in the case at bar, the supreme court of said state, acting in the name of and for said state, without due process of law, itself made what purports to be a law, and, at the same time of making, enforced the same, thereby denying to the plaintiffs in error due process of law under the 14th Amendment of the United States Constitution, and depriving the plaintiffs in error of their property without due process of law, in contravention of the provision of the 14th Amendment of the Constitution of the United States."—Ed.]

The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the
[380]construction which the supreme *court gave to the charter. This may be found in the judgment under review and two cases decided with it. Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467; Denver v. Dumars, 33 Colo. 94, 80 Pac. 114. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council, the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council, sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization "shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant" (33 Colo. 97, 80 Pac. 114); and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself, therefore, is clear of all constitutional faults. It remains to see how it was administered in the case at bar.

The fifth assignment, though general, vague, and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the supreme court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed, the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice, stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be "heard and determined by the city council before the passage *of any ordinance assessing the cost." Those **[381]** interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case, and that the statute could be sustained only upon the theory drawn from it. Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper:

Denver, Colorado, January 13, 1900.

To the Honorable Board of Public Works and the Honorable Mayor and City Council of the City of Denver:

The undersigned, by Joshua Grozier, their attorney, do hereby most earnestly and strenuously protest and object to the passage of the contemplated or any assessing ordinance against the property in Eighth avenue paving district No. 1, so called, for each of the following reasons, to wit:

1st. That said assessment and all and each of the proceedings leading up to the same were and are illegal, voidable, and void; and the attempted assessment, if made, will be void and uncollectible.

2d. That said assessment and the cost of said pretended improvement should be collected, if at all, as a general tax against the city at large, and not as a special assessment.

[382] *3d. That property in said city not assessed is benefited by the said pretended improvement, and certain property assessed is not benefited by said pretended improvement, and other property assessed is not benefited by said pretended improvement to the extent of the assessment; that the individual pieces of property in said district are not benefited to the extent assessed against them and each of them respectively; that the assessment is arbitrary, and property assessed in an equal amount is not benefited equally; that the boundaries of said pretended district were arbitrarily created without regard to the benefits or any other method of assessment known to law; that said assessment is outrageously large.

4th. That each of the laws and each section thereof under which the proceedings in said pretended district were attempted to be had do not confer the authority for such proceedings; that the 1893 city charter was not properly passed, and is not a law of the state of Colorado, by reason of not properly or at all passing the legislature; that each of the provisions of said charter under which said proceedings were attempted are unconstitutional and violative of fundamental principles of law, the Constitution of the United States, and the state Constitution, or some one or more of the provisions of one or more of the same.

5th. Because the pretended notice of assessment is invalid and was not published in accordance with the law, and is in fact no notice at all; because there was and is no valid ordinance creating said district; because each notice required by the 1893 city charter to be given, where it was attempted to give such notice, was insufficient, and was not properly given or properly published.

6th. Because of noncompliance by the contractor with his contract, and failure to complete the work in accordance with the contract; because the contract for said work was let without right or authority; because said pretended district is incomplete and the work under said contract has not been completed in accordance with said contract; [383] because items too *numerous to mention, which were not a proper charge in the said assessment, are included therein.

7th. Because the work was done under pretended grants of authority contained in pretended laws, which laws were violative of the Constitution and fundamental laws of the state and Union.

8th. Because the city had no jurisdiction in the premises. No petition subscribed by the owners of a majority of the frontage in the district to be assessed for said improvements was ever obtained or presented.

9th. Because of delay by the board of public works in attempting to let the contract, and because the said pretended improvement was never properly nor sufficiently petitioned for; because the contracts were not let nor the work done in accordance with the petitions, if any, for the work, and because the city had no jurisdiction in the premises.

10th. Because, before ordering the pretended improvement, full details and specifications for the same, permitting and encouraging competition. and determining the number of instalments and time within which the costs shall be payable, the rate of interest on unpaid instalments, and the district of lands to be assessed, together with a map showing the approximate amounts to be assessed, were not adopted by the board of public works before the letting of the contract for the work and furnishing of material; because advertisement for 20 days in two daily newspapers of general circulation, giving notice to the owners of real estate in the district of the kind of improvements proposed, the number of instalments and time in which payable, rate of interest and extent of the district, probable cost, and time when a resolution ordering the improvement would be considered, was not made, either properly or at all; and, if ever attempted to be made, was not made according to law or as required by the law or charter.

11th. Because the attempted advertisements for bids on the contract attempted to be let were not properly published, and were published and let, and the proceedings had, if at all, *in such a way as to be prejudicial [384] to the competition of bidders and to deter bidders; and the completion of the contracts, after being attempted to be let, was permitted to lag in such a manner as not to comply with the contract, charter, or laws, and the power to let the contract attempted to be let was not within the power of the parties attempting to let the same; because the city council is or was, by some of the proceedings, deprived of legislative discretion, and the board of public works and other pretended bodies given such discretion, which discretion they delegated to others having no right or power to exercise the same; and executive functions were conferred on bodies having no right, power, or authority to exercise the same, and taken away from others to whom such power was attempted to be granted or given, or who should properly exercise the same; that judicial power was attempted to be conferred on the board of public works, so called, and the city council, and other bodies or pretended bodies not judicial or quasi-judicial in character, having no right, power, or authority to exercise the same, and the courts attempted to be deprived thereof.

Wherefore, because of the foregoing and numerous other good and sufficient reasons, the undersigned object and protest against the passage of the said proposed assessing ordinance.

This certainly was a complaint against and objection to the proposed assessment. Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated, but in a specially called, session, and, without any hearing, adopted the following resolution:

"Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth avenue paving district No. 1, of the city of Denver, against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, no complaint or objection has [385] been filed or made *against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved."

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts, was there a denial by the state of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States?

In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place *of the [386] hearing. Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Central R. Co. v. Wright, 207 U. S. 127, ante, 134, 28 Sup. Ct. Rep. 47. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 171 et seq., 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.

It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the state. Raymond v. Chicago Union Traction Co. 207 U. S. 20, ante, 78, 28 Sup. Ct. Rep. 7. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error.

Judgment reversed.

The CHIEF JUSTICE and Mr. Justice **Holmes** dissent.

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[387] *HENRY CLAY PIERCE, Appt.,
v.
EDMUND P. CREECY, Chief of Police of the City of St. Louis.

(See S. C. Reporter's ed. 387-405.)

Appeal — from circuit court — case involving Federal Constitution.

1. Habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of U. S. Const. art. 4, § 2, ¶ 2, regulating extradition, involve the construction of the Constitution of the United States, within the meaning of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, governing direct appeals from the circuit courts to the Supreme Court.

Habeas corpus — to test extradition — questions reviewable.

2. The truth of an allegation in an indictment which may present a mixed question of law or fact cannot be inquired into on habeas corpus sued out by the accused, whose interstate extradition is sought.

Extradition — sufficiency of indictment.

3. An indictment, whether good or bad as a pleading, which unmistakably describes every element of the crime of false swearing, as defined by Tex. Pen. Code, art. 209, is a charge of crime within the meaning of U. S. Const. art. 4, § 2, ¶ 2, regulating interstate extradition.

[No. 357.]

Argued April 20, 21, 1908. Decided **June 1, 1908.**

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri to review a judgment discharging habeas corpus sued out by a person whose interstate extradition is sought. Affirmed.

See same case below, 155 Fed. 663.

Statement by Mr. Justice **Moody**:

This is an appeal directly to this court from a judgment of the circuit court upon a writ of habeas corpus, remanding the petitioner, now appellant, to the custody of the respondent, now appellee. The petition for the writ of habeas corpus alleges that the petitioner was "imprisoned, detained, confined, and restrained of his liberty, at the city of St Louis, within the district aforesaid, by Edmund P. Creecy, the chief of police of said city of St. Louis, in violation of the laws and Constitution of the United States." There is no dispute about the facts, which, as they appear in the petition and the return, are as follows. The governor of the state of Texas made a requisition upon the governor of the state of Missouri, which is as follows:

*To the Governor of the State of Missouri: [388]

Whereas, it appears by the annexed documents, which are hereby certified to be authentic, that H. Clay Pierce stands charged with false swearing, committed in the state of Texas, and information having been received that the said H. Clay Pierce has fled from justice and has taken refuge in Missouri.

Now, therefore, I, T. M. Campbell, governor of the state of Texas, have thought proper, in pursuance of the provisions of the Constitution and laws of the United States, to demand the surrender of the said H. Clay Pierce as fugitive from justice, and that he be delivered to G. S. Mathews, who is hereby appointed the agent, on the part of the state of Texas, to receive H. Clay Pierce.

Given under my hand and seal of the state, affixed at the city of Austin, this 11th day of February, A. D. 1907, and of the independence of the United States of America, the one hundred and thirty-first, and of Texas the seventy-first year.

T. M. Campbell, Governor.

To this requisition was attached a certified copy of an indictment against the petitioner. The indictment is as follows:

"In the name and by the authority of the state of Texas.

"The grand jurors of Travis county, in

NOTE.—On direct review in Federal Supreme court of judgments and decrees of district and circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

On habeas corpus in extradition cases—see notes to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464, and Bruce v. Rayner, 62 C. C. A. 506.

On the sufficiency of the information or complaint in extradition proceedings—see note to Ex parte Hart, 28 L.R.A. 801.

said state, duly empaneled, sworn, and charged as such at the September term, A. D. 1906, of the district court of said county, in and for the fifty-third judicial district, upon their oaths, in said court, present: That Henry Clay Pierce, in said county and state, on or about the 31st day of May, in the year of our Lord nineteen hundred, and before the presentment of this indictment, did then and there present himself and make his personal appearance before N. H. Nagle, a duly and legally qualified and acting notary public within and for the county of Travis and state of Texas, who was then and there duly authorized by law as such officer and notary public to administer an oath; and [389] the said *Henry Clay Pierce, having been duly sworn by the said N. H. Nagle, acting in her capacity as such officer and notary public, did then and there unlawfully, deliberately, corruptly, and wilfully, under the sanction of the oath so legally administered to him by the said N. H. Nagle, acting in the capacity aforesaid, make his voluntary false statement and declaration in writing, as follows:

"Affidavit.

"The State of Texas, County of Travis:

"I, Henry Clay Pierce, do solemnly swear that I am the president (president, secretary, treasurer, or director) of the corporation known and styled Waters-Pierce Oil Company, duly incorporated under the laws of Missouri, on the 29th day of May, 1900, and now transacting or conducting business in the state of Texas, and that I am duly authorized to represent said corporation in making this affidavit; and I do further solemnly swear that the said Waters-Pierce Oil Company, known and styled as aforesaid, has not, since the 31st day of January, 1900, created, entered into, or become a member of, or a party to, and was not, on the 31st day of January, 1900, nor at any day since that date, and is not now, a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination, or confederation to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, *or the price or pre- [390] mium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not issued, and does not own, any trust certificates for any corporation, agent, officer, or employee, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract, or agreement with any person or persons, corporation or corporations, or with any stockholders or directors thereof, the purpose and effect of which said combination, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price, or lessen the production and sale, of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been, since January 31, A. D. 1900, and is not now, a monopoly by reason of any conduct on its part which would constitute it a monopoly under the provisions of §§ 2, 3, 4, 5, 6, 10, and 11 of this act, and is not the owner or lessee of a patent to any machinery intended, used, or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling, or other process, and, while leasing, renting, or operating the same, refuses or fails to put the same on the market for sale; that it has not issued and does not own any trust certificates, and has not, for any corporation or any agent, officer, or employee thereof, or for the directors or stockholders thereof, entered into, and is not now, in any combination, contract, or agreement with any person or persons, corporation or corporations, or with the stockholders, director, or any officer, agent, or employee of any corporation or corporations, the purpose and effect of which combination, contract, or agreement would be a conspiracy to defraud, as defined in § 1 of this act, or to *create a monopoly, as [391] defined in §§ 2, 3, 4, 5, 6, 10, and 11 of this act.

Henry Clay Pierce,
(President, Secretary, Treasurer, or Director.)

"Subscribed and sworn to before me, a

notary public within and for the county of Travis, this 31st day of May, 1900.

(Signed) N. H. Nagle,
Notary Public.

"Whereas, in truth and in fact, the said Waters-Pierce Oil Company, mentioned in the above false statement and declaration in writing, had, since the 31st day of January, 1900, created, entered into, and become a member of, and a party to, and was, on the 31st day of January, 1900, and on every day since the 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of, and a party to, a pool, trust, agreement, combination, confederation, and undertaking with other corporations, individuals, and other persons and association of persons, to wit, with the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the state of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of whom are to said grand jurors unknown after diligent inquiry, to regulate and fix the price of petroleum and all of the products of petroleum, being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and, whereas, in truth and in fact, the said Waters-Pierce Oil Company, hereinbefore mentioned, had, since the 31st day of January, 1900, created, entered into, and become a member of, and a party to, and was, on the 31st day of January, 1900, and was on every day since the said 31st day of January, 1900, up to and on the 31st day of May, 1900, then and there a member of and a [392] party to a pool, trust, agreement, *combination, confederation, and undertaking with other corporations, individuals, and other persons and association of persons, to wit, the Standard Oil Company of New Jersey, a corporation incorporated under the laws of the state of New Jersey, and with all the Standard Oil Companies of the United States, the names and descriptions of said companies being to said grand jurors unknown after diligent inquiry, and with John D. Rockefeller, John D. Archbold, H. H. Rogers, and other individuals and persons whose names and a description of whom are to said grand jury unknown after diligent inquiry, to fix and limit the amount of supply and quantity of petroleum and all of the products of petroleum, the said petroleum and all the products of petroleum being articles of manufacture and a commodity and a convenience and a product of mining and an article and a thing; and whereas, in truth and in fact, the said Waters-Pierce Oil Company, hereinbefore mentioned, had, since the 31st day of January, 1900, and on every day since said 31st day of January, 1900, up to the 31st day of May, 1900, issued, and did then and on the 31st day of May, 1900, issue, trust certificates to another corporation, to wit, the Standard Oil Company of New Jersey, hereinbefore described, its agents, officer, and employee, to wit, one J. P. Gruet, and one John D. Johnson, and other agents, officers and employees of said Standard Oil Company of New Jersey, whose names and descriptions are to said grand jurors unknown, after diligent inquiry, whereby the said Standard Oil Company of New Jersey then and there became the owner of the majority of all the shares of stock of the said Waters-Pierce Oil Company, and the owner of a controlling interest in said Waters-Pierce Oil Company, which said false statement, so made as aforesaid by the said Henry Clay Pierce, was not then and there required by law, nor made in the course of judicial proceedings. Yet the same was then and there, nevertheless, wilfully and deliberately made, and was wilfully and deliberately false, as he, the said Henry Clay Pierce, then and there well knew.

"Against the peace and dignity of the state."

*To this petition the governor of Missouri [393] responded by issuing a warrant for the arrest of the petitioner and his delivery to the agent of the state of Texas.

While the respondent held the petitioner in custody upon this warrant, the writ of habeas corpus was issued. The petitioner, after alleging that he was held in custody by the respondent solely by virtue of the warrant issued by the governor of Missouri, further alleged in his petition:

"That said restraint, imprisonment, detention, and confinement are illegal, and that the illegality thereof consists in this, to wit:

"First. It is not shown by any sufficient averments in the said indictment that the facts stated or opinions expressed by petitioner in the affidavit set forth in said indictment were false when the said affdavit was made, and hence the indictment charges no offense under the laws of the state of Texas. That, so far as the averments of the said indictment are concerned, the conclusion, judgment, and opinion of petitioner expressed in the affidavit are only alleged to be false in the conclusion, judgment, and opinion of the grand jury preferring said indictment.

"Second. That the affidavit made by your petitioner was in the form prescribed by an act of the legislature of the state of Texas, entitled 'An Act to Prohibit Pools, Trusts, Monopolies, and Conspiracies to Control Business and Prices of Articles; to Prevent the Formation or Operation of Pools, Trusts, Monopolies, and Combinations of Charters of Corporations that Violate the Terms of This Act, and to Authorize the Institution and Prosecution of Suits Therefor.' which was approved May 25th, 1899, and became effective January 31st, 1900 (Tex. Gen. Laws 1899, p. 246), and that the language of said affidavit must be construed and interpreted in connection with the related text of the act of which it forms a part; that the pools, trusts, combinations, conspiracies, and monopolies prohibited by said act were such only as were formed by such natural or artificial legal entities as were then engaged in business in the state [394] of Texas, *and the indictment does not show or charge that the Waters-Pierce Oil Company, organized on May 29, 1900, as stated by petitioner in said affidavit, contrary to the fact stated by your petitioner in said affidavit, was a member of, or party to, any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any person or association of persons, then or theretofore transacting or doing business in the state of Texas, for the purpose of fixing the price or limiting the output or quantity of any article or thing whatsoever to be sold or marketed in said state of Texas.

"Third. That no charge of perjury or false swearing could legally be predicated upon any matter or thing stated in said affidavit, for the reason that the statements therein contained are mere expressions of legal conclusions or opinions upon a state of facts existent in the belief of the affiant.

"Fourth. The affidavit, being required by law, if false, could not be false swearing under the laws of the state of Texas.

"Fifth. For that it appears upon the face of the said indictment that more than four years elapsed between the date of the commission of the alleged offense and the finding of the said indictment."

No other grounds of the illegality of the petitioner's imprisonment than these were alleged in the petition.

Messrs. **Joseph H. Choate** and **Joseph H. Choate, Jr.**, argued the cause, and, with Mr. Henry S. Priest, filed a brief for appellant:

Where a petition to a circuit court of the United States for a writ of habeas corpus raises a question of the construction or application of the Constitution of the United States, the case falls within the fifth section of the act of March 3, 1891, and an appeal may be taken directly from the judgment of the circuit court to this court.

Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; Re Marmo, 138 Fed. 201.

In the case at bar the petition for the writ distinctly alleged, as the basis of the petitioner's right, that the detention of the appellant was in violation of the Constitution of the United States, in that the indictment upon which the extradition proceedings were based did not constitute a charge of crime within the meaning of article 4, § 2, subdivision 2 of the Constitution, and therefore did not justify the arrest. There can be no doubt that this contention raised a question of the construction and application of the Constitution.

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Re Strauss, 197 U. S. 324, 49 L. ed. 774, 25 Sup. Ct. Rep. 535.

That this constitutional question was the substantial question litigated in the circuit court further appears unmistakably from the opinion below, to which the court may and should turn for information on this subject.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The fact that a separate appeal was subsequently taken to the circuit court of appeals for the eighth circuit (which does not appear upon this record, but which this court may recall from our application for a writ of certiorari to bring the case from that court into this) could not, of course, affect the jurisdiction of this court, which had already attached.

Columbus Constr. Co. v. Crane Co. 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721.

Nor could the subsequent appeal constitute a waiver of this appeal.

Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

In order to sustain a requisition and warrant of extradition, an indictment must substantially allege facts which, if proven, would convict the prisoner of crime.

Princeton Review, Jan. 1879, p. 165; Spear, Extradition, 2d ed. p. 376; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; People ex rel. Lawrence v. Brady, 56 N. Y. 182; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Work v. Corrington, 34 Ohio St. 73, 32 Am. Rep. 345; Barriere v. State, 142 Ala. 72, 39 So. 55; Stewart v. United States, 55 C. C. A. 641, 119 Fed. 93; Re Terrell, 51

Fed. 213; Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; Re James, 18 Fed. 853; United States v. Brawner, 7 Fed. 86; Re Dana. 68 Fed. 886; Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218; Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605.

The indictment is or is not a "charge of crime" within the Constitution, according as it states or fails to state facts which, by the law of Texas, constitute the commission of a crime.

Webb v. York, 25 C. C. A. 133, 49 U. S. App. 163, 79 Fed. 616.

Courts of the United States should interfere by habeas corpus to release even persons held by state officers if the detention is without jurisdiction and is in violation of any Federal right.

Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781: Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556.

The indictment was fatally defective.

Reg. v. Whitehouse, 3 Cox, C. C. 86; 2 Bishop, New Crim. Proc. § 918; Gabrielsky v. State, 13 Tex. App. 428; Higgins v. State, 38 Tex. Crim. Rep. 539, 43 S. W. 1012; McMurtry v. State, 38 Tex. Crim. Rep. 521. 43 S. W. 1010; Morris v. State (Tex. Crim. App.) 83 S. W. 1126; Turner v. State, 30 Tex. Crim. Rep. 691, 18 S. W. 792; Anonymous, 1 Wash. C. C. 84, Fed. Cas. No. 475; Harp v. State, 59 Ark. 113, 26 S. W. 714; State v. Henderson, 90 Ind. 406; State v. Fannon, 158 Mo. 149, 59 S. W. 75; Re Howell, 114 Cal. 250, 46 Pac. 159; State v. Woolverton, 8 Blackf. 453; Rex v. Crespigny, 1 Esp. 280; State v. Marshall, 47 Mo. 378; State v. Lloyd, 77 Wis. 630, 46 N. W. 898.

State statutes, even if they are not in terms limited to the territorial jurisdiction of the state, are to be construed as if such limitation were expressed.

State v. Lancashire F. Ins. Co. 66 Ark. 466, 45 L.R.A. 348, 51 S. W. 633; Gates v. Hooper, 90 Tex. 563, 39 S. W. 1079; State v. Shippers Compress & Warehouse Co. 95 Tex. 603, 69 S. W. 58; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 594.

It is not every contract or arrangement fixing the price or limiting the quantity of merchandise, or restraining, in some measure, commerce, that is prohibited by the law. Whether they are prohibited is a question for judicial determination, after the essential facts are disclosed by the pleading. A manufacturer may very properly enter into an agreement with his factor, fixing the price of his products or limiting the output through that agency. Such a contract would not offend against any anti-trust law, or especially the anti-trust law of Texas, which we have under consideration.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

In a large number of cases of prosecution for violation of the anti-trust laws of the various states and of the United States, indictments following the language of the act and alleging that the defendants entered into such combinations, without specifying the acts or agreements whereby they did so, have been held not to charge a crime.

Re Greene, 52 Fed. 104; Re Terrell, 51 Fed. 213; Re Corning, 51 Fed. 205; Gage v. State, 24 Ohio C. C. 724; State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852; United States v. Baltimore & O. R. Co. 153 Fed. 997.

The assignments of falsity are insufficient. No facts are alleged which are necessarily inconsistent with the statements of the appellant's affidavit.

Re Greene, supra.

The indictment fails to inform appellant of the charge against him with that degree of reasonable certainty which will enable him to prepare his defense.

Rosen v. United States, 161 U. S. 30, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480; United States v. Potter, 56 Fed. 89; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; State v. Nelson, 74 Minn. 409, 77 N. W. 223; State v. Webber, 78 Vt. 463, 62 Atl. 1018; Shackelford v. Com. 25 Ky. L. Rep. 1830, 79 S. W. 192; Bartlett v. United States, 46 C. C. A. 19, 106 Fed. 884; United States v. Pettus, 84 Fed. 791; Rex v. Hepper, Ryan & M. 210; Gabrielsky v. State, supra; Williams v. State, 12 Tex. App. 395; Brinster v. State, 12 Tex. App. 612; Allen v. State, 13 Tex. App. 28; Flores v. State, 13 Tex. App. 337; Hewitt v. State, 25 Tex. 722; State v. Duke, 42 Tex. 455; Davis v. State, 20 Tex. App. 302; Caldwell v. State, 28 Tex. App. 581, 14 S. W. 122.

The indictment discloses upon its face that, at the time it was filed, the prosecution was barred by the statute of limitations.

Harwell v. State (Tex. Crim. App.) 65 S. W. 520; Hickman v. State, 44 Tex. Crim. Rep. 533, 72 S. W. 587.

The indictment itself discloses the fact that it was not found in good faith.

State v. Ela, 91 Me. 309, 39 Atl. 1001: United States v. Pope, Fed. Cas. No. 16,069.

The indictment is based upon an affidavit required by law, which cannot be the subject of a prosecution for the statutory crime of false swearing.

O'Bryan v. State, 27 Tex. App. 339, 11 S. W. 443.

Messrs. **Shepard Barclay** and **F. J. McCord** argued the cause, and, with Mr. Thomas T. Fauntleroy, filed a brief for appellee:

A mere charge of a crime, defined by the criminal law of a state, formulated upon affidavit before some magistrate, without indictment by a grand jury, is a sufficient basis for extradition, under the Federal law.

Day v. Otis, 8 Allen, 478; Mary v. State, 5 Mo. 79; Ryan v. People, 79 N. Y. 593; Drinkall v. Spiegel, 68 Conn. 441, 36 L.R.A. 486, 36 Atl. 830; Re De Giacomo, 12 Blatchf. 391, Fed. Cas. No. 3,747; People v. Garnett, 129 Cal. 364, 61 Pac. 1114; Rex v. Maynard, Russ. & R. C. C. 240.

The assignments of defects in the indictment raise no true or substantial Federal question for the application or construction of any Federal law or of the Constitution.

Every contention of illegality must be solved by interpretation of Texas law. Who shall make the interpretation? In the first instance, at least, the courts of that commonwealth. The real issue of law is what the duly appointed courts of Texas hold as to the sufficiency of the indictment.

Re Voorhees, 32 N. J. L. 141; Carfer v. Caldwell, 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264.

The petition for habeas corpus asserts that the indictment is insufficient according to the Texas law. Perhaps the courts of that state will agree with the petitioner. Will the Federal judiciary, in advance of any Texas interpretation of Texas law, interpose and assume that duty?

Carfer v. Caldwell, supra; Re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

Petitioner's sole plea was, and is, that the indictment is insufficient under the laws of Texas. If that is so, it does not oust the jurisdiction of the local court (in which is the indictment) to act upon the charge.

Spencer v. Duplan Silk Co. 191 U. S. 530, 48 L. ed. 290, 24 Sup. Ct. Rep. 174.

The petition for habeas corpus does not even present a case of Federal cognizance in any forum of that authority.

United States ex rel. Drury v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 233, 51 L. ed. 782, 27 Sup. Ct. Rep. 476.

Whether facts charged in an indictment constitute a crime under the state statutes, the courts of the state should decide. It is their province to determine that question if they have jurisdiction of the subject-matter.

Re Belt, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; Riggins v. United States, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; Rogers v. Peck. 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; Ex parte Moran, 75 C. C. A. 396, 144 Fed. 594.

The use of habeas corpus (as sought in this case) is a collateral attack on the pending proceeding in the court of Texas, and is only maintainable if that court has no power to proceed at all.

Ex parte Watkins, 3 Pet. 203, 7 L. ed. 653; United States v. Pridgeon, 153 U. S. 59, 38 L. ed. 635, 14 Sup. Ct. Rep. 746; Re Kowalsky, 73 Cal. 120, 14 Pac. 399.

If the facts are alleged in such a way in the indictment as not to render the judgment of conviction thereon void on a collateral attack, then there is no ground to discharge on habeas corpus, for that only is available where the prisoner is held without jurisdiction.

Benson v. Henkel, 198 U. S. 10, 49 L. ed. 922, 25 Sup. Ct. Rep. 569; Felts v. Murphy, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; Pearce v. Texas, 155 U. S. 311, 39 L. ed. 164, 15 Sup. Ct. Rep. 116; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; Carfer v. Caldwell, 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264; Re Lancaster, 137 U. S. 393, 34 L. ed. 713, 11 Sup. Ct. Rep. 117.

A failure to state a cause of action does not defeat jurisdiction if enough is said to disclose that a lawful jurisdiction is invoked.

17 Am. & Eng. Enc. Law, 2d ed. p. 1069.

Any lapse of time appearing on the face of the indictment between the act charged as a crime and the finding of the indictment would not deprive the trial court of jurisdiction to examine into the facts alleged.

Johnson v. United States, 3 McLean, 89, Fed. Cas. No. 7,418; Re Davison, 21 Fed. 618; Barker v. Hannibal & St. J. R. Co. 91 Mo. 86, 14 S. W. 280; State v. Snyder, 182 Mo. 498, 82 S. W. 12; United States v. Cook, 17 Wall. 168, 21 L. ed. 538; Ex parte Townsend, 133 Fed. 74; Campbell v. Haverhill, 155 U. S. 618, 39 L. ed. 283, 15

Sup. Ct. Rep. 217; Re White, 9 Sawy. 49, 17 Fed. 725; Ex parte Townsend, 133 Fed. 74.

An indictment need not negative facts which, on their face, might indicate that the charge was barred by limitation. That bar is an affirmative defense and cannot be considered in advance of a plea invoking it, in circumstances such as here appear by the pleading.

United States v. Cook, 17 Wall. 168, 21 L. ed. 538; Shelp v. United States, 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694; Blackman v. Com. 124 Pa. 578, 17 Atl. 194; People v. Durrin, 2 N. Y. Crim. Rep. 328; People v. Van Santvoord, 9 Cow. 655; Thompson v. State, 54 Miss. 740; Gill v. State, 38 Ark. 524; State v. Hussey, 7 Iowa, 409.

Under the Texas Code the date proved under an indictment for perjury need not be the exact one alleged. It may be another date within the statute of limitations.

Lucas v. State, 27 Tex. App. 322, 11 S. W. 443; Temple v. State, 15 Tex. App. 304, 49 Am. Rep. 200.

Even if the indictment (on account of limitation) was bad on demurrer or motion in arrest, there would be jurisdiction which would save the judgment from being void collaterally, and that is enough to bar discharge of defendant on habeas corpus.

United States v. Cook and People v. Van Santvoord, supra.

Jurisdiction of the subject-matter of the charge exists in the Texas court and the indictment avers facts enough to show that the jurisdiction has been invoked in a regular way, approved by the governors of Texas and of Missouri.

Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 316.

A failure to avoid (by facts) the defense of limitation does not affect the jurisdiction over the cause in any way. It is at worst error, and does not affect the jurisdiction.

Revelle v. St. Louis, I. M. & S. R. Co. 74 Mo. 438; 17 Am. & Eng. Enc. Law, 2d ed. p. 1069; State v. Gill, 33 Ark. 129; Thompson v. State, 54 Miss. 740; People v. Van Santvoord, supra; State v. Bowling, 10 Humph. 52.

The petitioner is validly held under the state law, and the Federal law is not exclusive.

Com. v. Tracy, 5 Met. 536; Ex parte Ammons, 34 Ohio St. 518; Com. v. Wilson, 1 Phila. 80; State v. Anderson, 1 Hill, L. 348; Re Fetter, 23 N. J. L. 315, 57 Am. Dec. 382; State v. Hall, 115 N. C. 818, 28 L. R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729; Holmes v. Jennison, 14 Pet. 597, 10 L. ed. 607.

The appellant has been duly charged with crime within the meaning and intent of the Texas law and of the Federal law.

Re Strauss, 197 U. S. 324, 331, 49 L. ed. 774, 778, 25 Sup. Ct. Rep. 535; Hughes v. Pflanz, 71 C. C. A. 234, 138 Fed. 980; Calvin v. State, 25 Tex. 793.

The facts of the charge of crime, recited in the indictment, bring the charge properly within the jurisdiction of the laws of Texas concerning false swearing.

Langford v. State, 9 Tex. App. 287; Davidson v. State, 22 Tex. App. 380, 3 S. W. 662; Steber v. State, 23 Tex. App. 176, 4 S. W. 880.

The "charge of crime" in the indictment is sufficient.

Anonymous, 1 Wash. C. C. 84, Fed. Cas. No. 475; Queen v. Schlesinger, 10 Q. B. 670; Crow v. State (Tex. Crim. App.) 90 S. W. 650; Trevinio v. State (Tex. Crim. App.) 88 S. W. 356; McDonough v. State (Tex. Crim. App.) 84 S. W. 594; State v. Cruikshank, 6 Blackf. 62; 2 Bishop, New Crim. Law 1892 ed. § 1040; State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

The writ of habeas corpus is not properly applicable to discharge the petitioner from the charge which has not yet been heard in the state court, the latter having jurisdiction of the charge, and of the act of the accused (which forms the subject of the charge), done in the territorial jurisdiction of the court of the process.

Ex parte McCorkle, 29 Tex. App. 20, 25 Am. St. Rep. 715, 13 S. W. 991; Robertson v. State, 36 Tex. 346; Munsey v. Clough, 196 U. S. 364, 49 L. ed. 515, 25 Sup. Ct. Rep. 282; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; Mackenzie v. Barrett, 76 C. C. A. 8, 144 Fed. 954; Minnesota v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; Re Dowd, 133 Fed. 747; Re Lewis, 114 Fed. 963; Spencer v. Duplan Silk Co. 191 U. S. 530, 48 L. ed. 290, 24 Sup. Ct. Rep. 174; Storti v. Massachusetts, 183 U. S. 142, 46 L. ed. 122, 22 Sup. Ct. Rep. 72; Ex parte Moebus, 148 Fed. 39; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484; Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67, 9 So. 659; Carfer v. Caldwell, 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264; Turner v. Conkey, 132 Ind. 248, 17 L.R.A. 509, 32 Am. St. Rep. 251, 31 N. E. 777; Ex parte Powers, 129 Fed. 985; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609; Farrell v. Hawley, 78 Conn. 150, 70 L.R.A. 686, 112 Am. St. Rep. 98, 61 Atl. 502; Re Terrill, 75 C. C. A. 418, 144 Fed. 616; People ex rel. Nagel v. Heider, 225 Ill. 347, 11 L.R.A. (N.S.) 257, 80 N. E. 291.

[400] *Mr. Justice **Moody**, after making the foregoing statement, delivered the opinion of the court:

The first inquiry must be whether there is jurisdiction of this appeal, which was taken from the circuit court directly to this court. Since the passage of the act establishing the circuit court of appeals (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), appeals in habeas corpus cases from the district and circuit courts can only be taken to the circuit court of appeals, unless they are of the kind specified in § 5 of the act, wherein a direct appeal to this court is allowed. Re Lennon, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123. Of the latter class is “any case that involves the construction or application of the Constitution of the United States.” In the case at bar the position of the appellant is that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of the provision of the Constitution regulating interstate extradition. Art. 4, § 2, ¶ 2. The precise and only question to be determined is whether the indictment constituted such a charge. The decision of this question requires us to ascertain and declare the meaning of the extradition clause, and therefore “involves the construction of the Constitution of the United States.” Craemer v. Washington, 168 U. S. 124, 42 L. ed. 407, 18 Sup. Ct. Rep. 1; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701. And see Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Motes v. United States, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472. Against this view it is argued that the question whether this indictment is good under the laws of Texas brings under consideration only the laws of that state, and that, as there is no pretense that they violate the Constitution of the United States, there can be involved no construction or application of that Constitution. But the answer to this is that the laws of Texas are considered only as they are embraced in the ultimate inquiry whether the indictment constitutes a charge of crime in that state, and for no other purpose. It is further said by the appellee that the delivery up in this case was by virtue of state laws only, and we are invited to determine [401] how far the state may make *laws for interstate extradition, independent of, though consistent with, the Federal Constitution. We decline to accept the invitation, because, in the case at bar, the demand of the governor of Texas, which was complied with, was expressed to be “in pursuance of the provisions of the Constitution and laws of the United States.” There is jurisdiction of the appeal.

The Constitution provides that “a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.” [Art. 4, § 2, ¶ 2.] No person may be lawfully removed from one state to another by virtue of this provision, unless: 1, He is charged in one state with treason, felony, or other crime; 2, he has fled from justice; 3, a demand is made for his delivery to the state wherein he is charged with crime. If either of these conditions is absent, the Constitution affords no warrant for a restraint of the liberty of any person. Here the only condition which it is insisted is absent is the charge of a crime. The only evidence of a charge of crime is the indictment, and the contention to be examined is that the indictment is insufficient proof that a charge has been made.

The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading, and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than these which would be good against it in the court where it is pending. We are unable to adopt the test *suggested [402] by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different states, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. Re Strauss, 197 U. S. 324, 49 L. ed. 774, 25 Sup. Ct. Rep. 535. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled. Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; Pearce v. Texas, 155 U. S. 311, 313, 39 L. ed. 164, 167, 15 Sup. Ct. Rep. 116; Hyatt v. New York, 188 U. S. 691, 709, 47 L. ed. 657, 660, 23 Sup. Ct. Rep. 456; Munsey v. Clough, 196 U. S. 364, 372, 49 L. ed. 515, 516, 25 Sup. Ct. Rep. 282; Davis's Case, 122 Mass. 324; State ex rel. O'Malley v. O'Connor, 38 Minn. 243, 36 N. W. 462; State ex rel. Smith v. Goss, 66 Minn. 291, 68 N. W. 1089; Re Voorhees, 32 N. J. L. 141; Ex parte Pearce, 32 Tex. Crim. Rep. 301, 23 S. W. 15; Re Van Sciever, 42 Neb. 772, 47 Am. St. Rep. 730, 60 N. W. 1037; State ex rel. Munsey v. Clough, 71 N. H. 594, 53 Atl. 1086.

Before proceeding further, it is well to set forth all the objections to the indictment, made by counsel, in order to see whether, if any one of them is well founded, it shows that there was no charge of crime against the petitioner. For, if all criticisms of the indictment should be approved, and they leave untouched in the pleading enough to show that the petitioner was charged with crime in the broad and practical sense in which those words ought to be understood, the condition prescribed by the Constitution has been performed.

The objections to the indictment which were advanced in the argument are six in number:

1. The statements in respect to which false swearing is alleged are not statements of facts, but of opinion; and therefore, however falsely made, cannot amount to the crime of false swearing.

2. The assignments of falsity are **[403]** insufficient, for no facts are *alleged which are necessarily inconsistent with the alleged false affidavit.

3. The charge is not alleged with the certainty required in an indictment.

4. Upon the face of the indictment the prosecution is barred by the statute of limitations.

5. The indictment discloses the fact that it was not found in good faith.

6. The affidavit was required by law, and therefore, if false, under the Texas law, lays the foundation for a prosecution for perjury, but not for false swearing.

The fifth and sixth objections require separate discussion. We are not informed of any principle by which we may inquire whether an indictment, duly found, was returned in good faith, but, whether that power exists or not, it is enough to say here that this objection does not seem to be true in fact.

Under the Texas law the crime of false swearing, as distinguished from perjury, can only be committed by a false oath to a voluntary declaration or affidavit, "not required by law or made in the course of a judicial proceeding." The sixth objection asserts that the affidavit set forth in this indictment was one required by law. But this assertion is in the teeth of the allegation of the indictment, that the affidavit "was not then and there required by law, nor made in the course of judicial proceedings." We cannot inquire into the truth of this allegation, which may present a mixed question of law and fact.

All the other objections are appropriate to a demurrer or a motion to quash or in arrest of judgment. They are attacks upon the indictment as a criminal pleading, the right to make which counsel expressly renounce. If well founded, they show that the indictment is bad. But the Constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime. Congress, in aid of the execution of the constitutional *provision **[404]**, has enacted a law—§ 5278, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3597)—directing that the charge shall be made either by "an indictment found" or "an affidavit made before a magistrate;" and, as we have seen, this court has held that such an affidavit is sufficient, saying (197 U. S. 331, 49 L. ed. 778, 25 Sup. Ct. Rep. 537): "Doubtless the word 'charged' was used in its broad signification to cover any proceeding which a state might see fit to adopt, by which a formal accusation was made against an alleged criminal." But it is obvious that an objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime. Are, then, the objections made to the indictment of that nature? Let it be assumed that these are all well taken. Let it be assumed, without decision, that the false statements contained in the affidavit were statements of opinion; that the assignments of falsity were bad, because no facts necessarily inconsistent with them were alleged; that the certainty required in criminal pleading was not observed; and that the time alleged antedates the indictment by more than the period of the statute of limitations. Nevertheless, the indictment alleges that on a day named the petitioner deliberately and wilfully made, under the sanction of an oath, legally administered, a voluntary false statement and declaration in writing; to wit, the affidavit; and that the affidavit was not required by law or made in the course of a judicial proceeding. The indictment, whether good or bad, as a pleading, unmistakably describes every element of the crime of false swearing, as it is defined in the Texas Penal Code, in art. 209, which follows:

"If any person shall deliberately and wilfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

This court, in the cases already cited, has said, somewhat vaguely, but with as much [405] precision as the subject admits, that *the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the states, and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution; and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance.

Judgment affirmed.

CONTINENTAL PAPER BAG COMPANY, Petitioner,
v.
EASTERN PAPER BAG COMPANY, Respondent.

(See S. C. Reporter's ed. 405-430.)

Patents — equivalents.

1. The doctrine of equivalents may be invoked for all patents, and not merely for pioneer ones, but the range of equivalents depends upon and varies with the degree of invention.

Certiorari — review of facts.

2. Concurrent findings of the courts below that the Liddell patent No. 558,969, for an improvement in paper bag machines, which combines a rotary cylinder with a forming plate oscillating about its rear edge upon the surface of the cylinder, is a broad invention, and is infringed by a machine in which the surface of the cylinder is depressed away from the forming plate, while the patent adopts the device of causing the pivot or axis of the forming plate to yield away from the cylinder, will not be disturbed by the Federal Supreme Court on certiorari, as clearly erroneous.

Injunction — infringement of patent — effect of nonuser.

3. Nonuser of a patent—at least, if such nonuse is not unreasonable, and does not involve the rights of the public—will not justify a court of equity in witholding injunctive relief against infringement.

Injunction — infringement of patent — effect of nonuser

4. The nonuse of a patent for an improvement in machinery, which is due to a desire to save the expense of changing the equipment of a factory or of altering the old machines, cannot be said, as a matter of law, to be so unreasonable as to defeat the right to injunctive relief against infringement, where there is no question of a diminished supply, or of an increase of prices.

[No. 202.]

Argued April 15, 1908. Decided June 1, 1908.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Maine for an accounting and for an injunction in a suit to restrain the infringement of a patent. Affirmed.

See same case below, 80 C. C. A. 407, 150 Fed. 741.

Statement by Mr. Justice **McKenna**:

This is a bill in equity to restrain the infringement of letters patent No. 558,969, issued to William Liddell for an improvement in paper bag machines, for making what are designated in the trade as self-opening square bags. The claims in suit do not include mechanism for making a complete bag, but only mechanism for distending one end of a tucked or bellows-folded paper tube made by other mechanism, and folding it down into a form known in the art as the "diamond fold." This fold is flattened and pasted by other mechanism and forms a square bottom to the bag.

The bill is in the usual form and alleges infringement of the claims by the Continental Paper Bag Company, hereafter called the Continental Company, and prays for an accounting and an injunction.

The answer interposed the defense of nonjurisdiction of a court of equity, noninfringement of the Liddell patent by defendant (Continental Company), and want of invention.

The allegation of the answer as to the jurisdiction of the court is as follows:

"The defendant says, on information, advice, and belief, that a court of equity has no jurisdiction to grant any prayer of the bill of complaint, even if the said Liddell patent, No. 558,969, were valid, and even if the defendant's paper bag machines were to be held to infringe that patent; because the said patent, No. 558,969, is a mere paper proposition which the complainant has never put into effect or use, and because it is contrary to equity to suppress a useful and established business, like that which the defendant is prosecuting with its paper bag machines, at the request of a complainant which simply owns one paper bag machine [407] patent that has never been employed by *that complainant in any way in any paper bag machinery, and because the complainant in this case has a plain, adequate, and complete remedy at law for any infringement which may have been done upon Liddell letters patent, No. 558,969."

The circuit court adjudged the patent valid as to the first, second, and seventh claims thereof; that the Eastern Paper Bag Company was the owner of the letters patent; that Liddell was the original and first inventor of the improvements described in the claims; and that the Continental Company had infringed the same. It was also adjudged that the Eastern Company recover of the Continental Company the profit the latter had made or received by the infringement. An account was ordered and a perpetual injunction decreed. 142 Fed. 479. The decree was affirmed by the circuit court of appeals. 80 C. C. A. 407, 150 Fed. 741. This certiorari was then granted.

Mr. **Albert H. Walker** argued the cause and filed a brief for petitioner:

The owner of a patent, who long and always and unreasonably withholds the invention covered thereby from making any contribution to the progress of the art to which it belongs, is chargeable with such inequitable conduct as must disentitle him to the assistance of a court of equity, in any efforts to prevent others from causing that invention to promote the progress of that art.

Isaacs v. Cooper, 4 Wash. C. C. 259, Fed. Cas No. 7,096; Ogle v. Ege, 4 Wash. C. C. 584, Fed. Cas. No. 10,462; Mott v. Bennett, 2 Fisher, Pat. Cas. 642, Fed. Cas. No. 9,884; Sullivan v. Redfield, 1 Paine, 441, Fed. Cas. No. 13,597; Magic Ruffle Co. v. Douglas, 2 Fisher, Pat. Cas. 333, Fed. Cas. No. 8,948; Hoe v. Knap, 27 Fed. 212; Germain v. Wilgus, 14 C. C. A. 561, 29 U. S. App. 564, 67 Fed. 600; Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 331; 1 Robinson, Patents, § 43, pp. 65, 66; Curtis, Patents, 1st & 2d ed. § 320, 3d & 4th ed. § 406.

"Although the owner of a patent may not, without assent on his part, be deprived of his monopoly, he may, of course, so conduct himself as to be no longer entitled to the aid of a court of equity in maintaining it."

Edison Electric Light Co. v. Mt. Morris Electric Light Co. 57 Fed. 644.

None of the exceptional grounds for equity jurisdiction which are included in the statement of Justice Matthews in Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975, are present, or can be claimed to be present, in the case now at bar; and therefore that jurisdiction is absent unless it can be based on what Justice Matthews defined as a "specific right to an injunction against a continuance of the infringement."

The law of primary patents and of secondary patents has been developed in the United States in numerous cases in Federal courts of all grades, beginning before the Civil War and continuing down to the present time. The history of the subject can be traced from an early period until now in the following Supreme Court cases:

McCormick v. Talcott, 20 How. 405, 15 L. ed. 930; Chicago & N. W. R. Co. v. Sayles, 97 U. S. 556, 24 L. ed. 1054; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 242, 36 L. ed. 421, 12 Sup. Ct. Rep. 637; Sessions v. Romadka, 145 U. S. 45, 36 L. ed. 615, 12 Sup. Ct. Rep. 799; Knapp v. Morss, 150 U. S. 230, 37 L. ed. 1063, 14 Sup. Ct. Rep. 81; Miller v. Eagle Mfg. Co. 151 U. S. 204, 38 L. ed. 129, 14 Sup. Ct. Rep. 310; Duff v. Sterling Pump Co. 107 U. S. 639, 27 L. ed. 518, 2 Sup. Ct. Rep. 487; Boyd v. Janesville Hay Tool Co. 158 U. S. 267, 39 L. ed. 976, 15 Sup. Ct. Rep. 837; Dashiell v. Grosvenor, 162 U. S. 432, 40 L. ed. 1029, 16 Sup. Ct. Rep. 805; Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521; Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 49 L. ed. 1100, 25 Sup. Ct. Rep. 697.

Identity of function is not enough to constitute equicalency between an omitted part and a substituted part of an otherwise unchanged combination.

Eames v. Godfrey, 1 Wall. 78, 17 L. ed. 547.

If the difference between two machines is not a mere difference of form, if there is a material alteration of structure, if they are substantially different combinations of mechanism, to effect the same purpose, by means which are really not the same in substance,—then the one will not be an infringement of the other.

Curtis, Patents, 4th ed. (1873) § 309.

The "rotating cylinder" of the Liddell patent is absent from the defendant's machine not only in name, but also in substance; because the compound conveyer and the carriers of the defendant's machine do not perform the same function as that cylinder in substantially the same way; and because one thing, to be equivalent to another in the eye of patent law, must perform the same function as that other, and must perform that function in substantially the same way.

Burr v. Duryee, 1 Wall. 573; 17 L. ed. 658; Werner v. King, 96 U. S. 230, 24 L. ed. 614; Dryfoos v. Wiese, 124 U. S. 37, 31 L. ed. 364, 8 Sup. Ct. Rep. 354; Forncrook v. Root, 127 U. S. 181, 32 L. ed. 99, 8 Sup. Ct. Rep. 1247; Sargent v. Burgess, 129 U. S. 19, 32 L. ed. 604, 9 Sup. Ct. Rep. 220; Sickles v. Borden, 3 Blatchf. 535, Fed. Cas. No. 12,832; Peard v. Johnson, 23 Fed. 509; Tonduer v. Chambers, 37 Fed. 337; Pacific Cable R. Co. v. Butte City Street R. Co. 58 Fed. 420; Carter Mach. Co. v. Hanes, 70 Fed. 865; Engle Sanitary & Cremation Co. v. Elwood, 73 Fed. 486; Pittsburg Meter Co. v. Pittsburg Supply Co. 48 C. C. A. 580, 109 Fed. 644; Farmers' Mfg. Co. v. Spruks Mfg. Co. 119 Fed. 599.

Identity of means and of operation are necessary to constitute infringment of a secondary patent.

Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 24, 47 L. ed. 696, 23 Sup. Ct. Rep. 521.

Where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained.

Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 414, 49 L. ed. 1107, 25 Sup. Ct. Rep. 697.

The "hiatus" between the patent which was narrowly construed in each of two very recent leading Supreme Court cases on this subject, and the prior art which occasioned that narrow construction, was much wider than the "hiatus" between the Liddell patent and the art prior thereto.

Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521; Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 49 L. ed. 1100, 25 Sup. Ct. Rep. 697.

The law of primary patents and secondary patents does not depend on any special or particular narrowness of "hiatus" between the patent in suit and the prior art, for that law is fully applicable wherever the function of the patent in suit was performed by some machine in the prior art, however different that patent may be in its mechanism from the mechanism of the prior-art machine.

Walker, Patents, 1st ed. § 359; Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co. 36 Fed. 192; Writing Mach. Co. v. Elliott & H. Book-Typewriter Co. 47 C. C. A. 536, 108 Fed. 629; Western Electric Co. v. Robertson, 73 C. C. A. 587, 142 Fed. 476; Dashiell v. Grosvenor, supra.

Messrs. **Francis T. Chambers** and **Samuel R. Betts** argued the cause, and, with Messrs. James J. Cosgrove and Betts, Sheffield, & Betts, filed a brief for respondent:

Under the principles of law and equity which must govern the right to injunctions restraining the infringement of patents for inventions, the court committed no error in entertaining the jurisdiction, even though there had been no commercial use of the invention.

Grant v. Raymond, 6 Pet. 218, 243, 8 L. ed. 376, 385; Wilson v. Rousseau, 4 How. 646–674, 11 L. ed. 1141–1153; Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; Seymour v. Osborne, 11 Wall. 516, 533, 20 L. ed. 33, 35; Cammeyer v. Newton, 94 U. S. 226, 24 L. ed. 72; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Densmore v. Scofield, 102 U. S. 375, 26 L. ed. 214; United States v. American Bell Teleph. Co. 167 U. S. 249, 42 L. ed. 157, 17 Sup. Ct. Rep. 809; Connolly v. Union Sewer Co. 184 U. S. 540, 546, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 90, 46 L. ed. 1058, 1068. 22 Sup. Ct. Rep. 747; Good v. Daland, 121 N. Y. 8, 24 N. E. 15; Edison Electric Light Co. v. Mt. Morris Electric Light Co. 57 Fed. 644; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co. 35 L. R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 294; Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 72, 108 Fed. 868; Fuller v. Berger, 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 277; Lamson Consol. Store Service Co. v. Hillman, 59 C. C. A. 510, 123 Fed. 422; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 425; United States Consol. Seeded Raisin Co. v. Griffin & S. Co. 61 C. C. A. 334, 126 Fed. 368; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; Munroe v. Railway Appliance Co. 145 Fed. 648; O. H. Jewell Filter Co. v. Jackson, 72 C. C. A. 304, 140 Fed. 343; United States Fastener Co. v. Bradley, 79 C. C. A. 180, 149 Fed. 222; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 83 C. C. A. 336, 154 Fed. 361; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365; Carr v. Rice, 1 Fisher, Pat. Cas. 200, Fed. Cas. No. 2,440; Wintermute v. Redington, 1 Fisher, Pat. Cas. 243, Fed. Cas. No.

17,896; Ransom v. New York, 1 Fisher, Pat. Cas. 255, Fed. Cas. No. 11,573; Pitts v. Wemple, 2 Fisher, Pat. Cas. 15, Fed. Cas. No. 11,194; Whitney v. Emmett, 1 Baldw. 304, Fed. Cas. No. 17,585; Broadnax v. Central Stock Yard & Transit Co. 5 Bann. & Ard. 609, 4 Fed. 216; Re Brosnahan, 4 McCrary, 1, 18 Fed. 62; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Wirt v. Hicks, 46 Fed. 71; Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co. 49 Fed. 930; Masseth v. Reiber, 59 Fed. 614; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 306; Wyckoff v. Wagner Typewriter Co. 88 Fed. 515; White v. Peerless Rubber Mfg. Co. 111 Fed. 190; Brodrick Copygraph Co. v. Mayhew, 131 Fed. 92; National Automatic Weighing Mach. Co. v. Daab, 136 Fed. 895; Hoe v. Michle Printing Press & Mfg. Co. 141 Fed. 115; Hartman v. John D. Park & Sons Co. 145 Fed. 358; 1 Robinson, Patents, §§ 20, 25, 30; Walker, Patents, 4th ed. §§ 151, 152, 154.

The writ of injunction is the only efficient means of giving complete effect to the patent statutes, and of protecting the unconditional right granted to the patentee, to exclude others from using his invention. And the basis of the jurisdiction of equity to grant an injunction restraining a continuing infringement of the patent is the evident inadequacy of the remedy at law.

Suffolk Mfg. Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76; Agawam Woolen Co. v. Jordan, 7 Wall. 593, 19 L. ed. 178; Bennet v. Fowler, 8 Wall. 448, 19 L. ed. 432; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 205, 26 L. ed. 975, 981; Birdsell v. Shaliol, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; Clark v. Wooster, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; Motte v. Bennett, 2 Fisher, Pat. Cas. 645, Fed. Cas. No. 9,884; Brooks v. Miller, 28 Fed. 615; Allington & C. Mfg. Co. v. Booth, 24 C. C. A. 378, 45 U. S. App. 627, 78 Fed. 879; Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 114 Fed. 945; Fuller v. Berger, 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 274; Curtis, Patents, § 314; Robinson, Patents, § 1168; Walker, Patents, § 685; Livingston v. Van Ingen, 9 Johns. 507; Sullivan v. Redfield, 1 Paine, 441, Fed. Cas. No. 13,597.

The court will not attribute the character of wrongful or unreasonable use to mere nonuse of a patent.

Strait v. National Harrow Co. 51 Fed. 819; Brown Saddle Co. v. Troxel, 98 Fed. 620; National Folding-Box & Paper Co. v. Robertson, 99 Fed. 988; American Soda-Fountain Co. v. Green, 69 Fed. 333; Edison Electric Light Co. v. Sawyer-Man Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 598; Bonsack Mach. Co. v. Smith, 70 Fed. 386; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 142 Fed. 536; Fuller v. Berger, 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 279; United States v. American Bell Teleph. Co.; E. Bement & Sons v. National Harrow Co.; Good v. Daland; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.; and Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.,—supra; Walker, Patents, § 154.

A patent can certainly be very broad in scope, and broad enough to cover very broad differences of details in mechanism, under the doctrine of equivalency, without requiring that it shall occupy the position held by so few patents, of being of a strictly "primary" or "pioneer" character.

2 Robinson, Patents, § 526, p. 141; Renwick v. Pond, 10 Blatchf. 39, Fed. Cas. No. 11,702; Brush Electric Co. v. Ft. Wayne Electric Light Co. 40 Fed. 833; Brush Electric Co. v. Western Electric Light & P. Co. 43 Fed. 537; Brush Electric Co. v. Electric Improv. Co. 52 Fed. 975.

Discussion, from a legal standpoint, of the subject of infringement of letters patent for inventions, we believe, has been exhausted in the opinions of this court, in the following cases:

Winans v. Denmead, 15 How. 330, 14 L. ed. 717; Morey v. Lockwood, 8 Wall. 230, 19 L. ed. 339; Mason v. Graham, 23 Wall. 261, 23 L. ed. 86; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Union Paper-Bag Mach. Co. v. Murphy, 97 U. S. 120, 24 L. ed. 935; Elizabeth v. American Nicholson Pav. Co. 97 U. S. 137, 24 L. ed. 1005; Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279; Clough v. Gilbert & B. Mfg. Co. 106 U. S. 166, 178, 27 L. ed. 134, 138, 1 Sup. Ct. Rep. 188; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 273, 32 L. ed. 719, 9 Sup. Ct. Rep. 299; Western Electric Co. v. La Rue, 139 U. S. 601, 606, 35 L. ed. 294, 296, 11 Sup. Ct. Rep. 670; Hoyt v. Horne, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922; Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. 521; Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 49 L. ed. 1100, 25 Sup. Ct. Rep. 697; Computing Scale Co. v. Automatic Scale Co. 204 U. S. 609, 51 L. ed. 645, 27 Sup. Ct. Rep. 307.

And in the opinions of the circuit court of appeals in—

Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. 10 C. C. A. 194, 21 U. S. App. 244, 61 Fed. 958; Devlin v. Paynter, 12 C. C. A. 188, 28 U. S. App. 115, 64 Fed. 398; Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 72, 108 Fed. 845; McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 259, 37 U. S. App. 299, 69 Fed. 387; Bundy Mfg. Co. v. Detroit Time Register Co. 36 C. C. A. 375, 94 Fed. 524; Kinloch Teleph. Co. v. Western Electric Co. 51 C. C. A. 362, 113 Fed. 653.

See also the two well-known text-books on the law of patents.

1 Robinson, Patents, 1890, p. 350; Walker, Patents, 4th ed. pp. 308, 309, 312.

Even though the invention of a complainant's patent is not of a pioneer or primary character, and notwithstanding defendant's means and mode of operation are different and even patented, yet there may be infringement.

Mason v. Graham, 23 Wall. 261, 23 L. ed. 86; Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Union Paper-Bag Mach. Co. v. Murphy and Elizabeth v. American Nicholson Pav. Co. supra; Clough v. Gilbert & B. Mfg. Co. 106 U. S. 166, 167, 27 L. ed. 134, 135, 1 Sup. Ct. Rep. 188; Western Electric Co. v. La Rue and Hoyt v. Horne, supra.

Mr. Justice **McKenna** delivered the opinion of the court:

The defense of want of invention in the Liddell machine is not urged here, because it is said that the decision of that question depends upon mechanical comparisons, too numerous and complicated to be conveniently made by a bench of judges, and because, though the Liddell patent approaches closely the prior art, it "perhaps covers a margin of differentiation sufficient, though barely sufficient, to constitute invention."

The two questions, therefore, which remain for decision, are the jurisdiction of the court and the question of infringement. We will consider the latter question first. It does not depend, counsel for the Continental Company says, "upon any issue of fact, but does depend, as questions of infringement" sometimes do, upon a "point of law." This point of law, it is further said, has been formulated in a decision of this court as follows: "Where the patent does not embody a primary invention, but only an improvement on the prior art, and defendant's machines can be differentiated, [414] the charge of infringement is *not sustained." Counsel for respondent do not contend that the Liddell invention is primary within the definition given of that term by petitioner. Their concession is that it is "not basic, in the sense of covering the first machine ever produced to make self-opening square bags by machinery." They do contend, however, that it is one of high rank, and, if it be given a "fair construction and scope, no matter whether we call it basic, primary, or broad, or even merely entitled to be construed as covering obvious mechanical equivalents, the question of infringement of the claims in suit by petitioner's machine becomes mechanically, and from a patent-law standpoint, a simple one, in spite of slight differences of operation, and of reversal of some of the moving parts." The lower courts did not designate the invention as either primary or secondary. They did, however, as we shall presently see, decide that it was one of high rank and entitled to a broad range of equivalents. It becomes necessary, therefore, to consider the point of law upon which petitioner contends the question of infringement depends.

The citation is from Cimiotti Unhairing Co. v. American Fur Ref. Co. 198 U. S. 399, 49 L. ed. 1100, 25 Sup. Ct. Rep. 697, and Kokomo Fence Mach. Co. v. Kitselman, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521, was adduced to sustain the proposition. But the whole opinion must be considered, and it will be seen from the language which we shall presently quote that it was not intended to say that the doctrine of equivalents applied only to primary patents.

We do not think it is necessary to follow counsel for petitioner in his review of other cases which, he urges, sustain his contention. The right view is expressed in Miller v. Eagle Mfg. Co. 151 U. S. 186, 207, 38 L. ed. 121, 130, 14 Sup. Ct. Rep. 310, as follows: "The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions." And this was what was decided in Kokomo Fence Mach. Co. v. Kitselman, Cimiotti Unhairing Co. v. *American Fur [415] Ref. Co., and Computing Scale Co. v. Automatic Scale Co. 204 U. S. 609, 51 L. ed. 645, 27 Sup. Ct. Rep. 307. It is from the second of those cases, as we have seen, that the citation is made which petitioner contends the point of law upon which infringement depends is formulated; but it was said in that case: "It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, maybe the last and successful step, in the art theretofore partially developed by other inventors in the same field."

It is manifest, therefore, that it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention. See Ives v. Hamilton, 92 U. S. 426, 23 L. ed. 494; Hoyt v. Horne, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922; Deering v. Winona

Harvester Works, 155 U. S. 286, 39 L. ed. 153, 15 Sup. Ct. Rep. 118; Walker, Patents, § 362; Robinson, Patents, § 258.

We start, then, with the proposition that the Eastern Company may invoke for the Liddell patent the doctrine of equivalents; but, without deciding now how broadly, we proceed to the consideration of the question of infringement. Invention is conceded to the Liddell machine, as we have seen, by the Continental Company. The concession, however, is qualified by the assertion that it covers only a "margin of differentiation" from the prior art. The circuit court and the circuit court of appeals had a higher estimate of it. The circuit court said that the nature of its invention was "clear . . . [was] disconnected from what precedes it by such a hiatus that, if the claims are as extensive as the invention, there is no difficulty so far as concerns the application to the case of the rules with reference to equivalents." And answering the contention that it was the twentieth in the line of patents in its branch of the arts, and that it should be limited to the details described in its specifications, it was said that [416] there was "such *a hiatus between them and what appears on the face of the Liddell patent that they have no effect either in narrowing or broadening the alleged Liddell invention." The circuit court of appeals affirmed the decree of the circuit court. It was less circumstantial than the circuit court in describing the invention. It said, however, after stating the claims, that their breadth "would imperil the patent, were the real invention less broad; but the defendant [the Continental Company] has not pointed out, and we have been unable to find, any operative combination of a rotary cylinder and a forming plate oscillating thereon earlier than the patent in suit. If, therefore, the patent is valid, it has a wide scope, and the mechanical arrangement used by the defendant is fairly within its terms." The lower courts, therefore, found that the invention was a broad one, and that the machine used by the Continental Company was an infringement. And these were questions of fact upon which, both of the courts concurring, their findings will not be disturbed, unless clearly wrong. Deslions v. La Compagnie Générale Transatlantique, 210 U. S. 95, ante, 973, 38 Sup. Ct. Rep. 664. To deçide the question of invention an examination of the prior art was necessary, and a consideration of what step in advance of that art, if any, the Liddell patent was. To decide the question of infringement a comparison of the Liddell machine with the machine used by the Continental Company was necessary and a determination of their similarity or difference. What was involved in these inquiries of fact and the conclusions from them is indicated by a record of many hundred pages of expert testimony and exhibits.

We shall proceed, then, to consider upon what grounds the circuit court and circuit court of appeals proceeded, and their sufficiency to sustain the judgments rendered within the rule announced.

The bill alleges the infringement of claims 1, 2, and 7. The courts below selected claim 1 for consideration, as determinative of the questions arising, as well on the other two claims as on it. In this, counsel for the Continental Company acquiesced. *Claim 1 [417] is as follows: "In a paper bag machine, the combination of a rotating cylinder provided with one or more pairs of side-folding fingers adapted to be moved toward or from each other, a forming plate also provided with side-forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder, the whole operating for the purpose of opening and forming the bottom of the bag tube, and means to move the bag tube with the cylinder."†

"The pith of . . . [the] invention," the circuit court said, "is the combination of a rotating cylinder with means for oper-

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†2. In a paper bag machine, the combination of the rotating cylinder provided with one or more pairs of side-folding fingers adapted to be moved toward or from each other, a forming plate also provided with side-forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder for the purpose of opening and forming the bottom of the bag tube, a finger moving with the forming plate for receiving the upper sheet of the tube and lifting it during the formative action, power devices for returning the forming plate to its original position to receive a new bag tube, and means to move the bag tube with the cylinder.

7. In a paper bag machine, the combination of the rotating cylinder with the bag tube provided with one or more pairs of folding fingers adapted to be moved toward or from each other, a forming plate also provided with forming fingers adapted to be moved toward or from each other, means for operating said fingers at definite times during the formative action upon the bag tube, operating means for the forming plate adapted

ating the forming plate in connection therewith, limited, however, to means which cause the plate to oscillate about its rear edge." The court expressed the opinion that the invention extended to every means by which [418] that result could be attained, *and rejected the contention of the Continental Company, that the invention was no broader than the details described in the specification. The court said that it was unable to see upon what the proposition could be based. And further said that there was nothing in the prior art which either broadened or narrowed the Liddell invention. "If any of . . . [the nineteen patents which had been put in evidence]" the court added, "pointed out any form of combining the forming plate with a rotating cylinder, they would, of course, narrow what Liddell could claim; but they have nothing of that kind." And, speaking of the claims and their limitation by the description, it was said: "Nothing in the manner in which the claims are expressed adopts as an element the detailed description contained in the specification. So far as the details of that description are concerned, they come within the ordinary rule of the preferable method."

We think it is clear that the court considered that Liddell sought to comply with § 4888 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3383).† In other words, he filed a description of his invention, explained its principle, and the best mode in which he "contemplated applying that principle" and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. "The principle of the invention is a unit, and invariable; the *modes of its embodiment in the concrete invention [419] may be numerous and in appearance very different from each other." 2 Robinson, Patents, § 485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it. Yale Lock Co. v. Greenleaf, 117 U. S. 554, 29 L. ed. 952, 6 Sup. Ct. Rep. 846. Snow v. Lake Shore & M. S. R. Co. 121 U. S. 617, 30 L. ed. 1004, 7 Sup. Ct. Rep. 1343, is a case where a claim was limited by a description of the device, with reference to drawings. The court, in rejecting the contention that the description of the particular device was to be taken as a mere recommendation of the patentee of the manner in which he contemplated to arrange the parts of his machine, said there was nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the parts of the device. Therein the description is distinguished from the description in the Liddell patent. Liddell was explicit in the declaration that there might be alternatives for the device described and illustrated by him. He was explicit in saying that, in place of the device for controlling the movement of the forming plate relatively to the cylinder, that the plate might "be moved or operated by any other suitable means."

This court said in Cimiotti Unhairing Co. v. American Fur Ref. Co. supra: "In making his claim the inventor is at liberty to choose his own form of expression; and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim." See also Howe Mach. Co. v. National Needle Co. 134 U. S. 388, 394, 33 L. ed. 963, 967, 10 Sup. Ct. Rep. 570.

The discussion thus far brings us to two propositions: That infringement is not averted merely because the machine alleged to infringe may be differentiated from the patented machine, even though the invention embodied in the latter be not primary; and, second, that the description does not necessarily limit the claims. It is probably not contended *abstractly by the Continental [420] Company that the description necessarily limits the claims, but only in the case at bar, as following from the first proposition; that is, as resulting from the alleged narrow character of the Liddell in-

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to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movements of said cylinder for the purpose of opening and forming the bottom of the bag tube, and connecting mechanism for timing the movements of the rotating cylinder and the forming plate.

†Sec. 4888. Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and, in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor and attested by two witnesses.

vention. A few words more may be necessary to develop fully the contention. Counsel separates the claims of the Liddell machine into divisions, and says that the fourth division of the claimed mechanism in each of the three claims alleged to be infringed is in exactly the same words, which words are: "'Operating means for the forming plate, adapted to cause the said plate to oscillate about its rear edge upon the surface of the cylinder during the rotary movement of said cylinder.'" And it is argued that neither claim designates "operating means," either by names or by reference letters or numerals, and recourse must therefore be had to the descriptive part of the specification to ascertain what "operating means" are meant, and then construe the claim as calling for those "operating means" or their equivalents. The other way, it is said, is to ignore the descriptive part of the specification "and to construe the claim as being satisfied by any 'operating means' which can perform the particular function designated in the claim." Under the second method, it is insisted, identity of function constitutes infringement. Under the first method identity of function must be accompanied by substantial identity of character and substantial identity of mode of operation in order to constitute that result. The second method was adopted, it is urged, by the circuit court, and led it into the error of deciding that "'Liddell's alleged invention covered every method of combining the rotating cylinder with the forming plate by causing the plate to oscillate about its rear edge on the surface of the cylinder, and the claims are as broad as the invention.'"

It may be well before considering these contentions to refer again to the view which the circuit court and the circuit court of appeals had of Liddell's patent. The circuit court said that the "pith" of the invention "is the combination of a rotating cylinder with means for operating the [421] forming plate *in connection therewith, limited, however, to means which cause the plate to oscillate about its rear edge on the surface thereof," and distinguished the invention from the prior art, as follows: "Aside from the cylinder and the forming plate oscillating about its rear edge, everything in these claims [the claims of the patent] is necessarily old in the arts." It was this peculiar feature of novelty, it was said, which clearly distinguished it from all that went before it. This conclusion was in effect affirmed by the circuit court of appeals. The latter court said that the folding of the bottoms of S. O. S. paper bags had been accomplished in the prior art "both by a folding plate reciprocating upon a plane, and by the operation of fingers upon a cylinder. The folding plate and the cylinder had never been combined. The complainant urges with much probability that the reason why they had not been combined lay in the difficulty of operating a pivoted folding form upon the surface of a cylinder. Two circles external to each can be in contact at but one point, while, in order that the folding plate may operate, its end, as it moves upon a pivot, must remain for some distance in contact with the surface of the revolving cylinder. The problem may be solved by causing the pivot or axis of the folding plate to yield away from the cylinder, or by causing the surface of the cylinder to be depressed away from the folding plate. The patent in suit adopts the first device, the defendant's machine the second, and the crucial question before the court is this: Under all the circumstances of the case, is the second method, as compared with the first, within the doctrine of equivalents?"

The court, as we have seen, concluded, from the character of the Liddell patent, that "the second method," that is, the method of the Continental Company's machine, was "within the doctrine of equivalents."

Counsel, however, contends that the circuit court, in its decision, virtually gave Liddell a patent for a function by holding that he was entitled to every means to cause the forming plate to oscillate about its rear edge.

[422] *The distinction between a practically operative mechanism and its function is said to be difficult to define. Robinson, Patents, §§ 144 et seq. It becomes more difficult when a definition is attempted of a function of an element of a combination which is the means by which other elements are connected and by which they coact and make complete and efficient the invention. But abstractions need not engage us. The claim is not for a function, but for mechanical means to bring into working relation the folding plate and the cylinder. This relation is the very essence of the invention, and marks the advance upon the prior art. It is the thing that never had been done before, and both the lower courts found that the machines of the Continental Company were infringements of it. It is not possible to say that the findings of those courts on that fact or on the fact of invention were clearly wrong, notwithstanding the great ability of the argument submitted against them.

2. The next contention of the petitioner is that a court of equity has no jurisdiction to restrain the "infringement of letters patent the invention covered by which has long and always and unreasonably been held in nonuse . . . instead of being made

beneficial to the art to which it belongs." It will be observed that it is not urged that nonuse merely of the patent takes jurisdiction from equity, but an unreasonable nonuse. And counsel concedes indulgence to a nonuse which is "nonchargeable to the owner of the patent,"—as lack of means, or lack of ability or opportunity to induce others to put the patent to use. In other words, a question is presented, not of the construction of the law simply, but of the conduct of the patentee as contravening the supposed public policy of the law.

The foundation of the argument of the petitioner is, as we have intimated, the policy of the patent laws executing the purpose of the Constitution of the United States to promote the progress of science and useful arts by securing for limited times to inventors the exclusive right to their [423] respective discoveries. *Art. 1, § 8. And it is urged that the nonuse of an invention for seventeen years (of course, the whole term of the patent may be selected to test the argument) is not to promote the progress of the useful arts, and the contention is that equity should not give its aid to defeat the policy of the statute, but remit the derelict patentee to his legal remedy. The penalty does not seem to fit the case. It is conceded that the patent is not defeated; only that a particular remedy is taken away. It is conceded that the remedy at law remains. It is conceded, therefore, that a right has been conferred, but it is said that it may be infringed, though the policy of the law is violated. The petitioner, further to sustain its side of the question, refers to the provision in § 4921 (U. S. Comp. Stat. 1901, p. 3395), giving power to the courts to grant injunctions. The provision is: "The several courts vested with jurisdiction of cases arising under the patent law shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, . . . " and the petitioner cites Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 216, 26 L. ed. 975, 984, for the contention that the statute does not confer power to grant the injunction, except as incidental to some other equity.

It may be well, however, before considering what remedies a patentee is entitled to, to consider what rights are conferred upon him. The source of the rights is, of course, the law, and we are admonished at the outset that we must look for the policy of a statute, not in matters outside of it,—not to circumstances of expediency and to supposed purposes not expressed by the words. The patent law is the execution of a policy having its first expression in the Constitution, and it may be supposed that all that was deemed necessary to accomplish and safeguard it must have been studied and provided for. It is worthy of note that all that has been deemed necessary for that purpose, through the experience of years, has been to provide for an exclusive right to inventors to make, use, and vend their inventions. In other words, the language of complete monopoly has been employed; and though at first *only a remedy at law was [424] given for a violation of the right, a remedy in equity was given as early as 1819. There has been no qualification, however, of the right, except as hereinafter stated. An exception which, we may now say, shows the extent of the right,—a right so explicitly given and so complete that it would seem to need no further explanation than the word of the statute. It has, however, received explanation in a number of cases which bring out clearly the services rendered by an inventor to the arts and sciences and to the public. Those cases declare that he receives nothing from the law that he did not have before, and that the only effect of the patent is to restrain others from manufacturing and using that which he has invented. United States v. American Bell Teleph. Co. 167 U. S. 249, 42 L. ed. 157, 17 Sup. Ct. Rep. 809. And it was further said in that case that the inventor could have kept his discovery to himself; but, to induce a disclosure of it, Congress has, by its legislation, made in pursuance of the Constitution, guaranteed to him an exclusive right to it for a limited time, and the purpose of the patent is to protect him in this monopoly,—not to give him a use which he did not have before, "but only to separate to him an exclusive use." And it was pointed out that the monopoly which he receives is only for a few years. The court further said: "Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention."

And the same relative rights of the patentee and the public were expressed in prior cases, and we cite them because there is something more than the repetition of the same thought *by doing so. It shows that, [425] whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. "And, for his exclusive enjoyment of it during that time, the public faith is pledged." Chief Justice Marshall in Grant v. Raymond, 6 Pet. 242, 243, 8 L. ed. 384, 385.

And, in Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532, Chief Justice Taney said: "The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented without the permission of the patentee. This is all that he obtains by the patent."

In Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, it was said that an inventor's own right to the use was not enlarged or affected by a patent. See also Wilson v. Rousseau, 4 How. 646, 674, 11 L. ed. 1141, 1153; Seymour v. Osborne, 11 Wall. 516, 533, 20 L. ed. 33; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Densmore v. Scofield, 102 U. S. 375, 26 L. ed. 214.

It may be said that these cases deal only with the right of a patentee, and not with the remedy, whether at law or equity, that he may, at any time, or in all his situations, be entitled to. And there is no case in this court that explicitly does so. However, in the three last cases cited it was decided that patents are property, and entitled to the same rights and sanctions as other property.

In E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 90, 46 L. ed. 1058, 1068, 22 Sup. Ct. Rep. 747, adopting the language of the circuit court of appeals for the sixth circuit in Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 294, it was said: "If he [a patentee] see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own . . . his title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in Hoe v. Knap, 217 Fed. 204, is not supported by reason or authority."

In Hoe v. Knap, Judge Blodgett refused [426]an injunction *against the infringer, holding that "under a patent which gives a patentee a monopoly, he is bound to either use the patent himself or allow others to use it on reasonable terms." In a number of the circuit courts of appeals it has been decided that, as a consequence of the exclusive right of the patentee, he is entitled to an injunction against an infringer, even though he (the patentee) does not use the patented device. The cases are inserted in the margin,† also decisions of the circuit courts,‡ some of which define the right of a patentee and others holding that, as incident to the right, he is entitled to an injunction, though he had not used his invention.

Counsel for petitioner cites counter cases, which he contends are more direct author-

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†Edison Electric Light Co. v. Mt. Morris Electric Light Co. (2d C.) 7 C. C. A. 375, 20 U. S. App. 111, 58 Fed. 572; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. (6th C.) 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 294; Crown Cork & Seal Co. v. Aluminum Stopper Co. (4th C.) 48 C. C. A. 72, 108 Fed. 845, 868; Fuller v. Berger (7th C.) 65 L.R.A. 381, 56 C. C. A. 588, 120 Fed. 274, 277; Lamson Consol. Store Service Co. v. Hillman (7th C.) 59 C. C. A. 510, 123 Fed. 416, 422; Victor Talking Mach. Co. v. The Fair (7th C.) 61 C. C. A. 58, 123 Fed. 425; United States Consol. Seeded Raisin Co. v. Griffin & S. Co. (9th C.) 61 C. C. A. 334, 126 Fed. 364, 368; Rupp & W. Co. v. Elliott (6th C.) 65 C. C. A. 544, 131 Fed. 730; Railway Appliances Co. v. Munroe (7th C.) 77 C. C. A. 383, 147 Fed. 241; O. H. Jewell Filter Co. v. Jackson (8th C.) 72 C. C. A. 304, 140 Fed. 340, 343; United States Fastener Co. v. Bradley (2d C.) 79 C. C. A. 180, 149 Fed. 222; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (7th C.) 83 C. C. A. 336, 154 Fed. 358, 361; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. (7th C.) 83 C. C. A. 343, 154 Fed. 365.

‡Carr v. Rice, 1 Fisher, Pat. Cas. 198, 200, Fed. Cas. No. 2,440; Wintermute v. Redington, 1 Fisher, Pat. Cas. 243, Fed. Cas. No. 17,896; Ransom v. New York, 1 Fisher, Pat. Cas. 255. Fed. Cas. No. 11,573; Pitts v. Wemple, 1 Biss. 87, 2 Fisher, Pat. Cas. 15, Fed. Cas. No. 11,194; Whitney v. Emmett, Baldw. 304, Fed. Cas. No. 17,585; Broadnax v. Central Stock Yard & Transit Co. 5 Bann. & Ard. 609, 4 Fed. 214, 216; Re Brosnahan, 4 McCrary, 1, 18 Fed. 62 (Justice Miller); Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803; Wirt v. Hicks, 46 Fed. 71; Campbell Printing-Press & Mfg. Co. v. Manhattan R. Co. 49 Fed. 930; Edison Electric Light Co. v. Mt. Morris Electric Light Co. 57 Fed. 642, 644; Masseth v. Johnston, 59 Fed. 613; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 302, 306; Wyckoff v. Wagner Typewriter Co. 88 Fed. 515; White v. Peerless Rubber Mfg. Co. 111 Fed. 190; Brodrick Copygraph Co. v. Mayhew, 131 Fed. 92; National Automatic Weighing Mach. Co. v. Daab, 136 Fed. 891, 895; Hoe v. Miehle Printing Press & Mfg. Co. 141 Fed. 115; Hartman v. John D. Park & Sons Co. 145 Fed. 358.

[427]ity.† He also reviews the cases cited *by respondent, and contends that they are not relevant to the question in the case at bar, which is not that of the simple nonuse of a patent, but a long and unreasonable nonuse of it. Judge Aldrich, in his dissenting opinion in the court of appeals, excluded the cases as authoritative for a different reason than counsel expresses. The learned judge said:

"Simple nonuse is one thing. Standing alone, nonuse is no efficient reason for withholding injunction. There are many reasons for nonuse which, upon explanation, are cogent; but when acquiring, holding, and nonuse are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels,—a hypothesis involving an attitude which offends public policy, the conscience of equity, and the very spirit and intention of the law upon which the legal right is founded,—it is quite another thing. This is an aspect which has not been considered in a case like the one here."

Respondent attacks the conclusion of Judge Aldrich and that of petitioner, and insists that there is nothing in the record to show that the nonuse of the patent was either unreasonable or sinister. A very strong argument is presented by respondent. Its counsel pointedly say that "there is no record evidence at all on the subject or character of complainants' [respondents'] use or nonuse," and points out that neither the assignments of error on appeal to the circuit court of appeals nor the petition for rehearing in that court presented the question that the injunction should be denied on the ground of mere nonuse or unreasonable nonuse. Let us see what the courts say and what petitioner says. The circuit court says:

"We have stated that no machine for practical manufacturing purposes was ever constructed under the Liddell patent. The record also shows that the complainant, so to speak, locked up its patent. It has never [428]attempted to make any *practical use of it, either itself or through licenses, and, apparently, its proposed policy has been to avoid this. In this respect it has not the common excuse of a lack of means, as it is unquestioned that the complainant is a powerful and wealthy corporation. We have no doubt that the complainant stands in the common class of manufacturers who accumulate patents merely for the purpose of protecting their general industries and shutting out competitors."

The comment of the circuit court of appeals is:

"The machine of the patent in suit is mechanically operative, as was shown experimentally for the purposes of this suit, but it has not been put into commercial use. No reason for the nonuser appears in the evidence, so far as we can discover. The defendant's machine has been an assured commercial success for some years. It was suggested at the oral argument that an unused patent is not entitled to the protection given by the extraordinary remedy of an injunction. This contention was not made in the defendant's printed brief. While this question has not been directly passed upon, so far as we are informed, in any considered decision of the Supreme Court, yet the weight of authority is in favor of the complainant." The cases were cited.

If these statements are to be reconciled, it can only be by supposing that the circuit court inferred the motive of the respondents from the unexplained nonuse of the patent. But petitioner has given its explanation of the purpose of respondent. Quoting Judge Aldrich, that the patent in suit has been "deliberately held in nonuse for a wrongful purpose," petitioner asks, "What was that wrongful purpose? It was the purpose to make more money with the existing old reciprocating Lorenz & Honiss machines and the existing old complicated Stilwell machines than could be made with new Liddell machines, when the cost of building the latter was taken into account. And this purpose was effective to cause the long and invariable nonuse of the Liddell invention, notwithstanding that new Liddell machines might have produced *better[429] paper bags than the old Lorenz & Honiss machines or the old Stilwell machines were producing."

But, granting all this, it is certainly disputable that the nonuse was unreasonable, or that the rights of the public were involved. There was no question of a diminished supply or of increase of prices, and can it be said, as a matter of law, that a nonuse was unreasonable which had for its motive the saving of the expense that would have been involved by changing the equipment of a factory from one set of machines to another? And even if the old machines could have been altered, the expense would have been considerable. As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive. Connolly v. Union Sewer Pipe Co. 184 U. S. 546, 46 L. ed. 684, 22 Sup. Ct. Rep. 431.

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†Isaacs v. Cooper, 4 Wash. C. C. 259, Fed Cas. No. 7,096; Ogle v. Ege, 4 Wash. C. C. 584, Fed. Cas. No. 10,462; Motte v. Bennett, 2 Fisher, Pat. Cas. 642, Fed. Cas. No. 9,884; Sullivan v. Redfield, 1 Paine, 441, Fed. Cas. No. 13,597; Magic Ruffle Co. v. Douglas, 2 Fisher, Pat. Cas. 333, Fed. Cas. No. 8,948; Hoe v. Knap, 27 Fed. 212; Germain v. Wilgus (9th C.) 14 C. C. A. 561, 29 U. S. App. 564, 67 Fed. 600; Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co. 86 Fed. 331; 1 Robinson, Patents, § 43; Curtis, Patents, § 320 of the first two editions and § 406 of the third and fourth editions.

The right which a patentee receives does not need much further explanation. We have seen that it has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor. The only qualification ever made was against aliens, in the act of 1832. That act extended the privilege of the patent law to aliens, but required them "to introduce into public use in the United States the invention or improvement within one year from the issuing thereof," and indulged no intermission of the public use for any period longer than six months. A violation of the law rendered the patent void. The act was repealed in 1836. It is manifest, as is said in Walker on Patents, § 106, that Congress has not "overlooked the subject of nonuser of patented inventions." And another fact may be mentioned. In some foreign countries the right granted to an inventor is affected by nonuse. This policy, we must assume, Congress has not been ignorant of nor of its effects. It has, nevertheless, selected another policy; it has continued that policy through many years. We may assume that experience *has demon-[**430**] strated its wisdom and beneficial effect upon the arts and sciences.

From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee. If the conception of the law that a judgment in an action at law is reparation for the trespass, it is only for the particular trespass that is the ground of the action. There may be other trespasses and continuing wrongs and the vexation of many actions. These are well-recognized grounds of equity jurisdiction, especially in patent cases, and a citation of cases is unnecessary. Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction, we do not decide.

Decree affirmed.

Mr. Justice **Harlan** thinks that the original bill should have been dismissed. He thinks the facts are such that the court should have declined, upon grounds of public policy, to give any relief to the plaintiff by injunction, and he dissents from the opinion and judgment.

MEMORANDA

OF

Cases Disposed of Without Opinions.

[431]*First National Bank of Decatur, Plaintiff in Error, v. Albert G. Henry. [No. 221.]

In Error to the Supreme Court of the State of Alabama.

Messrs. Hannis Taylor and Edgar W. Godbey for plaintiff in error.

Mr. Amos E. Goodhue for defendant in error.

June 1, 1908. *Per Curiam:* Dismissed with costs, on the authority of Missouri, K. & T. R. Co. v. Evans, 175 U. S. 723, 44 L. ed. 337, 20 Sup. Ct. Rep. 1023; Mason v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; Eastland v. Jones, Minor (Ala.) 275. See act of February 7, 1818, Toulmin's Digest, 448.

Ex parte: In the Matter of the Perth Amboy Dry Dock Company, Petitioner. [No. 18, Original.]

Mr. James D. Dewell, Jr., for petitioner.

Mr. Charles R. Snyder for respondent.

June 1, 1908. *Per Curiam:* Rule discharged and petition dismissed without prejudice. Re Rice, 155 U. S. 402, 39 L. ed. 200, 15 Sup. Ct. Rep. 149; Re New York & P. R. S. S. Co. 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; Re Alix, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522.

Fulgencio Segrera et al., Petitioners, v. Steamship Fri, etc. [No. 713.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 83 C. C. A. 205, 154 Fed. 333.

Messrs. J. Parker Kirlin and Arnold Charles Weil for petitioners.

Mr. Frederick M. Brown for respondent.

May 18, 1908. Denied.

*James A. Shine et al., Petitioners, v. Fox [432] Brothers Manufacturing Company. [No. 735.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 156 Fed. 357.

Messrs. Shepard Barclay, Thomas T. Fauntleroy, and C. H. Fauntleroy for petitioners.

Mr. Herbert R. Marlatt for respondent.

May 18, 1908. Denied.

Eugene Martin, Petitioner, v. Richard T. Wilson, etc. [No. 716.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 155 Fed. 97.

Mr. Wm. J. Harding for petitioner.

Mr. John G. Milburn for respondent.

May 18, 1908. Denied.

Novelty Tufting Machine Company, Petitioner, v. Champion Bed Lounge Company et al. [No. 725.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 81 C. C. A. 16, 151 Fed. 478.

Messrs. Walter F. Murray and Everett Dufour for petitioner.

Mr. Arthur Stem for respondents.

May 18, 1908. Denied.

Southern Railway Company, Petitioner, v. Mrs. Josephine King [No. 736]; and Southern Railway Company, Petitioner, v. Inez King, by Her Next Friend, etc. [No. 737.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. John J. Strickland for petitioner.

Mr. Charles D. Hill for respondents.

May 18, 1908. Granted.

CITY OF OMAHA, Petitioner, v. OMAHA WATER COMPANY. [No. 764.]

[433] Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John L. Webster and C. C. Wright for petitioner.

Messrs. Howard Mansfield and R. S. Hall for respondent.

June 1, 1908. Granted.

UNITED STATES, Petitioner, v. CHARLES R. EVANS et al. [No. 771.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

The Attorney General and the Solicitor General for petitioner.

No appearance for respondents.

June 1, 1908. Granted.

AJAX METAL COMPANY, Petitioner, v. BRADY BRASS COMPANY. [No. 729.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 160 Fed. 84.

Messrs. John G. Johnson and A. B. Stoughton for petitioner.

Mr. Frank H. Platt for respondent.

June 1, 1908. Denied.

PULLMAN COMPANY, Petitioner, v. WILLIE C. BACON. [No. 738.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 159 Fed. 1.

Mr. John B. Knox for petitioner.

Messrs. Joseph J. Willett and Alex. C. Birch for respondent.

June 1, 1908. Denied.

DELLA B. SWEETING, Petitioner, v. STEAMER WESTERN STATES, etc. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 159 Fed. 354.

Mr. J. H. Metcalf for petitioner.

Mr. Adelbert Moot for respondent.

June 1, 1908. Denied.

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[434] *D. S. HESSE & BRO., Petitioners, v. UNITED STATES. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 158 Fed. 407.

Mr. Albert H. Washburn for petitioners.

The Attorney General and the Solicitor General for respondent.

June 1, 1908. Denied.

R. R. HAZLEWOOD et al., Petitioners, v. ANNIE E. SNOW et al. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 157 Fed. 898.

Mr. Horace Chilton and R. R. Hazlewood for petitioners.

Mr. W. D. Gordon for respondents.

June 1, 1908. Denied.

JAMES G. LOWDON, Petitioner, v. UNITED STATES. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 158 Fed. 1021.

Mr. W. L. Crawford for petitioner.

The Attorney General and the Solicitor General for respondent.

June 1, 1908. Denied.

WESTERN TRANSIT COMPANY, Petitioner, v. JOHN CROSBY BROWN. [No. 770.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Harvey D. Goulder, Frank S. Masten, and S. H. Holding for petitioner.

Messrs. Harrington Putnam and Frederick M. Brown for respondent.

June 1, 1908. Denied.

GEORGE H. BALLANTINE et al., Petitioners, v. GEORGE G. FRELINGHUYSEN et al. [No. 776.]

Petition for a Writ of Certiorari to the United States Circuit Court of *Appeals for [435] the Third Circuit.

See same case below, 160 Fed. 927.

Messrs. John G. Johnson, Reynolds D. Brown, and Malcolm Lloyd, Jr., for petitioners.

Mr. John O. H. Pitney for respondents.

June 1, 1908. Denied.

ARTHUR MCMULLEN, Petitioner, v. O'ROURKE ENGINEERING CONSTRUCTION COMPANY. [No. 777.]

Petition for a Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit.

See same case below, 160 Fed. 933.

Messrs. J. Edgar Bull and Livingston Gifford for petitioner.

No appearance for respondent.

June 1, 1908. Denied.

UNITED STATES, Petitioner, v. BUEHNE STEEL WOOL COMPANY. [No. 779.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 159 Fed. 107.

The Attorney General, the Solicitor General, and Assistant Attorney General Sanford for petitioner.

Mr. Albert H. Washburn for respondent.

June 1, 1908. Denied.

RUMFORD CHEMICAL WORKS, Petitioner, v. HYGIENIC CHEMICAL CO. [No. 412.]

Order of Oct. 28, 1907, denying petition for Writ of Certiorari set aside, and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Philip Mauro for petitioner.

Mr. Willard Parker Butler for respondent.

June 1, 1908. Granted.

B. PENDLETON FERRIDAY et al., Appellants, v. MIDDLESEX BANKING COMPANY et al. [No. 398.]

[436] Appeal from the *Circuit Court of the United States for the Western District of Louisiana.

Mr. Wade R. Young for appellants.

Messrs. H. R. Boyd and E. H. Farrar for appellees.

May 18, 1908. Dismissed with costs.

SUCRERIE CENTRALE "COLOSO" DE PORTO RICO, Plaintiff in Error, v. JOSÉ FRANCISCO ESTEVES. [No. 387.]

In Error to the District Court of the United States for Porto Rico.

Messrs. Francis H. Dexter and Frederic D. McKenney for plaintiff in error.

No appearance for defendant in error.

May 18, 1908. Dismissed with costs, on motion of Mr. Frederic D. McKenney for the plaintiff in error.

BERNARR MACFADDEN, Plaintiff in Error, v. UNITED STATES. [No. 526.]

In Error to the District Court of the United States for the District of New Jersey.

Messrs. Alan H. Strong, Henry M. Earle, and John C. Gittings for plaintiff in error.

The Attorney General for defendant in error.

May 18, 1908. Dismissed, on motion of counsel for plaintiff in error.

CITIZENS' NATIONAL BANK OF LOUISVILLE, Appellant, v. S. W. HAGER, Auditor of Public Accounts of the State of Kentucky et al. [No. 676.]

Appeal from the United States Circuit of Appeals for the Sixth Circuit.

Mr. James P. Helm for appellant.

Mr. James Breathitt for appellees.

May 18, 1908. Dismissed with costs, on motion of counsel for the appellant.

HARRY B. MULFORD, Plaintiff in Error, v. UNITED STATES. [Nos. 802, 803, and 804.]

In Error to the Supreme Court *of the [437] Philippine Islands.

The Attorney General and the Solicitor General for defendant in error.

June 1, 1908. Docketed and dismissed.

QUINTIN GONZALES, Plaintiff in Error, v. UNITED STATES [No. 805]; GERTRUDIS MONTINOLA, Plaintiff in Error, v. UNITED STATES [No. 806]; GERTRUDIS MONTINOLA, Plaintiff in Error, v. UNITED STATES [No. 807]; JOAQUIN CELIS, Plaintiff in Error, v. UNITED STATES [No. 808]; JOAQUIN CELIS, Plaintiff in Error, v. UNITED STATES [No. 809]; and C. W. NEY et al., Plaintiffs in Error, v. UNITED STATES [No. 810].

In Error to the Supreme Court of the Philippine Islands.

The Attorney General and the Solicitor General for defendant in error.

June 1, 1908. Docketed and dismissed, on motion of Mr. Solicitor General Hoyt, for the defendant in error.

SOL. COHN, Plaintiff in Error. v. STATE OF TENNESSEE [No. 811]; WM. HARTMAN, Plaintiff in Error, v. STATE OF TENNESSEE [No. 812]; and CHARLES PERKINS et al., Plaintiffs in Error, v. STATE OF TENNESSEE [No. 813].

In Error to the Supreme Court of the State of Tennessee.

Mr. Charles T. Cates, Jr., for defendant in error.

June 1, 1908. Docketed and dismissed with costs, on motion of Mr. Charles T. Cates, Jr., for the defendant in error.

PEDRO ROMERO, Appellant, v. CARLOS LE BRUN et al. [No. 814.]

Appeal from the District Court of the United States for Porto Rico.

Mr. *Geo. H. Lamar and N. B. K. Pettingill for appellees. [438]

June 1, 1908. Docketed and dismissed with costs, on motion of Mr. George H. Lamar, for the appellees.

MIGUEL GUERRA, Plaintiff in Error, v. CARLOS CONDE. [No. 458.]

In Error to the District Court of the United States for Porto Rico.

Mr. Thomas D. Mott, Jr., for plaintiff in error.

Messrs. Francis H. Dexter and Frederic D. McKenney for defendant in error.

June 1, 1908. Dismissed with costs, on authority of counsel for plaintiff in error, and on motion of Mr. Frederic D. McKenney, for the defendant in error.

EX PARTE: IN THE MATTER OF WILLIAM O'GORMAN, JR., Petitioner. [No. 7, Original.]

Petition for Writ of Mandamus.

Mr. Edward B. Whitney for petitioner.

June 1, 1908. Dismissed, on motion of counsel for petitioner.

ALFRED BERGFELDT, Plaintiff in Error, v. STATE OF WASHINGTON. [No. 314.]

In Error to the Supreme Court of the State of Washington.

See same case below, 41 Wash. 234, 83 Pac. 177.

Mr. Harold Preston for plaintiff in error.

No appearance for defendant in error.

June 1, 1908. Dismissed with costs, on motion of counsel for plaintiff in error.

J. C. TURNER CYPRESS LUMBER COMPANY OF NEW JERSEY AND NEW YORK, Plaintiff in Error, v. SEABOARD AIR LINE RAILWAY. [No. 369.]

In Error to the Circuit Court of the United States for the Southern District of Florida.

Messrs. H. Bisbee and Geo. C. Bedell for plaintiff in error.

Messrs. J. C. Cooper and H. A. Herbert for defendant in error.

June 1, 1908. Dismissed with costs, on motion of counsel for the plaintiff in error.

*SAMUEL BURAK, Appellant, v. MILO D. CAMPBELL, UNITED STATES MARSHAL, et al. [No. 436.] [439

Appeal from the District Court of the United States for the Eastern District of Michigan.

Mr. Bernard B. Selling for appellant.

No appearance for appellees.

June 1, 1908. Dismissed with costs, on motion of counsel for appellant.

MILWAUKEE RUBBER WORKS COMPANY, Petitioner, v. RUBBER TIRE WHEEL COMPANY. [No. 460.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John C. Spooner, Charles Quarles, and J. L. Bishop for petitioner.

Mr. Augustine L. Humes for respondent.

June 1, 1908. Dismissed, per stipulation.

NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, Appellant, v. FRANK P. JAMES et al. [No. 712.]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Mr. Alex. Pope Humphrey for appellant.

No appearance for appellees.

June 1, 1908. Dismissed with costs, on motion of counsel for the appellant.

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*AMERICAN RAILROAD COMPANY OF PORTO RICO, Plff. in Err., [440

v.

FELICIA CARDONA DE CASTRO and Julio Castro, Her Husband.

(S. C. Reporter's ed. 440.)

[No. 467]

This case was reported in 51 L. ed. p. 1187.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1907.

ORDER.

On the application of the clerk, pursuant to section 678 of the Revised Statutes, it is ordered that James D. Maher be, and he is hereby, appointed deputy clerk of this court, vice Charles B. Beall, resigned.

November 4, 1907.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1907.

ORDER.

The Reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, is it therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

March 16, 1908.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1907.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued until the next term.

June 1, 1908.

Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

PHILLIPS ACADEMY
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